# A66 NORTHERN TRANS PENNINE (NTP) PROJECT

# JOINT SUBMISSION OF CUMBRIA COUNTY COUNCIL AND EDEN DISTRICT COUNCIL FOR EXAMINATION DEADLINE 2 (15TH JANUARY 2023)

## Councils' comments on Written Summary of Oral Submissions in National Highways' Issue Specific Hearing 2 (ISH2) Post Hearing Submission

**13th January 2023**

The Councils' comments are entered in the right hand column added to National Highways' written submission of oral case in Sections 2 to 5 of this document. The matters commented on are highlighted in yellow.

## 1. INTRODUCTION

1.1 This document summarises the oral submissions made by National Highways (the "**Applicant**") at Issue Specific Hearing 2 (**"ISH2"**) dealing with the Environmental Management Plan (the **"EMP"**), other environmental matters, the draft Development Consent Order (the **"DCO"**) and Brough Hill Fair, held on 1 December 2022 in relation to the Applicant's application for development consent for the A66 Northern Trans-Pennine Project (the "**Project**").

1.2 ISH2 was attended by the Examining Authority (the "**ExA**") and the Applicant, together with a number of other Interested Parties.

1.3 Where the ExA requested further information from the Applicant on particular matters, or the Applicant undertook to provide further information during ISH2, the Applicant's response is set out in or appended to this document.

1.4 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.

1.5 The structure of this document follows the order of items as set out in the agenda for ISH2 dealing with matters relating to the Project (the "**Agenda**"), published by the ExA on 22 November 2022. Numbered items referred to are references to the numbered items in the Agenda.

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## 2. WRITTEN SUMMARY OF THE APPLICANT'S ORAL SUBMISSIONS

| **2.0 Environmental Management Plan (EMP) [APP-019]** | | |
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| 2.1 Justification of Approach | | |
| **Agenda Item** | **The Applicant's Response[1]** | **Councils' Comments** |
| The ExA firstly ***wishes to understand whether the EMP should be secured by way of an Article having regard to s120 of the Planning Act 2008.***<br>***The ExA wishes to better understand why the Applicant considers the EMP approach contained within a singular document is justified as opposed to the conventional way of securing matters by individual Requirements.***<br>***The ExA also wishes to better understand why, in the context of the following DCOs, the approval role of the Secretary of State (SoS), in terms of the scrutiny and regulation of actions carried out under the*** | In response to the **ExA's** initial query as to whether any other DCO had secured an Environmental Management Plan (or similar document) by way of an article in a DCO, rather than a requirement in a schedule to a DCO, **Robbie Owen, for the Applicant**, confirmed that the Project would be the first time such an approach had been taken. **Mr Owen** confirmed that whilst this approach is different in its form, the substance remains the same. Ultimately, where in a DCO compliance with the EMP (or indeed any other matter) is secured has no bearing from a legal, and therefore enforceability, perspective. Whilst the approach might 'look and feel' different, the result is the same – the whole of a DCO is enforceable in the same way.<br>The **ExA** then queried why the Applicant's approach was better when compared to that which has been followed by DCOs before. In response, **Mr Owen** confirmed that the Applicant has considered ways in which project delivery could be streamlined and made easier for all parties/participants in the process, including in respect of post-consent determinations. He acknowledged that the use of requirements are 'the norm' for DCOs, but there is no legal requirement to follow this approach. **Mr Owen** explained that it is very common for a DCO to secure mitigation both via certified documents and by way of requirements on its face. He submitted that the consequence of this is that it is inevitably difficult for participants in the process (promoters, consultees and contractors) to navigate through the suite of documents that set the project controls, therefore hampering timely delivery of vital projects (and therefore their public benefits).<br>Having regard to this all of this, **Mr Owen** explained that the Applicant considered that there was merit in modifying the approach/framework for securing mitigation, whilst in no way altering the substance (i.e. the robustness | The Councils are not convinced of the argument for moving away from Requirements and have commented below in relation to specific parts of the Applicant's response (as highlighted).<br>Is it really the case that it 'standardises' the approach, when there will be different EMPs for each scheme within the |

[1] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***EMP, has been taken out of the end of the consultation processes between the undertaker and statutory environmental and other bodies. These other DCOs are:***<br>• ***the A47 Blofield to North Burlingham made DCO;***<br>• ***the M25 Junction 28 made DCO; and***<br>• ***the A12 Chelmsford to A120 Widening Scheme which is in the Pre-examination stage.***<br>***The above made Orders and draft Order include separate Requirements related to protected species, surface water drainage, landscaping, trees, contaminated land and groundwater, archaeological remains and traffic management. The ExA wishes to know whether the Applicant is aware of any delays to projects that have resulted from any*** | of the measures and how they are secured). He confirmed that this gave rise to the approach taken in the drafting of the draft DCO [Document Reference 5.1, APP-285] and the first iteration EMP [APP-019], with a view to a second iteration EMP (approved post-consent) being the 'single source of truth' for all controls for the Project – in effect, a mitigation bible. It 'standardises', for example, the approach taken to consultation, determination and other matters to take place after the DCO has been granted, whilst in no way diluting the effectiveness of the mitigation secured.<br>**Mr Owen** reiterated that this approach would aid project delivery, particularly having regard to the current position on DCOs, which can be unclear as a result of numerous requirements and commitments being contained within a schedule to a DCO. Each requirement necessitates various approvals and consultation processes and can relate to additional documents, resulting in complexity. Indeed, **Mr Owen** explained that the current 'standard approach' does also not provide an explanation as to *how* specific consultations ought to take place. He went to on to explain that whilst the concept of requirements has not been an outright barrier to the delivery of projects, it can be said to have impeded *timely* delivery. **Mr Owen** concluded by stating that the Applicant has not opted to depart from the standard approach lightly, but it is considered a distinct improvement in form (but not substance) by providing a singular codified regime to the securing of mitigation, applicable to all relevant parties.<br>Following on from this, the **ExA** queried whether the Applicant had any examples of requirements impeding the timely delivery of a project. **Mr Owen** explained that the Applicant has promoted and implemented a number of DCOs and the main challenges it faces are in terms of receiving consultation responses related to the discharge of requirements in a timely manner. He explained that there are material contrasts across the Applicant's portfolio of projects. Some consultees provide responses within weeks, so discharge of these matters is timely, but others provide comments after several months. **Mr Owen** made the further point that delays can occur even when there is, effectively, only a single scheme being promoted, rather than the multiple schemes comprising the Project. He went on to explain that there is a risk that the complex context of the Project will heighten the likelihood of delay if there is no clear and consistent consultation framework. | project and (as stated later) there could even be more than one EMP per scheme?<br>Having different EMPs across the project could actually end up being more confusing.<br><br>Each element of the EMP will still need approving, (and there will be several EMPs), so it is not clear why this is considered less complex than the use of Requirements? The complexity arises from what needs doing, as opposed to the mechanism for approval.<br>No evidence has been provided that requirements hinder timely delivery, nor that the EMP will be inherently quicker. There is a risk involved in using this novel approach which is previously untested.<br><br>The speed of consultee responses is not necessarily due to the process involved in the discharging of requirements. It is more likely to be influenced by the resource capacity of consultees and the effectiveness of advanced engagement and communication from the |

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| ***previous DCO mechanisms through the use of separate Requirements.*** | The **ExA** queried in this context how the consultation process set out in the first iteration EMP would help resolve these issues. In response, **Mr Owen** summarised the consultation process as follows:<br>a) The Applicant must give prescribed consultees advance notice of being sent materials and they then have 20 working days in which to provide comments;<br>b) The Applicant's principal contractor(s) ("**PC**") must take into account any comments and revise the consultation materials (and compile a report (Summary Report) setting out how the comments have been taken into account);<br>c) The consultees are then given a second chance to provide comments on the revised consultation materials and Summary Report within a 10-working day period; and<br>d) Those comments must then be again considered by the PC in making any further updates to the materials prior to submission for approval (such submission must also include an updated Summary Report).<br>**Philip Carter, for the Environment Agency[2]**, queried whether it would be possible to weave in a degree of informal engagement prior to the formal consultation provisions 'kicking in' under the first iteration EMP. **Mr Owen** confirmed that the Applicant would give that point further consideration.<br><br>***Post hearing note:*** *As set out at ISH2, the Applicant considers one of the key advantages to its proposed approach to the EMP is for there to be a consistent and clear programme and process for dealing with consultation with prescribed bodies as part of post-consent determinations. It is considered that is to the advantage of both the Applicant and those prescribed bodies, in terms of clear understanding and expectations.*<br><br>*However, it is also recognised by the Applicant that the proposed timescales for consultation could be challenging for consultees in certain circumstances. For that reason, the Applicant has been giving consideration to mechanisms that could be deployed to mitigate these challenges but which avoid diluting the purpose and* | Applicant. If the Applicant wants rapid and effective responses from the Councils it should consider supporting their resource needs to facilitate their engagement. This is relevant to all disciplines, but particularly relevant to archaeology and heritage, where substantial input will be required from the Councils' heritage officer, and to detrunking and diversions, which will require substantial input from the highway function of the Councils. How will the EMP process enable consultees to respond more quickly?<br><br>A consultation framework could equally apply to requirements. It doesn't require an EMP to achieve this.<br>It remains unclear to the Councils why the Applicant has departed from the standard approach to drafting |

[2] It is noted this point was made later in the agenda, but has been included here for ease of navigation.

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| | *advantages of the prescribed process and timescales. As such, the Applicant proposes to introduce the following two elements into the first iteration EMP in the next draft submitted to the examination:*<br><br>1. *a formal commitment that the Applicant (and its principal contractors) will set up and run regular engagement meetings (or 'forums') with the prescribed consultees, with the aim of providing as much visibility on materials coming to those consultees for consultation as practicable; and*<br>2. *amendments to the consultation process, such that the Applicant would be able to agree a longer consultation period with a consultee where circumstances justify it. Such circumstances would need to be considered on a case-by-case basis.*<br><br>*Its acknowledged that the Applicant has previously indicated that a revised draft of the first iteration EMP would be submitted at Deadline 2. However, having now considered the Examination timetable published in the ExA's Rule 8 letter, dated 8 December 2022, the Applicant intends to submit a revised draft of the first iteration EMP at Deadline 3, to ensure it has sufficient time to consider and action (as appropriate) relevant comments made in any written representations, Local Impact Reports and as part of on-going engagement with various parties.*<br><br>**Mr Owen** further explained that a DCO typically provides some detail of the discharge process within Part 2 of Schedule 2 (the usual schedule within which requirements are found), but this is usually in relation to the process applied to the discharge of matters by the Secretary of State (i.e. *after* details have been submitted for approval), rather than consultation *prior to* the submission of details for approval. As such, DCOs do not typically explain how this 'prior' consultation ought to take place in terms of process or timescales. In the case of the Project, the first iteration EMP would clearly set out this process and timescales, which can only be to the advantage of all parties. **Mr Owen** further stated that, as a result, the benefit of the Applicant's approach is therefore not limited to the EMP acting as a single source of truth for mitigation requirements, but in being clear as to how consultation must take place, and the obligations on various parties in ensuring that the Project is delivered in a timely manner. | Is an 'aim' to provide visibility of materials a sufficiently robust commitment? Terms like '...as practicable' and '...where circumstances justify it', means these commitments appear to be at the Applicant's discretion. |

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| | The **ExA** sought to further understand the legal difference between an article and a requirement within a DCO. **Mr Owen** explained that 'requirement' is a term given to a provision of a DCO that is akin to a planning condition under the conventional town and country planning regime – it often refers to paragraph numbers within a schedule to a DCO. Although DCOs are divided into a 'front end' (containing articles), and schedules, every provision is part of the DCO and has equivalent status, irrespective of whether it is contained within an article or in a schedule. To reiterate this point, **Mr Owen** quoted paragraph 16.1 of the Planning Inspectorate's Advice Note 15, which states:<br><br>*"An application may have significant adverse environmental effects that require mitigation; such effects will be identified in the accompanying ES and/ or relevant environmental information. Any mitigation measures relied upon in the ES must be robustly secured and this **will generally** be achieved through Requirements in the draft DCO. Mitigation that is identified in the ES as being required must also be clearly capable of being delivered"* (emphasis added).<br><br>**Mr Owen** explained that, as a result, it is clear that requirements are not the only way to secure and therefore ensure the implementation of mitigation. He further explained that given the proposed approach that the EMP acts as a single source of truth in terms of mitigation requirements, the Applicant took the view that it would be more appropriate for the relevant obligations to sit as an article in the main body of the DCO, rather than there being only a few requirements in a requirements schedule (the same rationale applies to articles 54 and 55, as well as article 53).<br><br>**Mr Owen** stated that the Applicant considers this approach appropriate having regard to, for example, the *Office of the Parliamentary Counsel Drafting Guidance* (June 2020) which states that, in relation to Bills (but the principle of which applies to DCOs as Statutory Instruments, too): "*Schedules can assist clarity by providing a home for material that would otherwise interrupt and distract from the main story you are trying to tell*" but "*relegating text to the end of the Bill may not always help the reader. It may break up the story you are telling; or make the structure of the Bill more complicated than it needs to be. So don't dispatch material to Schedules without good reason…*" The Applicant | |

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| | submits that there is no good reason in this case, for the reasons mentioned above.<br><br>**Mr Owen** again reiterated that whilst the approach the Applicant is taking on the Project is different to the usual approach taken on DCOs, the substance of it is the same, both in content and, importantly, legal effect.<br><br>The **ExA** then made reference to the A12 Chelmsford to A120 Widening Scheme (currently in the pre-examination stage) and the approach taken in that project to the securing of mitigation. **Mr Owen** noted that the Project is much larger than the A12 scheme, so there is more justification for a novel approach being taken (particularly having regard to Project Speed which applies to the Project). He further explained that DCOs are constantly evolving and in the interests of making them widely accessible and more transparent, there could be a reduction in the use of requirements, in future.<br><br>**Mr Owen** concluded by clarifying that the entirety of the DCO contains a mixture of powers and duties. Article 53 of the draft DCO [Document Reference 5.1, APP-285] contains clear duties which the Applicant must comply with. He emphasised that compliance with these duties is a statutory duty which, if disregarded, amounts to a criminal offence under the Planning Act 2008 and can thus be enforced.<br><br>The **ExA** took comments from Interested Parties and some concerns were raised (including by **Louise Staples for the National Farmers Union** and **Dr Mary Clare Martin**) on the timescales provided for in the consultation process set out in the first iteration EMP (and whether those are now approved).<br><br>**Mr Owen** and **Kerry Whalley, leading on EMP matters for the Applicant** confirmed that the timelines for consultation are contained within the current draft of the first iteration EMP. They explained that the Applicant is envisaging to submit at least one further version of the first iteration EMP during the examination. **Mr Owen** explained that the Applicant would consider the timescales in the consultation process but confirmed that the Applicant was not committing to amend them. | The Councils question whether the large size of the A66 project a sound reason to try something novel? Trialling this novel approach on a smaller project would arguably involve less risk, and if successful it could then be rolled out to larger projects? |

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| | ***Post hearing note:*** *The Applicant has provided a further explanation as to the legal basis for its approach in Appendix 1 of this document. That explanation also includes a link to the Office of the Parliamentary Counsel Drafting Guidance (June 2020) cited above.* | |
| 2.2 The Approvals Process | | |
| **Agenda Item** | **The Applicant's Response[3]** | **Councils' Comments** |
| ***The ExA wishes to better understand the approvals process of the EMP. The ExA will ask the Applicant to take us through step by step how each part of the EMP will be approved. The ExA will wish to examine how subsequent changes to the EMP are to be made, and how these have the potential to affect the need and conclusions of the HRA and the Appropriate Assessment having regard, for example, to EMP Commitment MW-BD-15. Questions are likely to follow.***<br><br>***The ExA may also wish to examine the quantum of annex plans supporting the EMP and in particular*** | **Drafting points on article 53 of the draft DCO**<br>Prior to exploring the approvals process under the EMP, the **ExA** sought to understand the rationale behind specific drafting points within article 53 of the draft DCO [Document Reference 5.1, APP-285].<br>In response to a query from the **ExA** as to whether article 53 should include definitions for the second iteration EMP and third iteration EMP **Robbie Owen, for the Applicant** stated that the Applicant would consider this further.<br>***Post hearing note:*** *The Applicant has considered the ExA's helpful suggestion as to whether article 53 of the draft DCO would benefit from new definitions being added for "a second iteration EMP" and "a third iteration EMP". The Applicant has concluded that whilst arguably not strictly necessary, it can see the merits in including such definitions for ease of interpretation. As such, these will be added to the next draft of the DCO submitted into the examination.*<br>In response to a query from the **ExA** as to whether article 53 should further define what a 'part' of the authorised development is, **Mr Owen** explained that article 53 of the DCO has been drafted to allow the Project approvals for a second iteration EMP to be sought on a scheme-by-scheme basis, but this is not yet confirmed.<br>**Kerry Whalley, for the Applicant** further explained that the EMPs (all iterations) are intended to be a single source of truth for mitigation, to establish consistency across the Project in terms of the delivery of mitigation. The intention behind the first iteration EMP is to specify the intended environmental outcomes that need to be achieved for the Project. Where specific mitigation must be achieved in a certain way, that is identified within this first iteration EMP. | Will there be consistency with separate EMPs for each scheme? |

[3] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***the absence of a Code of Construction Practice plan.***<br>***The ExA will seek the views of Interested Parties in particular the Environment Agency, Historic England and Natural England having regard to the respective PADSS submissions [AS-004, AS-005 and AS-006].*** | **Ms Whalley** explained that a second iteration EMP would set out *how* these environmental outcomes will be achieved, with more detail on the specific measures to be implemented. The second iteration EMPs may be split on a scheme-by-scheme basis (as opposed to topic by topic, for example) – meaning one second iteration EMP would be produced and submitted for approval for each scheme, but this cannot yet be confirmed until the contractors have confirmed the favoured approach. **Ms Whalley** stated that some mitigation will only apply to certain geographical areas (so wouldn't necessarily be in all second iteration EMPs submitted for approval) but noted that if particular mitigation is not brought forward within a second iteration EMP, this will need to be robustly justified. Finally, Ms Whalley explained that a third iteration EMP is effectively an operational EMP, which will set out how the road will be operated to comply with the on-going mitigation required to be implemented.<br>In response to a query from the **ExA** as to how sufficient regulation would be put in place to ensure justification *is* provided where certain mitigation is not considered to be necessary for inclusion in a second iteration EMP, **Mr Owen** confirmed that justification must be provided to the Secretary of State and would be considered as part of the approval process required by article 53 of the draft DCO.<br>***Post hearing note:*** *Having considered whether the references to 'part of the authorised development' in article 53 of the draft DCO should be amended to refer to 'scheme', the Applicant does not propose to make any revisions to the drafting.*<br>*Whilst it may be the case that the relevant principal contractors will develop a second iteration Environmental Management Plan on a scheme-by-scheme basis, it could also be the case that it is considered more efficient to 'group' schemes together or, even, develop more than one second iteration Environmental Management Plan per scheme, depending on the complexities and approach taken. At present, this level of detail is simply not known, and a degree of flexibility is required within the DCO.*<br>*For this reason, it is also difficult at this stage to provide further clarity on what a 'part of the authorised development' could be in practice. However, the key point to note in all of this is that regardless of how many 'parts' the authorised development is split into, works on any 'part' cannot commence until a second* | The Councils are unclear about the process for approving the individual components of the EMP. Are all the elements of the EMP expected to be completed before sign-off can take place? As opposed to the Requirements process, where each management plan for a particular environmental matter can be submitted for approval once it is ready, the EMP process appears to require all component parts to be complete before sign-off can occur. This places a larger burden upon both local authorities as consultees and the Secretary of State as approver due to the volume of documentation that needs to be reviewed at the same time. This problem could be exacerbated by the number of EMPs if more than one needs to be considered at the same time.<br>This appears to add complexity and scope for confusion, particularly if some schemes have |

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| | *iteration Environmental Management Plan clearly relating to that part has been approved by the Secretary of State. In other words, no 'part' of the Project can be started until a second iteration Environmental Management Plan that covers, and relates to, that 'part' can be commenced. Integral to this will be for the Applicant to ensure as part of any submission seeking approval of a second iteration Environmental Management Plan, that the Secretary of State will have sufficient certainty as to what 'part' such submission is seeking to cover (and therefore what 'parts' are not covered).*<br><br>*It should also be noted that including references to a 'part of the authorised development' is by no means unusual for DCOs and that formulation has been approved by the Secretary of State in a number of recently made DCOs. For example, The A57 Link Roads Development Consent Order 2022 (e.g. Paragraph 4 of Part 1 of Schedule 2), The A417 Missing Link Development Consent Order 2022 (e.g. Paragraph 3 of Part 1 of Schedule 2), The A428 Black Cat to Caxton Gibbet Development Consent Order 2022 (e.g. Paragraph 3 of Part 1 of Schedule 2), and The Manston Airport Development Consent Order 2022 (e.g. Paragraph 6 of Part 1 of Schedule 2). As such, the approach taken by the Applicant in respect of the draft DCO is well precedented.*<br><br>In response to a query from the **ExA** as to why the second iteration EMP cannot be brought forward during the examination, **Mr Owen** clarified that the current draft of the first iteration EMP has been produced to reflect the level of detail, in respect of design and planning, that is currently available in respect of the Project. This will naturally evolve and develop over time post consent (should the DCO be granted). **Ms Whalley** explained that some of the management plans (contained in annexes to the EMP) draw heavily on the environmental assessment undertaken or surveys that have been completed to date (Annex B3 Detailed Heritage Mitigation Strategy [Document Reference 2.7, APP-023] is one example) and are developed in the DCO application to a relatively high level of detail based on the understanding of the baseline and the required mitigation. Other plans (for example, Annex B14 Site Establishment Plan [Document Reference 2.7, APP-034]) are heavily dependent on the detailed design, construction planning or specific construction methodologies that will be implemented by the contractors. | one EMP and others more than one. This would not be a single point of reference. |

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| | These will need to be developed in detail by the contractor at a later date, to specify how the outcomes required by the EMP will be delivered.<br>The **ExA** questioned why consultation with local authorities and statutory bodies had seemingly been omitted from article 53 of the draft DCO. **Mr Owen** explained that it is provided for within article 53(2)(b) which requires the second iteration EMP to be *"prepared in accordance with the consultation and determination provisions"*. These 'consultation and determination provisions' are defined in article 53(10) as the provisions contained in paragraphs 1.4.9 to 1.4.51 of the first iteration EMP. **Mr Owen** explained that they set out the matters on which consultation is required and the procedures that apply to the conduct of that consultation. He concluded that the Applicant is therefore under specific obligations to consult before submitting the second iteration EMP to the Secretary of State for approval. Moreover, **Mr Owen** pointed out that the Secretary of State is also able to consult with any relevant parties before making a determination, at their discretion.<br><br>The **ExA** raised further drafting queries in relation to article 53, specifically around the use of:<br>a) "substantially based";<br>b) "materially new or materially worse adverse environmental effects"; and<br>c) "in comparison with".<br><br>In response to (a) above, **Mr Owen** explained that "substantially based" provides the necessary flexibility required without 'loosening' the wording, given the current stage of project development. **Mr Owen** referenced paragraph 4(1) of Schedule 2 of the A57 Link Roads Development Consent Order 2022, which uses broadly similar wording – "*substantially in accordance with"* to demonstrate that a variety of wording has been used and accepted previously (albeit acknowledging this formulation was different to that contained in article 53). **Mr Owen** confirmed that the Applicant would reflect on the use of this wording. | The Councils have made comments in their Written Representation (REP1-019.1) regarding the provisions of Article 53, including requesting an extension from 20 working days to 30 working days for the relevant authorities to review information submitted to them. |

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| | ***Post hearing note:*** *The Applicant has reflected on the use of this wording and acknowledges it is a departure from recently made DCOs. As a result, it proposes to amend 'substantially based' to 'substantially in accordance with', to reflect those DCOs. This change will be made in the next draft of the DCO submitted into the examination at deadline 2.*<br><br>Turning to (b), **Mr Owen** stated this wording has been used throughout the draft DCO (articles 2(1) (in the definition of "maintain"), 7(6), 53(2)(a) and 53(5)(b), 54(2) and as a qualifier to the list of ancillary works within Schedule 1 to the draft DCO). He explained that the purpose of this phrase is to provide a limited degree of flexibility whilst ensuring the Project could not give rise to likely significant environmental effects that are worse (or in addition to) those reported in the Environmental Statement. The general principle of this degree of flexibility is very well precedented.<br><br>**Mr Owen** acknowledged that the Applicant is aware that the Secretary of State's preferred formulation for this mechanism has been "materially new or materially different environmental effects…" to date. He further acknowledged that when alternative formulations, including the Applicant's preferred formulation included in the draft DCO, have come before the Secretary of State for determination, they have *generally* opted to revert to the preferred formulation.<br><br>Despite this, **Mr Owen** explained that the Applicant remains of the view that the formulation "materially new or materially worse adverse environmental effects" is appropriate and has merit. He explained that ultimately, reverting to the 'standard' formulation would prohibit beneficial environmental effects being achieved. **Mr Owen** submitted that if a better environmental effect can be delivered by the detailed design, it should not be prohibited by the DCO. He also explained that in assessing what is "materially worse" versus "worse", environmental experts are well-placed to make this distinction, which ultimately provides an appropriate degree of flexibility to allow necessary amendments at the detailed design stage. However, again, **Mr Owen** confirmed that the Applicant would reflect on the use of this wording. | The Councils support this change |

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| | ***Post hearing note:*** *The Applicant has reflected on both the use of 'worse' and 'adverse' in the wording used in the draft DCO.*<br><br>*Turning first to the use of 'worse', whilst the Applicant acknowledges that made DCOs have in the past used 'different', the Secretary of State has recently approved the use of 'worse' in the A57 Link Roads Development Consent Order 2022. The intention of this provision in the draft DCO is to ensure that the Project does not give rise to any materially worse effects than those reported in the Environmental Statement. However, should the word 'different' be used instead, this puts the Applicant in a position, where, faced with an opportunity to produce a materially better environmental outcome it would have to weigh the benefit of delivering that better environmental outcome against the significant programme delay and cost of seeking an amendment to the DCO. Given that the project is proceeding under the Project Speed initiative, with a view to significantly reducing the construction phase, then it is highly likely that it would not be possible to accommodate the programme delay caused by the need to seek an amendment. As a result, unless the DCO contained the Applicant's preferred wording the opportunity to deliver the environmentally better outcome would be lost. Given the very sensitive environment in which the project is situated, the Applicant considers it cannot be in the public interest to place barriers in the way of delivering improved environmental outcomes – this would appear to be a perverse outcome.*<br><br>*This same principle is also behind the Applicant utilising the word 'adverse' in the draft DCO. The reason for that is that simply precluding 'materially new' environmental effects could have the result of preventing materially new positive environmental effects arising out of detailed design. As such, the use of the word 'adverse' ensures that only 'materially new adverse' environmental effects would be precluded.*<br><br>*Ultimately, the Applicant wishes to ensure that whilst the environmental effects of the Project cannot materially worsen the situation as reported in the* | |

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| | *Environmental Statement, there is scope for material improvements to be achieved if practicable, in a timely fashion.*<br><br>In respect of (c), **Mr Owen** stated that the effect of the proposed formulation was to tie and compare the relevant 'revised' effects to those reported in the Environmental Statement, but committed the Applicant to considering this further.<br><br>***Post hearing note:*** *The Applicant has again re-considered the use of this wording in light of the ExA's comments but does not propose to amend it in the draft DCO.*<br><br>*Having considered recent precedents to ensure the draft DCO is not inconsistent, it is apparent that the Applicant's formulation has recently been approved by the Secretary of State in the A57 Link Roads Development Consent Order 2022, illustrating that this drafting is acceptable in policy, as well as legal, terms (it has also been included in other DCOs made over the past year, such as the M54 to M6 Link Road Development Consent Order 2022 and the M25 Junction 28 Development Consent Order 2022).*<br><br>**<u>Construction methods</u>**<br><br>In response to a query from the ExA as to whether a second iteration EMP could and should include easily digestible information on construction methodology and management (similar to a document that covered those issues published as part of the Project's statutory consultation), **Ms Whalley** explained that the document presented at statutory consultation was illustrative, to provide examples of how certain aspects of the construction *could* be constructed. It therefore fulfilled a different purpose at that stage. She further stated that details on construction methods are not available at this stage but would be included as part of a 2nd iteration EMP, including within the various management plans, strategies and method statements. As such, the Applicant does not consider that a separate 'construction method statement' or similar is required to be included as part of a second iteration EMP, given it would be repeating information | |

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| | contained elsewhere. However, **Ms Whalley** confirmed the Applicant would consider this point further.<br><br>***Post hearing note:*** *The Construction Method and Management Statement (**CMMS**) referenced by the ExA was a document issued for the purposes of statutory consultation, produced to provide consultees with an illustration of what the construction might involve and how it might be experienced by the local communities. The Applicant has, since ISH2, reflected on the points raised by the ExA and particularly on what is already included in the first Iteration EMP and what the addition of such a statement might deliver in terms of benefits to the public and local communities.*<br><br>*The core information that would be contained in a CMMS or similar is already included in the first Iteration EMP [Document Reference 2.7, APP-019] and will be built on and provided in more detail in the second Iteration EMP (that will be subject to approval by the Secretary of State) For example, the Site Establishment Plan (commitment ref D-GEN-08) will provide detail on the site compounds and storage areas, including access routes, the Construction Traffic Management Plan (commitment ref D-GEN-10) will provide detail on the proposed construction traffic routes and the traffic management proposed on the main A66 and local roads, and the Air Quality and Dust Management Plan (commitment ref D-AQ-01) will identify key risk areas for dust and set out detail of dust control measures that will be implemented. In addition, the four method statements required at Annex C of the first iteration EMP (commitment ref D-GEN-07) will provide detailed construction methods at particularly sensitive locations.*<br><br>*The Applicant recognises the point raised by the ExA that some of this information will be highly technical and summary 'public facing' information could potentially make it more accessible to the public and local communities. However the Applicant is concerned that having such a document as an approval document sitting alongside or as part of the second iteration EMP creates the potential for repetition and, more concerningly, confusion or inconsistency.*<br><br>*It is worth noting in this context that a further commitment within the first iteration EMP (at commitment ref D-PH-02) is that a Community Engagement Plan must be prepared as part of the second iteration EMP, which would set out the* | |

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| | *processes and forms of engagement that must take place during construction. Having regard to the points raised by the ExA, the Applicant proposes that this commitment is expanded to include specific commitments regarding the type of information that must be provided to local communities as part of this Plan to help communities understand construction methodologies to be employed in their area. The proposed addition to the list of bullet points (and thus which must be included in a Community Engagement Plan submitted for approval as part of a second iteration EMP) at commitment D-PH-02 is:*<br><br>1. *Details of the information that will be produced by the contractors and shared with members of the public through the engagement channels specified which shall, as a minimum, include public facing information about the construction planned in each local area such as working hours, details of any activities which would be expected to be particularly noisy, description of the types of construction activities the public would be expected to see in the local area and construction traffic routes.*<br><br>**Archaeological mitigation**<br><br>The ExA queried how, in practice, the 'carve out' in the definition of 'start' in relation to archaeological mitigation works would operate, given this does not appear to align with when an approved Detailed Heritage Mitigation Strategy would be in place. **Ms Whalley** confirmed that the intent is to allow some minor works relating to archaeological survey or investigations to take place in advance of start of the main works. However, **Ms Whalley** confirmed that the Applicant would consider this point further.<br><br>***Post hearing note:*** *The Applicant has, since the Hearing, reflected again on the wording of the carve out definition of start of works contained within the Environmental Management Plan (EMP). The Applicant recognises the overlap with commitment reference D-CH-01. In response to this issue, the Applicant proposes that the start of works definition is amended to remove the reference to an approved Detailed Heritage Mitigation Strategy (**HMS**). The amended definition would read:*<br><br>*"start" means beginning to carry out any material operation as defined in section 56(4) (time when development begun) of the Town and Country Planning Act* | |

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| | *1990 that forms part of the authorised development other than archaeological investigations and mitigation works ~~carried out in accordance with an approved Detailed Heritage Mitigation Strategy (D-CH-01) for those works~~, ecological surveys and mitigation works, investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt of construction plant and equipment, erection of construction plant and equipment and the temporary display of site notices or information.*<br><br>*This change will be incorporated into a revised first iteration EMP, which will be submitted to the Examination at Deadline 3.*<br><br>*In making this change, the proposed wording in the first iteration EMP will align to the wording of similar provisions approved by the Secretary of State previously in numerous made DCOs. For example the A417 Missing Link Development Consent Order 2022 includes in the definition of "commence" a carve out for archaeological investigations, and enabling activities including soil stripping, but with the archaeology requirement (Schedule 2, para 9) stipulating that the requirement for an Archaeological Mitigation Strategy and Written Scheme of Investigation to be in place is only triggered on 'commencement' (meaning certain works could be undertaken prior to this being in place, under the 'carve out'). The same approach is used in the A1 Birtley to Coal House Development Consent Order 2021, the Portishead Branch Line (MetroWest Phase 1) Order 2022, the Manston Airport Development Consent Order 2022 and the draft DCO for the A12 Chelmsford to A120 Widening Scheme, to name a few.*<br><br>*In relation to a query from the ExA as to how changes to the HMS would be managed, it is important to note that a HMS would be approved as part of a second iteration EMP. As such, the same provisions that apply to changes to the second iteration EMP would apply to a HMS. These are explained in detail below and are not considered further here, aside from making the point that any changes would require consultation with prescribed bodies, as set out in the first iteration EMP.*<br><br>**Approval process** | |

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| | The **ExA** queried the extent to which the Applicant is required to obtain the Secretary of State's approval for an amendment to the second iteration EMP, pursuant to article 53(3) to (5) of the draft DCO, in comparison to when the Applicant can determine to approve such an amendment.<br><br>**Mr Owen** explained that for changes to the second iteration EMP that are deemed material, Secretary of State approval is required under article 53(3). He further explained that the Applicant has reserved the ability to make minor changes to a second iteration EMP, within a limited scope, to allow for flexibility. **Mr Owen** further submitted that it would be disproportionate (and burdensome on all parties) should the Applicant need to seek Secretary of State approval for minor changes. This is particularly the case, given the first iteration EMP is clear that any 'self-determination' by the Applicant would be undertaken by a functionally separate person, that would take an independent approach.<br><br>**Mr Owen** explained that the criteria governing major and minor changes to a second iteration EMP, and the overall control framework, is set out in article 53(2). This provides that the Secretary of State may approve an amendment to the second iteration EMP, provided that the Secretary of State is satisfied that it is substantially based on the first iteration EMP or would not give rise to any materially new or materially worse adverse environmental effects when compared to those reported in the Environmental Statement. In contrast, **Mr Owen** directed the ExA to article 53(5), which provides the mechanism for when the Applicant can approve an amendment to a second iteration EMP. It states that this can occur only where (a) such an amendment is substantially in accordance with the second iteration EMP, (b) the amendment would not give rise to any materially new or materially worse adverse environmental effects when compared to those reported in the Environmental Statement and (c) that amendment has been produced (and determined/approved) in accordance with the prescribed consultation and determination provisions contained in the first iteration EMP.<br><br>In response to queries from some interested parties as to what mechanism would regulate any disputes in this context (i.e. as to the sort of amendment that can be approved by the Applicant rather than the Secretary of State), **Mr Owen** explained that aside from the general arbitration provisions contained within article 51 of the draft DCO [Document Reference 5.1, APP-285], there are no | |

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| | other dispute resolution mechanisms. He reiterated that the Applicant would only be able to approve changes to a second iteration EMP that would still be substantially in accordance with an approved second iteration EMP. In contrast, the Secretary of State, under article 53(3), would be able to approve more material changes. **Mr Owen** confirmed that, in light of the comments made at ISH2, the Applicant would give consideration as to whether any other mechanism or wording could be included in the DCO or EMP to provide further comfort to the interested parties.<br><br>***Post hearing note:*** *The Applicant has considered whether further clarification should be added to article 53 of the draft DCO as to when a proposed amendment to an approved second iteration Environmental Management Plan can be determined by either the Secretary of State or the Applicant.*<br>*Presently, article 53 provides that:*<br>• the Secretary of State can approve an amendment to a previously approved second iteration Environmental Management Plan provided that:<br>○ *the amendment would result in a second iteration Environmental Management Plan (a) still being substantially based on the first iteration Environmental Management Plan or (b) would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement; and*<br>○ *the amendment has been prepared in accordance with the relevant consultation and determination provisions contained in the first iteration Environmental Management Plan; and*<br>• the Applicant can approve an amendment to a previously approved second iteration Environmental Management Plan provided that:<br>○ *the amendment is substantially in accordance with the approved second iteration Environmental Management Plan;*<br>○ *the amendment does not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement; and* | How is this to be established? Is there a clear process to create this functional separation or does it already exist within National Highways/DfT for other purposes? Will it be an individual or a panel or committee? It is unclear who approves the constitution and terms of reference for the approval arrangements. The Councils suggest that the mechanism is subject to Secretary of State approval in consultation with statutory consultees.<br><br>Is 'substantially' needed? Shouldn't the SoS simply consider whether the change is in accordance with the 2nd (and arguably the first) iteration EMP? |

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| | ○ *the amendment has been prepared in accordance with the relevant consultation and determination provisions contained in the first iteration Environmental Management Plan.*<br><br>*As can be seen from this, the parameters set out in article 53 mean that the Applicant could only determine an amendment to a second iteration Environmental Management Plan in very limited circumstances (i.e. the change must be substantially based on the provisions of the already approved second iteration Environmental Management Plan, leaving limited scope for departure).*<br><br>*That being said, given the very wide scope of matters that could be subject to amendment in a second iteration Environmental Management Plan, the Applicant considers that it would be difficult to further define the circumstances as to when either it or the Secretary of State could determine a change. An indicative, non-exhaustive list of examples could be given, but would have limited use in this context. Ultimately it will be a matter of judgement and evidence, applied on a case by case basis.*<br><br>*However, taking on board both these difficulties and comments made at the Hearing, the Applicant proposes to instead include a mechanism in either the draft DCO or first iteration EMP (the appropriate 'home' for this is still to be confirmed, pending further consideration) whereby the Secretary of State is notified when the Applicant wishes to determine a change to the second iteration EMP itself. There would then be a prescribed period within which the Secretary of State could 'call-in' that decision, should they consider that the change is more properly determined by them, having regard to the parameters summarised above.*<br><br>*This mechanism will be included in the next draft of the relevant document submitted into the examination.*<br><br>In response to a further query on dispute resolution mechanics in the context of approvals, **Mr Owen** confirmed that the usual position is that persons with the benefit of a DCO can appeal for non-determination of an application to discharge a requirement, or to appeal against the refusal to discharge a requirement, where the requirement is to be discharged by a local planning authority, which is not relevant in relation to the Project. He clarified that the 'base' position is that DCOs never include the ability to appeal against a decision of the Secretary of | The Councils question whether this wording is robust enough |

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| | State. Instead, the 'dispute resolution' mechanism is that context is by way of a judicial review.<br>In relation to operation of the EMP mechanisms, the **ExA** sought the Applicant's view on whether the 'self-approval' process results in the Secretary of State's approval role only being at a 'high level', removing scrutiny of the detail.<br>**Mr Owen** explained that the Applicant is keen to dispel the impression that the scope of the Secretary of State's approval of the second iteration EMP is limited in any way. The second iteration EMP needs to include the various management plans, strategies and method statements (as relevant), all of which would contain detailed proposals. He explained that whilst the first iteration EMP contains the outlines of the various management plans, strategies and method statements, it is clear from Table 3-2 of the first iteration EMP [Document Reference 2.7, APP-019] that these must be developed further as part of a second iteration EMP (**Ms Whalley** also made reference to commitment references in the EMP in this context, namely D-GEN-06 in relation to the management plans and D-GEN-07 in respect of method statements). **Mr Owen** made clear that the 'self-approval' process does not extend to the initial approval of any aspect of a detailed second iteration EMP – that falls to the Secretary of State. Instead, the scope of any subsequent self-approval process is in practice limited to certain operational, 'downstream' matters.<br>To assist and provide some context, **Mr Owen** provided an indication of the sort of matters that the self-approval process would apply to:<br>a) a second iteration EMP will contain a number of on-going obligations (that don't require any 'active' approvals from any party), such as ensuring designs are in accordance with certain standards or certain construction management measures are implemented. The Applicant would clearly monitor compliance with these as part of its contractual arrangements with its contractors;<br>b) the approval of an environmental management system (REAC reference D-GEN-01), co-ordination systems (D-GEN-20), for example – ultimately 'administrative' matters;<br>c) the approval of certain on-going matters or one-off events, such as those related to contaminated land; and | The Councils agree with the proposed notification to the Secretary of State. |

d) the approval of certain detailed design matters (e.g. drainage – D-RDWE-02) where strict prescribed parameters are set out in the EMP (e.g. by reference to listed items/requirements, industry standards or other application documents, including the Environmental Statement or in the Project Design Principles).

**Mr Owen** reiterated that given the breadth and detail of the approvals required by the Secretary of State as part of a second iteration EMP, the self-approvals are therefore not as broad-ranging as may be feared.

In response to a request from the **ExA**, **Ms Whalley** confirmed that a list of the 'subsidiary plans' to be approved as part of the second iteration EMP, and the potential content/level of detail of those, could be provided.

***Post hearing note:*** *The list of plans, strategies and method statements to be included in a second iteration EMP for Secretary of State approval (pursuant to article 53 of the draft DCO) as requested by the ExA is set out in the first iteration EMP in Table 1-2 Consultation requirements for specified commitments (repeated below for reference), and the content required for each is described in Table 3-2 Register of Environmental Actions and Commitments (REAC) at the references provided in Table 1-2 and expanded on in the outline plans contained at Annexes B and C as relevant.*

Table 1-2 Consultation requirements for specified commitments

| REAC reference | Summary | Consultee(s) |
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| Management plans, strategies and method statements | | |
| D-BD-01 | Landscape and Ecology Management Plan | Local Planning Authorities, Natural relation to Temple Sowerby to Appl |
| D-MAW-01 | Site Waste Management Plan | Local Planning Authorities, Environ |
| D-CH-01 | Detailed Heritage Mitigation Strategy | Historic England, County Archaeolo |

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| | D-AQ-01 | Air Quality and Dust Management Plan | Local Planning Authorities | |
| | D-NV-01 | Noise and Vibration Management Plan | Local Planning Authorities | |
| | D-PH-01 | Public Rights of Way Management Plan | Local Planning Authorities, Local Highway Authorities | |
| | D-RDWE-01 | Ground and Surface Water management Plan | Environment Agency, Lead Local Flood Authorities, Local Planning Authorities | |
| | D-GS-01 | Materials Management Plan | Environment Agency, Local Planning Authorities | |
| | D-GS-02 | Soils Management Plan | Environment Agency, Local Planning Authorities | |
| | D-GEN-09 | Construction Worker Travel and Accommodation Plan | Local Planning Authorities, Local Highways Authorities | It is suggested that reference to 'County' be removed, given that Cumbria CC will cease to exist from 1st April 2023 and this be amended to read 'Local Authority ~~Archaeologist or Heritage Adviser~~' |
| | D-PH-02 | Community Engagement Plan | Local Planning Authorities | |
| | D-PH-03 | Skills and Employment Strategy | Local Planning Authorities | |
| | D-GEN-10 | Construction Traffic Management Plan | Local Planning Authorities, Local Highway Authorities, Appleby Horse Fair Multi-Agency Strategic Coordinating Group | |
| | D-GEN-08 | Site Establishment Plan | Local Planning Authorities | |
| | D-BD-07 | Invasive Non-Native Species Management Plan | Local Planning Authorities, Natural England, Environment Agency | |
| | MW-BD-15 | Working in and near an SAC Method Statement | Natural England, Environment Agency, Local Planning Authorities | |
| | MW-BD-03 | Working in watercourses Method Statement | Environment Agency, Lead Local Flood Agency, Local Planning Authorities | |

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| MW-CH-03 | Working in and near Scheduled Monuments Method Statement | Historic England, County Archaeologists, Local Planning Authorities | |
| MW-RDWE-04 | Piling Method Statement | Environment Agency, Local Planning Authorities | |
| Detailed Design | | | |
| D-LV-02 | Landscaping scheme | Local Planning Authorities, Natural England, AONB Partnership (in relation to Temple Sowerby to Appleby and Bowes Bypass) | |
| D-RDWE-02 | Surface water drainage | Environment Agency, Lead Local Flood Authorities, Local Planning Authorities | |
| D-BD-05, D-BD-06, D-RDWE-08 | Environmental mitigation design | Local Planning Authorities, Natural England, Environment Agency | |
| MW-GS-01 and D-GS-04 | Remediation Plans | Environment Agency, Local Planning Authorities | |

*The Applicant has, since ISH2, reflected again on the process proposed to be implemented under article 53 and the first iteration EMP in terms of the various management plans, schemes, strategies and method statements that require post-consent approval. The Applicant wishes to reiterate that what is proposed for the Project is in substance no different to the processes approved under numerous made DCOs (and indeed is also an approach regularly seen in the conventional town and country planning regime). For example, paragraph 4(2)(d) of Part 1 of Schedule 2 to the A57 Link Roads Development Consent Order 2022 requires for a number of detailed plans to be submitted for approval as part of a second iteration EMP. Identical arrangements are included in the M25 Junction 28 Development Consent Order 2022 (albeit the relevant 'parent' document is called a 'CEMP') and the A417 Missing Link Development Consent Order 2022, and there are many other examples.*

*What is different in the case of the Project is that the commitment to produce these management plans and other documents is contained in the first iteration*

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| | *EMP, rather than on the face of the DCO in a requirement. However, the first iteration EMP, via the commitments contained in the REAC and annexes, contains a detailed 'outline' of the key requirements of each of the documents in question, informed by the Environmental Statement, leaving no doubt as to what each of the documents will (and must) contain.*<br>*Ultimately, the level of detail and content of the plans and other documents that go to the Secretary of State for approval will be no different to the myriad other documents the Secretary of State has approved for the purpose of numerous of DCOs over recent years.*<br>**Third iteration EMP**<br>The ExA asked the Applicant to explain article 53(7) of the draft DCO, and the process for developing and approving a third iteration EMP. **Mr Owen** explained that article 53(7) regulates the preparation and approval of a third iteration EMP, which is often known as the 'operational' EMP. He explained that the drafting of the article provides that on completion of the construction of a part of the Project, the Applicant must prepare and decide whether to approve, in accordance with the consultation and determination provisions set out in the first iteration EMP, a third iteration EMP for that part which must reflect relevant operational provisions and commitments in an approved second iteration EMP.<br>He further explained that there is a tie back to, where relevant, a second iteration EMP which would have been approved by the Secretary of State initially or subsequently (if amended). **Mr Owen** also pointed out that the DCO contains a provision, given that a third iteration EMP will be in effect over a long period of time, allowing the Applicant to approve amendments to that third iteration EMP. However, any amendments must still reflect what it is in a second iteration EMP, so far as it relates to operational matters. **Mr Owen** pointed out that it is worth noting that most of the conditions within a second iteration EMP would have been discharged as they relate to construction, but some will subsist to the extent they, for example, have ongoing maintenance and operational relevance.<br>**Mr Owen** confirmed that it is the Applicant's view that a third iteration EMP does not need to be approved by the Secretary of State, given it will effectively be 'tied' to the content of a second iteration EMP that *would* have been approved. He further explained that should the terms of a third iteration EMP not be | |

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| | complied with, the relevant local planning authority would be able to take enforcement action under the Planning Act 2008. **Mr Owen** did acknowledge that to date on DCOs, approval from the Secretary of State has generally been required for third iteration EMPs and that the Applicant's approach is a departure from this 'norm', albeit there are safeguards in place (which are suitable in the Applicant's view).<br>In response to questioning from the **ExA**, **Ms Whalley** confirmed that outline operational elements that would be included in a third iteration EMP are contained within the first iteration EMP. She explained that there are currently a number of commitments in the first iteration EMP relating to monitoring the effectiveness of mitigation. It was also confirmed that a third iteration EMP would not incorporate routine maintenance that the Applicant undertakes to all of its roads, but the third iteration EMP would be specific to the Project, linked to necessary mitigation identified in the Environmental Statement.<br>The **ExA** asked further queries on the level of detail that would feature in a third iteration EMP. Taking maintenance of the landscape as an example, **Ms Whalley** explained that the detail on this would be contained within the second iteration EMP, as there is a requirement for a detailed landscape and ecological management plan to be submitted for approval as part of that second iteration EMP. She explained that the intention is that the details of the landscaping, including the required maintenance regime to ensure the effectiveness of the planting, would be finalised at that point. As such, the third iteration EMP in this example would require compliance with the on-going maintenance regime, post-construction, to ensure the planting remains in place. Given this, **Ms Whalley** explained that there will naturally be an overlap between a second iteration EMP and third iteration EMP, as they all tie in with one another.<br>The ExA then queried whether the maintenance provisions relating to drainage ponds would overlap between the second iteration EMP and third iteration EMP. **Ms Whalley** confirmed that this would be the case. Within the second iteration EMP, the establishment of any planting around the drainage ponds would be secured. Following this initial phase, the maintenance of the ponds and the planting would be secured in the third iteration EMP. | The Councils consider that 'reflect' does not provide sufficient assurance and suggest it should be 'follow' or 'in accordance with' (or similar tighter wording). |

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<td>In response to a general query from the ExA on the content of a third iteration EMP, Ms Whalley confirmed that, ultimately, it would capture anything that arises during the construction phase but which requires further maintenance or ongoing monitoring. Ms Whalley concluded by stating that in many ways, the third iteration EMP is used as a quality assurance compliance check against what is constructed.<br><br>Post hearing note: The below provides further commentary on the role of a third iteration EMP.<br>In terms of overarching context, as described by the Applicant at ISH2, Environmental Management Plans are intended to be the mechanism that links assessment assumptions and the mitigation identified in the Environmental Statement (ES) and obligations identified through the consenting process. It is intended to cover the construction, operation and maintenance of the project. The first iteration EMP (and the framework for the second and third iteration EMPs) for the A66 has been developed in line with the Standard for Highways, Design Manual for Road Building LA120 Environmental Management Plans (which is referenced in the first iteration EMP and has been appended to this note in Appendix 2 for the ExA's information).<br>Environmental Management Plans set out the control of environmental effects through all lifecycle stages from the design stage, as set out in Table 2.2 of LA120 reproduced here:<br><br>Table 2.2 Delivery schedule and updates to the EMP
<table>
<tr><th>Project Stage</th><th>EMP iteration</th></tr>
<tr><td>Design</td><td>First iteration of EMP (formerly outline EMP) produced the design stage for the preferred option</td></tr>
<tr><td>Construction (refined for the consented project)</td><td>Second iteration of EMP (formerly construction EMP) r during the construction stage for the consented projec advance of construction.</td></tr>
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<td>It is suggested that this text should relate to ‘ongoing maintenance, management and monitoring of mitigation’<br><br>Enforcement relating to compliance is not really an answer to any inadequacy of the approval methodology or process. Enforcement after the event is also ineffective in that it doesn’t avoid the problem occurring.</td>
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| | End of construction | Third iteration of EMP (formerly handover EMP) building on the construction EMP refined at the end of the construction stage to support future management and operation. | Refined |

*As set out in the table above, the later (second and third) iterations of the EMP are intended to further develop the detail of the first iteration EMP, refining the content to be up to date to the relevant stage of Project.*

*The key aspects included in the 3rd Iteration and how its content differs from the 2nd Iteration are summarised in LA 120 Table A.3 EMP content and structure – Third Iteration (end of construction stage). In summary, the key updates that would be anticipated at this stage of the Project are:*

- *Project team roles and responsibilities are refined, where applicable, to reflect the roles that are specifically related to handover and ongoing maintenance of the environmental mitigation elements of the Project that have been implemented and monitoring activities that are required to continue*
- *Register of Environmental Actions and Commitments is refined to capture date and signature of completion of actions (updated on a continual basis during construction as commitments are signed off) and capturing any amendments to the commitments that have arisen through construction (e.g. if additional monitoring is required post-construction as a result of surveys undertaken during construction)*
- *Consents and Permissions are updated to identify which are no longer relevant and which remain in place, and reflect any specific requirements of those consents/permissions*
- *Environmental asset data and as built drawings – these are produced at this stage and handed over to the Applicant in accordance with the procedures set out in the 1st Iteration EMP.*
- *Details of maintenance and monitoring activities – this section is refined in response to data gathered during the construction phase, any changes in the design and mitigation assumptions, physical characteristics of the project, changes to legislation or policy and stakeholder consultation during construction.*

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| | • *Induction, training and briefing procedures for staff is refined to focus on procedures for maintenance staff.*<br><br>*Below, the Applicant has set out an illustration of how this would be expected to work in practice, with reference to the example that the ExA highlighted of the landscape scheme for the project.*<br><br>1. *The first iteration EMP sets the obligation for a landscaping scheme and the outcomes it must achieve (see Table 3.2 Register of Environmental Actions and Commitments, ref D-LV-02). The commitment specifically references that the landscaping scheme must comply with the Project Design Principles (APP-302) and describes further what it must include. It also defines the consultation that must be carried out on that landscaping scheme. The landscaping scheme sits alongside the environmental mitigation scheme (commitment D-BD-05), which itself must also be consulted upon. Commitment D-BD-01 also sets out the obligation to produce a Landscape and Ecological Management Plan (LEMP), which will sit alongside the landscaping scheme, and states that this will "identify what the landscape and ecology mitigation measures are, how they will be implemented, monitored, maintained and managed; and who will be responsible for ensuring they achieve their stated functions". Also relevant are commitments D-LV-03 (regarding the selection of native species and planting stock), and M-LV-01 (regarding the monitoring required of landscape elements post-construction) and M-BD-01/M-BD-03 (which set out the relevant ecological monitoring requirements). At Annex B1, there is an outline of the LEMP which includes as much information about the landscaping scheme as can be provided at the current preliminary design phase.*<br>2. *A second iteration EMP will include, for each part, the detailed landscaping scheme and an updated LEMP for that part. The detailed landscaping scheme will show exactly how and where the planting will occur to meet the landscape commitments in the first Iteration EMP and PDP. The LEMP will be developed with reference to the detailed landscaping scheme, providing specific instructions regarding the planting, monitoring and management of each landscape area/habitat parcel. The second iteration EMP will include* | |

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| | *information to evidence how the landscaping scheme and the LEMP meet the outcomes specified in the first iteration EMP.*<br>3. *A third iteration EMP is not anticipated to provide any further detail to that contained in the second iteration EMP, as the monitoring and maintenance requirements for the landscape scheme will be specified in the that second iteration EMP (specifically in the LEMP). At this stage, the third iteration EMP (including the LEMP) will be refined to include the as-built landscaping design drawings and the LEMP will be amended if necessary to reflect the scheme that has been implemented (e.g. if planting is included for a specific screening purpose and the nature/location of that screening changes during construction in response to site conditions, the monitoring and maintenance required for that planting parcel will be updated to reflect what has actually been planted). This will include a record of any minor changes that occurred during the construction stage as reported through the Evaluation of Change Register, which forms Annex E of the 2nd Iteration and 3rd Iteration EMPs.*<br>*As was set out at ISH2, and alluded to above, a third iteration of the EMP is produced at the end of the construction stage and its purpose is to inform the handover of the project to the operational arm of the Applicant, the ongoing monitoring and maintenance during operation and to provide the as-built information to be adopted into the Applicant's systems and procedures.*<br>*As is provided for in article 53(7) of the draft DCO (Document Reference 5.1, APP-285), the Applicant proposes that a third iteration EMP is approved by it, in accordance with the consultation and determination provisions contained in the first iteration EMP. This would mean that various prescribed consultees are required to be consulted on a third iteration EMP prior to the Applicant determining to approve it.*<br>*As was set out at the Hearing, the first iteration EMP provides that any determinations of matters carried out by the Applicant must be undertaken by a functionally separate person or persons, with the relevant 'handling arrangements' made publicly available for transparency. This is no different to, for example, a local planning authority considering a planning application it has made to itself.* | |

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| | *It is acknowledged that on other made highway DCOs, a third iteration EMP is subject to Secretary of State approval. However, given the 'Project Speed' context, the Applicant considers it to be appropriate for the third iteration EMP in this case to be subject to approval by it. This is because:*<br>1. *There will be clear, transparent procedures for the Applicant approving matters itself, with decisions taken by functionally separate persons (which is absent on other DCOs);*<br>2. *There is a clear requirement for extensive consultation with prescribed consultees, whereby (under public law principles) any responses received would need to be taken into account by the Applicant;*<br>3. *Article 53(7) is clear that a third iteration EMP must reflect the measures "relevant to the operation and maintenance of the authorised development contained in the relevant second iteration EMP", which would have been subject to Secretary of State approval – as such, there is clarity as to what the third iteration EMP would have to include to be approved by the Applicant;*<br>4. *This approach would be consistent with the approval of other 'downstream' matters post-consent, after the initial approval of a second iteration EMP.*<br>*Given all of this, the Applicant is of the view that the third iteration EMP should, in this case, be subject to approval by the Applicant, rather than being referred to the Secretary of State.*<br><br>On an unrelated note, a query was raised by an Interested Party as to the extent to which Agenda Item 2.3 (Scheme 0405 (Temple Sowerby to Appleby)) from Issue Specific Hearing 1, adequately addressed the proximity of the route at Kirkby Thore to residential properties. In particular, **Emma Nicholson** queried whether a more detailed noise assessment ought to take place in respect of Kirkby Thore and whether the Applicant could provide a "heat-map", or equivalent, showing which properties are affected by noise.<br><br>**Ms Whalley** confirmed that a detailed noise assessment has been undertaken for the whole Project and is reported in the Noise and Vibration Chapter of the Environmental Statement [APP-055], which includes details of noise on Kirkby Thore in particular. In relation to the heat-map, the Applicant agreed to provide | |

Ms Nicholson with the specific reference to the noise contours / heatmaps for Kirkby Thore.

***Post hearing note:*** *The specific references to the noise contours/heatmaps for Kirkby Thore in response to Ms Nicholson are as follows (with links provided in the table below). Sheet 3 of Figure 12.2 [Document Reference 3.3, APP-113], Figure 12.3 [Document Reference 3.3, APP-114], Figure 12.4 [Document Reference 3.3, APP-115], Figure 12.5 [Document Reference 3.3, APP-116], Figure 12.6 [Document Reference 3.3, APP-117] and Figure 12.7 [Document Reference 3.3, APP-118] .*

*The Applicant has also included the link to the technical appendices (ES Volume 3, Appendix 12.4 Operational Assessment Results). This lists each individual property predicted to experience a significant adverse or significant beneficial noise effect, and it includes the Do Minimum and Do Something noise levels for each property.*

| ***Application ref.*** | ***ES Vol 3, reference*** | ***Title*** | ***Link*** |
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| *APP-214* | *Appendix 12.4* | *Operational Assessment Results* | *https://infrastructure.planninginspector content/ipc/uploads/projects/TR01006 3.4%20Environmental%20Statement% onal%20Assessment%20Results.pdf* |
| *APP-113* | *Figure 12.2* | *Opening Year Do-Minimum Noise Level* | *https://infrastructure.planninginspector content/ipc/uploads/projects/TR01006 3.3%20Environmental%20Statement% %20Year%20Do-Minimum%20Noise%* |
| *APP-114* | *Figure 12.3* | *Opening Year Do-Something Noise Level* | *https://infrastructure.planninginspector content/ipc/uploads/projects/TR01006 3.3%20Environmental%20Statement% %20Year%20Do-Something%20Noise* |

The Councils do not accept that this is a correct analogy, in that Local Authorities have long standing provisions for independent regulatory functions of their work, eg. Planning committees, which are set out in their constitution with clear terms of reference and subject to a democratic process. Can the Applicant demonstrate a transparent and lawful process for decision making?

The procedures are not yet transparent because they haven't been explained. The way this will work should be explained during the Examination and secured in detail with Secretary of State approval.

The Councils welcome point 2.

Does 'reflect' imply a sufficient level of compliance with 2nd iteration EMP?

Is this process demonstrably quicker to support Project Speed? The self-approval process isn't

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| | *APP-115* | *Figure 12.4* | *Opening Year Alignment Noise Difference* | *https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010062/TR010062-000375-3.3%20Environmental%20Statement%20Figure%2012.4%20Opening%20Year%20Alignment%20Noise%20Difference.pdf* | tested, set up or explained in any detail, nor is it transparent, which should be an over-riding principle |
| | *APP-116* | *Figure 12.5* | *Future Year Do-Minimum Noise Level* | *https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010062/TR010062-000376-3.3%20Environmental%20Statement%20Figure%2012.5%20Future%20Year%20Do-Minimum%20Noise%20Level.pdf* | |
| | *APP-117* | *Figure 12.6* | *Future Year Do-Something Noise Level* | *https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010062/TR010062-000367-3.3%20Environmental%20Statement%20Figure%2012.6%20Future%20Year%20Do-Something%20Noise%20Level.pdf* | |
| | *APP-118* | *Figure 12.7* | *Future Year Alignment Noise Difference* | *https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010062/TR010062-000368-3.3%20Environmental%20Statement%20Figure%2012.7%20Future%20Year%20Alignment%20Noise%20Difference.pdf* | |

***Post hearing note:*** *The Applicant noted comments made at ISH2 regarding concerns related to construction working hours. As such, it has sought to provide further information below, recognising the concerns of local residents.*

*The first iteration Environmental Management Plan (Document Reference 2.7, APP-019) contains the following commitments in relation to construction phase working hours within Table 3-2 Register of Environmental Actions and Commitments:*

- *D-GEN-11 sets out the core working hours during construction, which are set at 07:30 – 18:00 Monday to Friday and 07:30 – 13:00 on Saturday. This commitment allows for a period of one hour before and after to be used for start up and close down activities, for preparation and maintenance activities. The commitment allows for standard operational activities within the existing*

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| | *highway, repairs or maintenance of construction equipment and work in response to an emergency outside of these hours.*<br>• *D-GEN-11 also allows for the contractor to apply for consent under Section 61 of the Control of Pollution Act 1974 for work to be undertaken outside of the core working hours.*<br>• *D-GEN-13 requires the contractor to sign up to and adhere to the Considerate Constructors Scheme (which itself requires, as part of their Code of Considerate Practice, that the contractor "provides a safer environment, preventing unnecessary disturbance and reducing nuisance for the community from their activities", and provides independent monitoring of the performance of the works against that standard)*<br>• *D-NV-01 sets the requirement for a Noise and Vibration Management Plan to be approved as part of a second iteration EMP, and specifies that it must include:*<br>  ○ *Details of any consents to be sought under Section 61 of the Control of Pollution Act 1974*<br>  ○ *Details on proposed Site Working Hours (for that part)*<br>  ○ *Details of sensitive Noise and Vibration receptors (such as local residents close to the construction works)*<br>  ○ *Details on how local residents that may be affected by construction noise and vibration will be notified of activities that have the potential to cause a nuisance*<br>  ○ *This commitment also requires that monitoring is carried out where sensitive receptors (such as local residents) are located particularly close to construction works and mitigation for such temporary noise or vibration shall be considered on a case by case basis (possibly including noise insulation for example).*<br>• *D-PH-03 sets the commitment for a Community Engagement Plan for each part of the scheme, to include details of how engagement with local communities will occur.*<br>*A second iteration EMP will include a Noise and Vibration Management Plan. This document will include, for each part of the development, confirmation of working hours and any variations to (shortening of, as all working hours must be within those specified in the first iteration EMP unless agreed otherwise through* | |

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| | *a Section 61 consent) working hours to be implemented at any location on the basis of any further noise and vibration assessment as part of detailed design. It would also be expected to include results of any further modelling, details of noise monitoring and actions to minimise noise, and details of any Section 61 consents that may be applied for (for work outside core working hours). A second iteration EMP will also include a detailed Community Engagement Plan, setting out how the local community will be kept informed and providing information to the public about construction activities planned in each local area. As referenced under Agenda item 2.2 the first iteration EMP will be updated to expand the commitment relating to the Community Engagement Plan, requiring public facing information to be provided regarding planned construction activities.*<br><br>*The intention behind the development of a second iteration EMP (including the Noise and Vibration Management Plan) and subsequent Secretary of State approval is that it ensures the contractor reviews the proposed working practices, including working times, in relation to the detailed design by identifying particularly sensitive receptors close to the works, and developing bespoke measures to protect those receptors. The Secretary of State would need to be satisfied that these considerations have been taken into account before approving the second iteration EMP.* | |

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| | | As well as monitoring, is information to be provided to those likely to be affected along with engagement? |

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| | | This should also set out active engagement with the community, not just information provision, ie. A two-way process of communication is needed. |
| **3.0 Environmental Matters** | | |
| 3.1 Design and Landscaping | | |
| **Agenda Item** | **The Applicant's Response[4]** | **Councils' Comments** |
| ***The ExA will discuss the Applicant's design approach, with specific regard to the viaduct structures at:***<br>• ***Trout Beck (Scheme 0405)***<br>• ***Cringle Beck (Scheme 06)***<br>• ***Moor Beck (Scheme 06)***<br>***The ExA wishes to examine the approach and selections of viewpoints and photomontages. It would assist if the Applicant could make available for display the ZTV 3km document [APP-105]; the*** | **Viewpoints and photomontages**<br>Based on their site visit on 28 November 2022, the **ExA** requested additional viewpoints and photomontages to illustrate three key structures across Trout Beck, Cringle Beck and Moor Beck.<br>**Jon Simmons, landscape lead for the Applicant** explained that the viewpoints used in the Environmental Statement were selected in accordance with established practice, including that given within the Design Manual for Roads and Bridges ("**DMRB**"). **Mr Simmons** referred the ExA specifically to references 3.32, 3.33 and 3.34.1 of DMRB LA 107 (Landscape and Visual Effects). He explained that viewpoints are determined primarily by site visits. A desk study of theoretical visibility is undertaken, followed by a site survey where viewpoints are checked and verified. Where there is a viewpoint, measured photos are taken. **Mr Simmons** noted that the proposed viewpoints were tabled at regular focus group meetings with stakeholders, including the local planning authorities and additional viewpoints were added based on the input of those stakeholders.<br>**Kate Wilshaw, for Friends of the Lake District** raised concerns that she did not receive invites for the focus group meetings, so did not have the opportunity to provide input into this process. **Robbie Owen, for the Applicant** confirmed that in line with established practice, the technical working group was made up of local | |

[4] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***General Arrangement Plans for Schemes 0405 [APP-013] and Scheme 06 [APP-014]; and Sheet 4 of the Engineering Section Drawing Plan for Scheme 0405 [APP-328] and Sheets 3 and 4 for Scheme 06 [APP-329]. The ExA may recommend additional viewpoints and photomontages specifically at the above structures, but also at Cross Lanes (Scheme 08).***<br><br>***The ExA will also wish to discuss the Applicant's design approach to the structures and their architectural appearance and will seek additional supporting information including examples of designed structures used elsewhere. The ExA will explore the project-wise design principles on landscape integration as set out in the Project Design Principles [APP-302]. The ExA will also invite discussion on the cited effect of the*** | planning authorities, Natural England and the North Pennines AONB Partnership, being statutory bodies with statutory responsibilities.<br>**Mr Simmons** confirmed that the Applicant would consider the requested additional viewpoints and photomontages and confirm whether they could be provided and, if so, by when.<br><br>***Post hearing note:*** *The ExA requested additional Viewpoints and photomontages related to the major structures present on Scheme 0405 and Scheme 06, namely the crossings of* Trout Beck, Cringle Beck and Moor Beck<br>*Specifically, the ExA requested confirmation of the Applicant's acceptance of the proposed viewpoint positions and to provide an expected programme to produce the new photomontages showing the structures (illustratively) in situ.*<br><br>***Viewpoints:***<br>*The proposed photo locations arising from ISH2 are set out below and presented on the attached Figures 1 and 2 at Appendix 3.*<br>***Viewpoint A***<br>*From existing Viewpoint taken from the gate at Sleastonhow Farm looking south (VP 4.9a).*<br>***Viewpoint B***<br>*View from the gated entrance to Sleastonhow Farm looking east/northeast. The Applicant has established that this will require permission to access private property. From initial assessment it looks like a clearer view might be available further along the lane at proposed Viewpoint C.*<br>***Viewpoint C***<br>*Viewpoint proposed to address requirement for a photomontage of the structure from this location looking east. The Applicant has established that this will require permission to access private property.*<br>***Viewpoint D***<br>*Proposed photo location from the footpath to the rear of Sleastonhow Farm as requested by Ms Nicholson during the Hearing. Final location to be determined on* | |

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| ***proposed development on the AONB.***<br>***The ExA may wish to discuss Article 54 (detailed design) of the draft DCO and the powers sought by the Article in particular to changes to the approved designs. We will also seek clarification on why the Project Design Report [APP-009] is not a certified document in Schedule 10.*** | *site by the survey team confirming best available view of the structure along this section of footpath.*<br>***Viewpoint E***<br>*Viewpoint on the footpath south of Wheat Sheaf Farm, looking south to present the structure over the Cringle Beck.*<br>***Viewpoint F***<br>*Viewpoint from footpath 372/021 looking south to present the structure over Moor Beck.*<br>***Access onto private property***<br>*As set out above, the Applicant has established that a number of the above viewpoints require access onto private property for both personnel and potentially vehicle parking. As the Applicant does not have a right of access, it will engage with the relevant landowners to seek to secure this access for the required photography as soon as possible. However, where this access is not granted, the Applicant will seek to identify equivalent representative viewpoints from publicly accessible points, having regard to the project's health and safety requirements. The Applicant will report back to the ExA at Deadline 2 as to its progress with obtaining access and any proposed alternative viewpoints.*<br>***Approach to preparation of structure visualisations***<br>*The Applicant wishes to note that verified photomontages are a tool to aid impact assessment. Given that some of the locations requested by the ExA are very close (within 70m) of the relevant structure) the Applicant respectfully submits that photomontages are not an appropriate means to represent the design here. The Applicant has therefore devised what it considers to be an appropriate means of visualisation to show the preliminary designs of structures in their landscape context and to allow the ExA to better understand the design and appearance in context of the three structures; the proposed approach is summarised below.*<br>*The Applicant considers its proposed approach will provide an appropriate degree of information and enable the proposed structures to be clearly understood in their landscape context. The approach proposed would also strike a proportionate balance between clearly translating the design principles and integration with the* | |

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| | *landscape context, whilst also reflecting the preliminary stage of design the Project is currently at.*<br>*The Applicant proposes to undertake measured photographs from the agreed viewpoints (or alternative publicly accessible viewpoints – see above) and to construct simple wireframe overlays of the structures to conform with a Type 2 visualisation (Landscape Institute (LI) Type 2 Visualisations, as set out in LI Technical Guidance Note 06/19: Visual representation of development proposals. See Appendix 4).This would show the position, mass and scale of the structures. In order to provide more information as to how these could look and be experienced in context using the design principles defined in the PDP, an architectural illustrator will be commissioned to provide artists impressions from each viewpoint, using the above photographic material and wirelines as a basis for illustrative representations of the structures and to show how the visual appearance / visual qualities and landscape integration could be implemented (again recognising the detailed design process has not yet commenced on the structures). The Applicant submits that this would provide the ExA with the information it is seeking, having regard to the stage of design the Project is at.*<br><br>***Programme***<br>*As the viewpoint photography is both access and weather dependent it is proposed to submit the visualisations for Deadline 4*<br>**Approach to design**<br>By reference to paragraph 10.9.4 of Chapter 10 of the Environmental Statement [Document Reference 3.2, APP-053], the ExA queried what an "aesthetic review" included in respect of the design of the Project, having regard to the three structures that the ExA are particularly interested in (and as cited in the agenda). **Paul Carey, for the Applicant** confirmed that the structures have been, to a preliminary extent, structurally designed, with architectural considerations also taken into account. He stated that each structure has been subject to preliminary design as a result of collaborative efforts between multi-disciplinary teams, whereby structural and design engineers work with environmental teams to understand not only the structural form and function of the viaducts, but how they are set in the context of the landscape. **Mr Carey** stated that ultimately the | |

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| | preliminary design of the structures has sought to minimise the bulk of each structure and be complementary and not detract from the value of the landscape. He confirmed that their span arrangements have been given careful consideration, taking account of the need to cross the watercourse, the top of banks and the alignment of columns to support structures, amongst other considerations.<br><br>The ExA noted that the structures are sizeable, and requested a design brief for the three viaducts, explaining how the Project Design Principles have been taken into account to date, relating this to engineering considerations, particularly in light of making them aesthetically beautiful, and how the next stage of design would be undertaken. **Mr Carey** confirmed that the Applicant would consider this request.<br><br>***Post hearing note:*** *The Applicant will submit commentary at Deadline 3 on the approach taken to date in respect of the design of Trout Beck, Cringle Beck and Moor Beck Structures. This will include consideration of site-specific constraints and sensitivities, the functional requirements of the structures as well as site context and design outcome objectives (including aesthetics). This commentary will include examples (images) of similar structures as well as a commentary on how the Project Design Principles, to be secured by the DCO, arose in relation to structures such as these, and how the Project Design Principles will be implemented during the detailed design process for these structures.*<br><br>The ExA queried whether the Design Report [Document Reference 2.3, APP-009] ought to be a certified document under the DCO. **Andrew Tempany, landscape and design expert for the Applicant** explained that the Project Design Report [Document Reference 2.3, APP-009] explains the narrative behind the development of the reference (or preliminary) design, it explains the factors relevant to the development of that design and gives the reader a visually rich tour of the vision for the reference design and its key features. **Mr Tempany** confirmed that, in effect, the document summarises how the Applicant progressed from broad alignments for the Project to the reference design for which development consent is sought. He also explained how the document illustrates how, within the constraints of the parameters for which development consent is sought, the Project could come forward. It does this by reference to a selection of the Project Design Principles to illustrate how the application of those principles would secure good design. | |

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| | **Mr Tempany** further explained that the Project Design Principles [Document Reference 5.11, APP-302] is the key document intended to guide the hands of the detailed designers to develop the Project such that it meets the criteria for good design set out in the National Policy Statement for National Networks and the other relevant design guidance cited in the Project Design Report. It is also the vehicle for securing important aspects of the design that are relied upon for essential mitigation in the Environmental Statement. In this context, **Mr Tempany** submitted that certifying the Project Design Report would introduce a degree of ambiguity in relation to the importance of the Project Design Principles that was never intended. He continued, by stating that the Project Design Report only contains a selection, not all, of the Project Design Principles and only articulates those principles in summary form. This creates a significant risk of ambiguity in the interpretation of the Project Design Principles and defeats one of the key objectives of the document having the Project Design Principles (and therefore the Project's design obligations and parameters) encapsulated in a single document.<br><br>**Robbie Owen, for the Applicant** further explained that the Project Design Report shows *one* way in which the DCO can be designed and delivered and is the illustrative articulation of themes, as well as the Project Design Principles. He submitted that is why only the latter ought to be secured and be a certified document.<br><br>The **ExA** then sought to understand whether article 54 of the DCO necessitated third party regulatory approval of the designs of the three cited viaducts, or whether those fall into the self-approval process by the Applicant. The ExA then queried whether a Design Brief for those structures ought to be secured within article 54 of the DCO. **Mr Owen** explained that in the same way that many made DCOs are expressed, the detailed design is tied to a number of certified documents. In this respect, article 54 states that the Project must be designed in detail and constructed so that it is compatible with the Project Design Principles, Works Plans [Document 5.16, APP-318 to 325], Engineering Section Drawings: Plan and Profiles [Document 2.5, APP-011 to 018] and Engineering Section Drawings: Cross Sections [Documents 5.18, APP-334 to 341]. **Mr Owen** continued that is the well-established way that DCOs made for the Applicant's benefit have been drafted; there is very limited, if any, provision within other such | |

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| | DCOs for detailed design approvals. He concluded by stating that the safeguards in this respect are that the Applicant is tied back to the preliminary design shown on the documents referred to previously.<br>In response to a request to speak from the ExA, **Emma Nicholson** commented that parish councils are being informed that trees will not be planted for screening purposes, due to on-going maintenance responsibilities. She enquired whether the Applicant will be planting trees around the village, road or viaduct. **Kerry Whalley**, **for the Applicant** explained that screening by planting trees is a technique used in landscape and design where appropriate, so a location-by-location approach is being taken. The Applicant agreed to liaise with the parish council on this point, to clarify what locations are being referred to.<br><br>***Post hearing note:*** *Paul Smith, representing the Applicant, will engage with the parish council to clarify whether trees are being proposed for screening purposes.* | |
| 3.2 Traffic and Access | | |
| **Agenda Item** | **The Applicant's Response[5]** | **Councils' Comments** |
| ***The ExA wishes to understand the proposed access arrangements to the Countess Pillar, which appear to reduce its accessibility. While listed as an agenda item here, there is overlap with heritage issues on this matter. Reference will be made to General Arrangement Plan Sheet 1 [APP-012].*** | The **ExA** queried whether the footpath to the west of the Countess Pillar could be reinstated to provide pedestrian access. **Mr Paul Carey, design lead for the Applicant** confirmed that there is currently vehicular access to the Pillar via the B6262, as advertised on the English Heritage website. Mr Carey confirmed that pedestrian access will be provided as part of the Project, but the precise means of implementing this east-west connectivity is subject to detailed design.<br>**Robbie Owen, for the Applicant** further confirmed that the first iteration EMP [Document Reference 2.7, APP- 019] REAC table, Reference MW-CH-02, secures the mitigation required for the relocation of, or in-situ protection of, medieval milestones and boundary stones which includes the Countess Pillar. This includes, in part, access to Countess Pillar. The Applicant agreed to review the precise wording of this commitment to ensure that access to the Countess Pillar is available from all directions, as proposed to be provided. | |

[5] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| | ***Post hearing note:*** *Sheet 1 of General Arrangement Drawing [Document Reference 2.5, APP-012] includes notation that the 'Existing footpath to Countess Pillar to be made redundant and removed' which would remove access for pedestrians from the west. This has been re-considered following comments received and the Applicant intends to amend this proposal as currently shown on Sheet 1 of the Rights of Way and Access Plans [Document Reference 5.19, APP-343] to show the footpath being retained. This will be submitted to the examination at Deadline 3, as part of the Proposed Changes Application.* | This is welcomed by the Councils |
| 3.3 Flooding and Drainage | | |
| **Agenda Item** | **The Applicant's Response[6]** | **Councils' Comments** |
| ***The ExA wishes to understand:***<br>• ***The current status of agreement with the Environment Agency, with particular reference to Flood Risk Assessment baseline conditions [AS-004, Annex 1]*** | **Kevin Crookes, flooding and drainage lead for the Applicant** confirmed that the baseline hydraulic modelling of the watercourses was undertaken based on methodology agreed with the Environment Agency (the "**EA**"). This modelling was issued to the EA for comment. **Mr Crookes** confirmed that comments were received from the EA and the Applicant addressed all the comments that had the potential to impact the flood depth/extent in the model output. These changes are included in the submitted Flood Risk Assessment [Document Reference 3.4, APP-221].<br>**Mr Crookes** concluded that following submission, the remainder of the comments were addressed by a written response and sensitivity testing of the baseline model. The testing concluded that the remaining minor comments from the EA did not result in any material changes and therefore the conclusion of the Flood Risk Assessment remains unchanged. | Michelle Spark advised that, for NYCC and CCC, her instructions were that there had been limited engagement from NH to date and that the Councils (in this instance NYCC and CCC) would welcome further engagement on this issue as soon as possible (see REP1 - 016). |

[6] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| • ***The current status of any discussions and agreement with local authorities and any Lead Local Flood Authorities.*** | **Philip Carter, for the Environment Agency** confirmed that the baseline hydraulic modelling was submitted to the EA and comments were provided to the Applicant. An updated version of the baseline hydraulic modelling has been received by the EA, which the EA is in process of reviewing.<br>In respect of the current status of any discussions and agreement with the Lead Local Flood Authorities ("**LLFAs**"), **Mr Crookes** confirmed that the baseline hydraulic modelling of the watercourses was undertaken based on methodology issued to all LLFAs for comment (with comments considered and addressed where received) and that the Applicant is engaging with the local authorities and LLFAs at this stage.<br>In response to comments made by the LLFAs, **Mr Crookes** confirmed that the Applicant would seek further engagement with the LLFAs as soon as possible on the flood modelling.<br>In response to a query by the **ExA, Mr Crookes** confirmed that the Applicant would provide comments on the EA's Principal Areas of Disagreement Summary Statement, to demonstrate none of the issues raised are incapable of resolution by the end of the examination process.<br><br>***Post Hearing Note:*** *The Applicant expects that the comments raised by the Environment Agency (EA) in its Principal Areas of Disagreement Summary Statement can be* resolved within the Examination and the Applicant does not consider that there are any issues incapable of resolution.<br>*In order to address any outstanding matters, the Applicant has scheduled a regular fortnightly meeting with the EA to discuss issues and record the outcome of these meetings through the Statement of Common Ground. Additional meetings will be scheduled as required to address unresolved issues.*<br>*A summary of the issues raised by the EA, and their current status, is set out below.* | |

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| | *A written response alongside sensitivity testing reports that address the comments from the EA regarding the baseline flood models, have been issued to the EA for their review.. The Applicant will continue to engage with the EA as they undertake their review of the hydraulic modelling.*<br><br>*The Applicant and the EA are currently discussing the form of Protective Provisions in the draft DCO for the benefit of the EA, to allow the EA to agree to the disapplication of the Environmental Permitting (England and Wales) Regulations 2016 in relation to flood risk activity permits in the draft DCO.. The Applicant does not foresee any issues with this, and there is no reason to suspect that an agreement won't be reached before the end of Examination.*<br><br>*Following the receipt of relevant representations, the Applicant has been meeting with the Statutory Environmental Bodies (SEBs) and Local Authorities to discuss the Environmental Management Plan (EMP). A meeting was held with the EA on 4 November 2022 to address the issues and further meetings are planned to continue dialogue. It is anticipated that these matters will be resolved within the Examination.*<br><br>*The EA is currently reviewing the various parcels of land that the Applicant is seeking to acquire that the EA have an interest in. The Applicant will continue to engage with the EA on this matter. There is no reason to suspect that an agreement won't be reached before the end of Examination.*<br><br>*The Applicant notes the EA's comments in relation to the Project Design Principles (PDP) and Environmental Statement (ES). The Applicant will continue to liaise with the EA to understand in greater detail the concerns and seek to address the issues within the Examination. The outcome of these discussions will be recorded in the Statement of Common Ground.*<br><br>*Sensitivity testing using the latest rainfall climate change allowances has been undertaken and it did not result in any changes to the outline drainage strategy or flood risk assessment. The Applicant intends to share these results with the EA as part of the on-going engagement between the parties.* | |

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| | In response to the comments made by the LLFA's regarding further engagement on flood modelling, *the Applicant has issued a request for a meeting on Monday 5 December 2022 to all Lead Local Flood Authorities (LLFA's) to discuss outstanding items from the Principal Areas of Disagreement Summary Statement (AS-004). A meeting has been arranged for 12 December 2022. The Applicant is continuing dialogue with the LLFA's on all unresolved issues, including flood modelling, which will be documented in the SoCGs.* | |
| 3.4 Climate Effects | | |
| **Agenda Item** | **The Applicant's Response[7]** | **Councils' Comments** |
| ***The ExA wishes to understand:***<br>• ***How the significance thresholds for the calculated greenhouse gas (GHG) emissions arising from the project compared against the relevant carbon budgets have been used to inform the conclusion that 'the project's GHG emissions, in isolation, will not have a significant effect on climate or a material impact on the ability of the*** | **Approach to climate assessment**<br>In response to a query from the **ExA**, **Keith Robertson, climate lead for the Applicant** explained that the Applicant's assessment of the significance thresholds for the calculated greenhouse gas emissions is based on the Design Manual for Roads and Bridges ("**DMRB**"), LA 114 guidance document which directs that the assessment of a project on climate change shall report significant effects only where increases in greenhouse gas emissions will have a material impact on the ability of the government in meeting its carbon targets. **Mr Robertson** confirmed that the wording within LA 114 reflects the overarching decision-making approach set out in the National Policy Statement for National Networks.<br>**Mr Robertson** further confirmed that there is no confirmed guidance on a numerical threshold to be used when comparing and contextualising emissions. For the Project, emissions are being compared to the national carbon budget. The assessment of the impact of the Project on the relevant national carbon budgets is very small, in that construction accounts for 0.027% of the 4th carbon budget and 0.03% of the 5th carbon budget and net increases in emissions from users less than 0.1% in the 6th carbon budget period.<br>**Mr Robertson** continued and stated that throughout the assessment and quantification of emissions, a conservative approach has been adopted to avoid under-estimating the total emissions arising from the Project. This still results in | |

[7] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***Government to meet its carbon reduction plan targets and Carbon Budgets' [ES Chapter 7, APP-050, para 7.5.19 and 7.11.24].***<br>• ***What, in the context of the change from 100% to 8%, has informed the 'updated assumption for ES' that 'the quantity of additional lime required for stabilisation is 8% of the proportion of excavation material identified as requiring stabilisation' [ES Chapter 7, APP-050, para 7.11.10]. Why is this said to be a 'conservative estimate'?***<br>• ***The current status and future development, in terms of its scope and timescales, of*** | small total emission levels. **Mr Robertson** noted that there is potential for a reduction in the greenhouse gas emissions through further wider measures over time. Given the UK Government's legal target to meet net zero and in the context of wider commitments and the Applicant's own wider net-zero plan, it is unlikely that the emissions from the Project are so great that they will have a material impact on the government achieving carbon targets (in line with the LA 114 test).<br>The **ExA** noted that Chapter 7 of the Environmental Statement [Document Reference 3.2, APP-050] talks about greenhouse gas emissions in isolation and does not take them forward into a cumulative impact. The Applicant was invited to elaborate on what the updated Institute of Environmental Management and Assessment ("**IEMA**") guidance instructs in relation to this.<br>**Mr Robertson** explained that the intention of the updated IEMA guidance is to tackle various challenges identified as the topic of greenhouse gas assessments has become more important in recent years. He stated that the guidance addresses the discussion around the cumulative assessment of greenhouse gases, in that it acknowledges that there are specific challenges around the assessment of greenhouse gas emissions which makes it harder to undertake a cumulative assessment in the same way as it is for other environmental topics.<br>**Mr Robertson** stated that the main challenge in this context is that the impacts of greenhouse gas emissions are not limited to where emissions take place, so it becomes almost impossible to define a zone of influence at any scale smaller than a national appraisal. This is because the proximity of another project has no direct relevance in terms of the greenhouse gas emissions produced by another project. IMEA guidance therefore notes that cumulative assessment is of limited value.<br>**Mr Robertson** noted, however that the assessment undertaken of user emissions is based on traffic modelling for the Project and that strategic modelling is effectively a cumulative model, taking account of other consented projects which would have an impact on the road network. Therefore, when an output is received from strategic modelling for this assessment, this model includes other consented development that would have an effect on the road network. From this perspective, it does provide a cumulative assessment. | |

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| ***the project Carbon Strategy which is identified in the application [Statement of Reasons (SoR), APP-299, para 2.4.2].***<br>• ***Why some of the mitigation schedule source references to climate matters [Mitigation Schedule, APP-042, table 2] refer to ES Section 7.10 [APP-050, Chapter 7] and not ES Section 7.9.*** | In response to a query from the **ExA, Mr Robertson** confirmed that the Applicant would confirm how the costs included in Table 6-9 of the Combined Modelling and Appraisal Report [Document Reference 3.8, APP-237] had been arrived at.<br><br>***Post Hearing Note:*** *The IEMA Guide on 'Assessing Greenhouse Gas Emissions and Evaluating their Significance' 2nd Edition dated February 2022 has been included in Appendix 10 of this document.*<br><br>***Post Hearing Note:*** *A note containing an explanation of the costs contained within Table 6-9 of the Combined Modelling and Appraisal Report [Document Reference 3.8, APP-237] is provided in Appendix 9 of this document.*<br><br>**Lime stabilisation**<br><br>In response to a query from the **ExA** around the change from 100% to 8% (between statutory consultation and the submission of the application) in terms of the lime being required for stabilisation, **Mr Robertson** clarified that a correction was made to the calculation process, as the Environmental Statement was prepared following the identification of an error within the materials published as part of statutory consultation.<br><br>**Mr Robertson** explained that during the design and construction of highways projects, it is often found that there are soils which are insufficiently stable. Various methods are used to stabilise the soils to make them appropriate for construction. He went on to state that one method used is to add lime to the soil to make it more cohesive and therefore appropriate for construction. **Mr Robertson** explained that the calculation for embodied carbon used as part of the assessment process uses an industry standard calculation tool, requiring an estimate of the quantity of lime to be used. In error, in preparation for statutory consultation, the quantity of soil needing treatment was identified and the full volume equivalent of lime was entered into the calculator. This modelled a 100% replacement of inappropriate soil with lime, whereas the actual weight of lime used is significantly less than this. | |

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| | ***Post Hearing Note:*** *The Applicant was to asked provide justification for use of the 8% figure in modelling lime used for stabilisation.*<br>*As noted in Paragraph 7.5.9 of Chapter 7 Climate Change [Document Reference 3.2, APP-050] within the Environmental Statement (ES) the calculation assumption made in the Preliminary Environmental Information Report (PEIR) was an error.*<br>*For context, lime stabilisation is one of various methods used to stabilise soils prior to construction. It is used as a method for increasing the strength of soils with high clay content. By mixing lime into clay-heavy soils this can reduce the need for alternative strategies to provide strong soils for construction (which can include replacement or mechanical compaction). The need, or otherwise, for soil stabilisation is not yet fully understood for the route but it is not uncommon for soil stabilisation to be required.*<br>*At the time of the PEIR, the project wanted to assess the impact of lime used for stabilisation. There is an industry carbon factor for lime, but the project needed to determine the quantity required. This is done by setting an assumption for the % ratio of lime to soil. At the time of the PEIR this was, in error, modelled as a 100% replacement of soil with lime i.e. the project was modelling all soil requiring stabilisation would be replaced at 100% ratio by lime.*<br>*The error was corrected within the ES, and an 8% lime ratio was adopted.*<br>*A main source for carbon factors is the ICE database of embodied carbon for materials produced by Circular Economy. This is an industry standard source for carbon factors. It provides data on lime stabilisation and sets out two stabilisation rates – 5% and 8%. The higher value was adopted as a conservative value. This value was then inputted into the National Highways embodied carbon calculator tool used for the main embodied carbon assessment.*<br>*A review of a case study from Britpave ('Stabilised Soils – as subbase or base for roads and other pavements'), which is referred to as an industry source by the British Lime Association, suggests typical lime addition rates of between 1.5 and 4%. On this basis an 8% addition rate was considered conservative.* | |

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| | **Carbon strategy**<br>The **ExA** then queried the current status and future development, in terms of its scope and timescales, of the Project's Carbon Strategy, identified within the Statement of Reasons [Document Reference 5.8, APP-299, para 2.4.2]. **Kerry Whalley, for the Applicant** confirmed that the Carbon Strategy referred to in the Statement of Reasons [Document Reference 5.8, APP-299] is referring to the same Strategy which is secured within the DCO via the first iteration EMP [Document Reference 2.7, APP-019], specifically within the Register of Environmental Actions and Commitments, at Table 3.2 of the EMP, at MW-CL-01.<br>**Ms Whalley** confirmed that, in essence, the commitment is for a detailed Carbon Strategy to be worked up prior to the start of works, through stakeholder engagement. This will be a contractual commitment placed on the contractors. **Monica Corso-Griffiths, DCO lead for the Applicant** confirmed that the appointed contractors intend to have a form of Carbon Strategy completed by the end of the examination.<br>***Post hearing***: *The Applicant can confirm that an Outline Carbon Strategy will be submitted at Deadline 3 of the Examination Timetable (24 January 2023). The Applicant considers that the Carbon Strategy is identical in purpose to the other management plans, strategies and method statements that are currently in outline in the first iteration EMP but will be developed in detail alongside the detailed design (a general commentary on this is provided at the agenda items above). As such, a detailed Carbon Strategy will be developed and implemented prior to the start of works.*<br>**Mitigation Schedule**<br>In regard to the final agenda bullet point provided by the **ExA**, **Ms Whalley** noted the discrepancies within the Mitigation Schedule, explaining that the references are one section out due to a typographical error, which will be addressed by the Applicant.<br><br>***Post hearing note***: *A corrected version of the Mitigation Schedule (APP-042) Table 2 is provided in a revised version of the document at Deadline 1 [Document Reference 2.9, APP-042] in both clean and tracked versions.* | Surely each strategy has a different purpose relevant to the environmental factor it is intended to consider. The Councils do not agree that the purpose of the Carbon Strategy is 'identical' to all the other management plans that the Applicant is committed to producing. |

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| 3.5 Trees | | |
| **Agenda Item** | **The Applicant's Response[8]** | **Councils' Comments** |
| ***The ExA notes that the Applicant has not provided an Aboricultural Impact Assessment with the application. EMP REAC reference D-LV-01 states one would be provided at the detailed stage. REAC reference D-LV-04 states "Tree removal must be kept to a minimum as far as reasonably practicable… [and]…two trees will be planted to one lost". The ExA wishes to discuss the practicality of this Commitment and will be seeking the submission of the AIA within the*** | **Robbie Owen, for the Applicant** confirmed that the Applicant does not propose to provide an Aboricultural Impact Assessment ("**AIA**") at this stage as the proposal is to complete the AIA at the detailed design stage. **Jon Simmons, for the Applicant** explained that the landscape and visual assessment detailed within Chapter 10 of the Environmental Statement [Document Reference 3.2, APP-053] was undertaken using a reasonable worst-case scenario, allowing a degree of flexibility in the design without compromising the robustness of the assessment.<br>**Mr Simmons** stated that in respect of tree removal there was an assumption that all trees located within the indicative site clearance boundary, as shown on Figure 2.2 of Chapter 2 of the Environmental Statement [Document Reference 3.3, APP-062], would potentially require removal. This was to ensure that a reasonable worst-case scenario was assessed. Tree and woodland cover was evaluated by looking at aerial photography and ratified by site surveys and site photography.<br>**Mr Simmons** confirmed that on this basis and acknowledging the flexibility within the design provided by the Limits of Deviation secured in the DCO, it was considered that the completion of an AIA at the preliminary design stage would not further inform the reasonable worst-case landscape or visual assessment undertaken within the Environmental Statement or the associated mitigation | |

[8] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***Examination period to identify the areas of tree removal noting each tree to be removed, the maximum number of trees that would be removed, and the approximate location for replacement trees.*** | requirements. He informed the ExA that tree surveys that form the basis of the AIA are usually considered out of date after 12 months and would require to be resurveyed.<br>**Mr Simmons** explained that it was identified early in the assessment process that there are a number of important trees along the route of the Project, due to their age, visual prominence or ecological value. These notable and veteran trees have been identified by site survey and are noted within Chapter 6 Biodiversity of the Environmental Statement, specifically paragraph 6.7.8 [Document Reference 3.2, APP-049]. These are also represented on ES Document 3.3 Environmental Statement Figure 6.2 Ancient Woodland, Ancient Tree Inventory and Habitats of Priority Importance [Document Reference 3.3, APP-070].<br>**Mr Simmons** confirmed that the location of these notable and veteran trees has been used to inform the preliminary design of the Project, with those trees retained where possible. If retention is not possible, replacement planting of suitable species and stature would be included in the detailed design (see reference 03.04 in the Project Design Principles).<br>**Mr Simmons** then turned to the Applicant's commitment to complete an AIA during detailed design and why this is more appropriate. He explained that as the design develops, a targeted AIA would be more focused in scale and extent, giving a more accurate measurement of the trees to be removed, with the intention of retaining as many existing trees as practicable through the detailed design process.<br>**Mr Simmons** referred the ExA to a Project Wide Design Principle for addressing/committing to tree protection at the detailed design stage states: "*The detailed design must minimise impacts on mature trees, root protection zones and mature tree canopy cover and so far, as is reasonably practicable carry out the detailed design so as to retain mature and established trees as valued landscape features*." (ref LC03).<br>He then referenced commitment D-LV-01 contained in the first iteration EMP [Document Reference 2.7, APP-019], which secures the production of an AIA | Does 'stature' refer to the size of the tree at maturity or the size of the replacements at the time of planting? |

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| | prior to the start of the construction of the main works. In addition, the EMP secures Tree Protection Plans to be prepared for the protection of trees retained in line with relevant British standards within and immediately adjacent to the Order limits. In response to a query from the ExA, the Applicant agreed to provide an estimate, on a worst-case basis, of the number of trees that could be lost in the development of the Project.<br>In relation to the commitment in the first iteration EMP to replace trees on a 2:1 basis, **Mr Simmons** explained that the trees may not be replanted in the same location from which they are felled. The mitigation design (as presented illustratively in the Environmental Mitigation Maps, [Document Reference 2.8, APP-041]) considers the value of woodland blocks and green corridors and seeks to restore these if they are disturbed by the proposed scheme. He further explained that in all cases, the ecology and landscape teams worked (and will work) hand in hand to ensure the proposed replacement planting provides the right ecological balance and would not alter the landscape character, as there are places where trees can and cannot be planted in this context.<br>With regard to the 'practicality' of this replacement ratio, **Mr Simmons** stated that while the exact number of trees which will be lost has not been reported (and does not need to be to understand the likely significant environmental effects), the change in woodland cover has, in terms of area of woodland which will be lost as a result of the Project (on a reasonable worst case basis). The area of woodland mitigation planting identified in the Environmental Mitigation Maps is based on habitat multipliers and variables prescribed by the Biodiversity Net Gain metric (based on the woodland cover lost), which lead to a replacement ratio that is typically greater than 2:1 for woodland habitats. **Mr Simmons** confirmed that the Applicant would provide further explanation as to how the 2:1 tree replacement ratio is to be achieved, with particular reference to the location within the Order limits where those trees can be replanted.<br><br>***Post hearing note**: The Applicant intends to submit a Tree Loss and Compensation Planting Report into the examination by Deadline 4. The report will quantify the total number of trees which could be lost to the Project and* | The Councils consider that a 2 for 1 ratio is low, considering that it will take many years for any replacement planting to achieve the same positive benefits and impacts as provided by the mature trees that are lost. A higher level of replacement planting should be considered. |

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| | *subsequently determine and set out the total number of trees which could be required to be replanted as part of the mitigation.*<br><br>Individual trees will be identified in the Report using the most recent BlueSky – National Tree Map™ (NTM) dataset. The root protection area (RPA) will be calculated with an offset multiplying the canopy radius three times and to a maximum radius of 15m (in accordance with British Standard BS5837:2012 – 'Trees in relation to design, demolition, and construction – Recommendations'). Where these intersect the site clearance boundary (refer Environmental Statement Figure 2.2 – Indicative site clearance boundary (DCO Document reference 3.3 / APP-062) the worst-case assumption will be taken that all the trees will be lost – as per Chapter 10 of the Environmental Statement (APP-053). The Bluesky data set will be supplemented with the dataset from the notable and veteran tree survey completed for the project (refer Figure 6.2 – Ancient Woodland, Ancient Tree Inventory and Habitats of Priority Importance, Document reference 3.3 / APP-070).<br><br>The replacement planting set out in the Report will reflect the measures assessed and determined within the Environmental Statement. The replacement planting requirements are secured in the first iteration EMP (DCO Document reference 2.7 / APP-019) in various commitments. This includes the relevant replacement ratios.<br><br>Commitment ref. D-LV-01 requires an Arboricultural Impact Assessment (AIA) to be undertaken prior to the start of the main works for the Project. The intention is this will proactively look to retain as many trees as possible, this could significantly reduce the number of trees lost and in turn the number of replacement trees required for mitigation, when compared to the worst case assumption adopted in the Environmental Assessment.<br><br>An environmental mitigation scheme, as set out in commitment ref. D-BD-05, must be developed and form part of a second iteration EMP that is subject to approval by the Secretary of State pursuant to article 53 of the DCO. The first iteration EMP provides (at commitment ref. D-BD-05) that this mitigation scheme must consider the results of the AIA by referring back to commitment ref. D-LV-01. The environmental mitigation scheme approved by the Secretary of State must then be implemented. | |

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| | Replacement tree planting (species and density) included as part of the Project (and secured via the above mechanisms) will be determined having regard to the types of woodland habitat lost. The total area required for each type of habitat creation or replacement (based on the worst-case assumption) is outlined within Table 6-20 of the Chapter 6 Biodiversity within the Environmental Statement (Document Reference 3.2, APP-049). Replacement ratios are typically greater than 2:1 for woodland habitats and are based on habitat multipliers and variables prescribed by the Biodiversity Net Gain metric. The Order limits have been set having regard to the need to accommodate the environmental mitigation requirements, amongst other factors.<br><br>The total number of trees that could be lost, in the worst case scenario, and the total amount of replacement tree planting required, will be presented in a table within the report which will also provide the replacement planting ratios that would be applied in that scenario. The location of the potential replacement tree planting will be shown illustratively on supporting figures. However, it is important to note that all of these aspects remain subject to detailed design, with elements approved by the Secretary of State as part of a second iteration EMP at the appropriate time. | |
| 3.6 Air Quality | | |
| **Agenda Item** | **The Applicant's Response[9]** | **Councils' Comments** |
| ***The SoCG with Natural England indicates that discussions are taking place between the parties about the robustness of the air quality assessment undertaken using the methodology outlined in DMRB LA105. The ExA would like to understand*** | In response to a query from the **ExA**, **James Bellinger, for the Applicant** confirmed that a meeting with Natural England is scheduled to take place on 8 December 2022 and engagement is on-going between the parties both at a project and strategic level.<br><br>**Mr Bellinger** confirmed that in the Applicant's view, the assessments undertaken are robust and set out four key points accordingly:<br><br>1. The conservative assumption around the emissions factors used on the traffic data, allows the Applicant to be confident in the results of its assessment. | |

[9] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***how such discussions are progressing and the implications for the Examination.*** | 2. There was scheme specific air quality monitoring for ammonia, without which the Applicant would not have absolute certainty in the concentrations predicted within the modelling that has been undertaken for the air quality assessment.<br>3. The use of ammonia modelling is a key point that Natural England were previously concerned about. By taking Natural England's concerns into account in respect of the Applicant's modelling, the Applicant has been able to calculate a full view of the total concentration changes.<br>4. The Applicant has taken into account Natural England's concerns in terms of relying on the "loss of one species" metric.<br>**Tom House, for the Applicant** provided more detail on the "loss of one species" metric. He stated that notwithstanding conversations between Natural England and the Applicant beyond Project level, Natural England has indicated it does not support the use of DMRB LA 105, specifically with reference to the "loss of one species" metric. Mr House clarified that the assessment is not based on this metric. The "loss of one species" metric was reported in line with DMRB and for consistency with other road schemes, however the metric does not form the basis upon which the assessment was made. It was made using other information including habitat mapping, to inform the presence of qualifying features within the potential zone of influence, data on current pressures and condition of the site, professional judgement and robust ecological principles. The metric was not used to opine on the adverse effects on site integrity. Crucially, no designated sites were screened out of further assessment based on "loss of one species" metric at screening stage [Document Reference 3.5, APP-234] or through the assessment [Document Reference 3.6, APP-235].<br><br>***Post hearing note:*** *The Applicant has provided the DMRB LAs LA105, LA107 and LA114 information in Appendix 11 of this document.*<br><br>***Post hearing note:*** *The purpose of the meeting with Natural England that took place on 8 December 2022 was to describe the methodology for the air quality assessment undertaken for the Project, both in terms of the modelling and the subsequent interpretation of potential biodiversity impacts. The outcome of this* | |

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| | *meeting (and any further engagement) will be recorded in the Statement of Common Ground between the parties* | |
| 3.7 Cultural Heritage | | |
| **Agenda Item** | **The Applicant's Response[10]** | **Councils' Comments** |
| ***The ExA wishes to understand:***<br>• ***What sensitivity testing, if any, has been undertaken regarding the ZTV modelling, considering the Limits of Deviation (LoD). For context, Paragraph 8.5.5 of [APP-051] states "The [ZTV] modelling does not however allow impacts which might be introduced through design changes within the limits of deviation to be assessed. Preliminary sensitivity assessment has indicated that*** | In response to a query from the **ExA, Kerry Whalley, for the Applicant** confirmed that a ZTV was not prepared for the Limits of Deviation ("**LoD**"). She explained that the ZTV is formed using a variety of models and mapping data. This includes the Project itself, within an engineering model, digital terrain data and GIS mapping. An engineering model for the LoD does not exist – instead, it is based on the preliminary design shown on the Works Plans. Given the LoD are a flexibility tool, and the numerous variations a scheme could take within those LoDs, it is not possible to create a single engineering model taking into account the LoD. It is therefore not possible to produce a ZTV of the maximum LoD.<br>**Ms Whalley** further explained that, instead, the ZTVs that the Applicant has developed are used, alongside site and desktop surveys, to undertake sensitivity tests. Those tests identify the sensitive receptors where the assessment conclusions could be affected by a change within the LoDs. Relevant sources of information, such as assessments of setting, photography and site visits, are then used to understand the potential impacts on those receptors should flexibility within the LoDs be used. | |

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| ***changes within the limits of deviation will not introduce elevated effects."***<br>• ***On the above basis, can the Applicant explain how the assessments presented in the ES (based on / informed by the ZTV) have presented a worst-case approach in assessment terms?***<br>• ***Whether the production of a Heritage Impact Assessment has been considered, with reference to the western portion of the route, given proximity to the Lake District WHS.*** | | |
| **4.0 The draft Development Consent Order** | | |

| Agenda Item | The Applicant's Response[11] | Councils' Comments |
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| ***This section will discuss matters concerning the draft DCO where they largely do not concern compulsory acquisition and/or temporary possession. Those matters will be discussed at the CAH1.***<br>***Article 2 (and elsewhere): The phrase "materially new or materially worse"***<br>***Article 3 (disapplication of legislation) and specifically subparagraph (1)(a)***<br>***Article 15 (authority to survey land…): The ExA wishes to better understand the powers sought by subparagraph (1)(b) in respect to any land which is adjacent to, but outside the Order limits. In particular:***<br>• ***The ExA wishes to better understand specifically which land this would*** | **Article 2**<br>The **ExA** clarified that article 2 has already been discussed in ISH2, within Agenda Item 2.2, so was not discussed at this point during ISH2.<br>**Article 3**<br>Turning to the specific paragraph of article 3 mentioned in the agenda, **Robbie Owen, for the Applicant** explained that Section 28E of the Wildlife and Countryside Act 1981 requires owners and occupiers of land within a Site of Special Scientific Interest ("**SSSI**") to give notice to Natural England before carrying out an activity that is specified in the SSSI's notification. He further explained that section 28H of that Act imposes a duty on public bodies, such as the Applicant, to give notice to Natural England before carrying out activities likely to damage the features of scientific interest of a SSSI.<br>**Mr Owen** further explained that as is set out in paragraphs 6.10 and 6.11 of the Explanatory Memorandum [APP-286], the Applicant considers that disapplication of these provisions is appropriate because, if development consent is granted, issues relating to the management of SSSIs potentially affected by the Project will have been thoroughly examined through the examination. He confirmed that appropriate measures required to safeguard and protect SSSI features of scientific interest have been included in the first iteration EMP and thus would be secured through the DCO. For example, measure D-GEN-07 provides for method statements for working in or near a Special Area of Conservation ("**SAC**") and measure D-BD-4 makes provision for the protection of the SAC crossing at Trout Beck.<br>**Mr Owen** explained that the Applicant's rationale for the disapplication is wholly in line with the 'one stop shop' concept of DCOs in terms of consents. Ultimately, the Applicant wishes to ensure that there is a framework for securing the protection of SSSIs (and other features) through the EMP, which is not then duplicated through existing legislative processes that seek to achieve the same outcomes. | |

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| ***refer to, having regard to the term "adjacent to".***<br>• ***Explanatory Memorandum paragraph 7.42 final sentence in relation to this Article states "This is particularly relevant with respect to ecological receptors that are liable to move into and out of the Order limits". The ExA requests the Applicant to explain whether the power in the Article goes much further than the Explanatory Memorandum explanation and should be restricted to areas where there is known ecological sensitivity or linked to an assessment in the ES.*** | **Mr Owen** confirmed that article 3 of the draft DCO would not prevent the designation of a SSSI but would simply mean that two of the effects of land being designated as a SSSI would not apply in respect of the Project due to the disapplication, being the obligation upon landowners and occupiers to notify before carrying out activities would not apply and the public body duty to provide notice for carrying out activities.<br>Based on a query from the ExA, **Mr Owen** and **Kerry Whalley, for the Applicant**, clarified that the Applicant is not aware of Natural England having an intention to designate any of the land within the Project's limits as a SSSI.<br>The ExA queried where article 3(1)(f), relating to s80 of the Building Act 1984, sits in terms of whether the provision is within section 150 of the Planning Act 2008. **Mr Owen** confirmed that the Applicant would provide further information on this point.<br><br>***Post hearing note:*** *As is reported in the Applicant's Responses to the Examining Authority's Issue Specific Hearing 2 Additional Questions (Document Reference 7.1) DCO.ISH2.01, section 150 of the Planning Act 2008 confirms that an order granting development consent may include provision the effect of which is to remove a requirement for a prescribed consent or authorisation to be granted, only if the relevant body has consented to the inclusion of the provision.*<br>*The consents that are prescribed for the purposes of section 150 of the Planning Act 2008, i.e. those in relation to which the consent of the relevant body is required for their consenting requirements to be removed, are listed in Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015. The Building Act 1984, is not included in the list of prescribed consents to which Section 150 of the Planning Act 2008 applies, therefore the consent of the relevant body is not required for the consent requirement to be disapplied by the Order.*<br><br>**<u>Miscellaneous</u>**<br>The ExA sought to understand the Applicant's position in the event that the ExA or the Secretary of State was to find one scheme to be unacceptable in environmental terms. In other words, could one of the schemes be removed from | |

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| • ***The Applicant is required to explain why this article is different to Article 23(1) in the A47 Blofield to North Burlingham DCO in respect of 'land shown within the Order limits or which may be affected by the authorised development'. This should be explained in the context of the Explanatory Memorandum [APP-286, para 7.42] 'surveys can be conducted to assess the effects of the Project, or on the Project' and 'ecological receptors that are liable to move'.***<br>• ***The Applicant will also be invited to comment on the possible use of:***<br>○ ***for the purposes of this Order' in draft*** | the DCO and consent be granted for the remainder, or would one scheme being deemed unacceptable mean that the same applied to the entire Project.<br>**Mr Owen** explained that the position is that the Secretary of State, under the provisions of the Planning Act 2008 which govern the role that the Secretary of State has within the process, has a number of options at their disposal. Ultimately the Secretary of State would need to "take a view" if one or more schemes were not acceptable. **Mr Owen** suggested that practically, the Applicant could be invited to reconsider the aspect of the particular scheme which is causing the unacceptable effect. He concluded that the key point is that the Project's objectives make it one Project comprising eight schemes. There may well be the need to balance the overall public benefit of the Project with the environmental impact of the one scheme in question. Ultimately, the overall Project needs to be considered alongside its individual components.<br>*The **ExA** stated that article 15 was removed from the ISH2 agenda and was instead discussed within the CAH hearing, which took place on 2 December 2022, under agenda item 3.16.* | |

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| ***DCO Article 15(1); and***<br><br>○ ***where reasonably necessary, any land which is adjacent to, but outside the Order limits which may be affected by or have an effect on the authorised development' in draft DCO Article 15(1)(b).*** | | |
| **5.0 Brough Hill Fair** | | |
| **Agenda Item** | **The Applicant's Response[12]** | **Councils' Comments** |
| ***The ExA wishes to better understand the following:***<br>• ***The issues around the selection of the replacement Brough Hill Fair site. This will include confirmation from the Applicant as to which site is proposed to be the replacement site and the specific*** | The ExA asked the Applicant to confirm the proposed replacement site for the Brough Hill Fair. Referring to a plan that was shown on screen at ISH2 (and which was requested to be submitted into the examination by the ExA), **Robbie Owen, for the Applicant** confirmed the existing site and proposed replacement site, the latter as defined in article 36 of the draft DCO. **Mr Owen** confirmed that in discussion with the Gypsy and Traveller Community, the Applicant has considered reasonable alternatives to the proposed replacement site and a supplementary consultation took place between 18 March and 3 April 2022 on this point, looking at a specific alternative (referred to as the "eastern site"). He went on to explain that following the supplementary consultation and consideration of responses to that consultation, the site that is now in the DCO application and referred to in article 36 is what was known as the "Bivvy site". He confirmed that this is ultimately what the Applicant is promoting as the replacement site. | Cumbria County Council has been asked by the Applicant to consider taking on responsibility for future management of the Brough Hill Fair. The Council is not willing to take on this responsibility and it understands that the Ministry of Defence is unwilling to continue in this role. It is therefore unclear how the fair will be managed in the future and this needs to be clarified by the Applicant |

[12] It should be noted that this response is summarised in the order in which the points were made at ISH2. As such, it does not always match exactly with the agenda items in the first column (and it is for that reason, those agenda items have been grouped together to give an indication as to the broad topics explored).

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| ***site concerns of both alternatives from the gypsies and travellers' representative.***<br>• ***The powers contained within Article 36 of the draft DCO. The ExA has a number of questions in respect to the wording of this Article and its intended purpose, and to better understand the stated "Brough Hill Fair Rights" including whether any local legislation exists relating to Brough Hill Fair.***<br>• ***The intended mechanism and land ownership aspects of the transfer, the nature and impact of temporary suspension and the relationship of what is proposed*** | ***Post Hearing Note:*** *Visualisations of the Brough Hill Replacement Site shared with Mr Welch are included in Appendix 6 of this document.* However, it is acknowledged that further work is being undertaken by the Applicant to consider how a noise barrier fence and horse barrier can be accommodated within the site in response to comments made by Mr Welch at the Hearing.<br>In response to comments made by **Billy Welch, for the Gypsy and Traveller Community**, **Mr Owen** confirmed that engagement has been ongoing for many months between the Applicant and the community. Visualisations of the proposed replacement site were sent to Mr Welch digitally on 8 April 2022, after the supplementary consultation which took place on 3 April, and a hard copy was provided on 30 November 2022 in A2 size.<br>**Paul Carey, for the Applicant** clarified the bunding considerations on the proposed replacement site, explaining that the visualisation provided to Mr Welch includes two bunds. One runs adjacent to the carriageway along the northern edge and the other runs to the south. In respect of concerns raised by **Mr Welch** with respect to horses, **Mr Carey** explained that the detailed design stage would consider the specification of fencing to be provided. In terms of size, both the existing and replacement site are approximately 5 acres, with access to the proposed replacement site where the relevant plan states "Station Road".<br>In terms of concerns raised by **Mr Welch** around noise at the proposed replacement site due to the proximity to the dual carriageway as proposed, **David Hiller, for the Applicant** confirmed that additional noise modelling has been undertaken for the proposed replacement site, which has bunding on the northern and southern perimeter (as stated by Mr Carey), the former of which has the main objective of being a noise barrier. Mr Hiller explained that the existing site has been modelled with the traffic and noise exposure as it currently is and the proposed replacement site has been modelled with the new dual carriageway *and* proposed bunding.<br>**Mr Hiller** continued, by confirming that whilst there is a strip along the northern side of the proposed replacement site that is exposed to high levels of noise, the areas exposed to high noise levels would not extend as far into the site as they do on the existing site. This is due to the noise bunding provided, which acts as a barrier. He concluded by stating that, therefore, in relation to a comparison of | |

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| ***with the Public Sector Equality Duty.***<br>• ***Why the land on which the Brough Hill Fair is currently held has not been identified by the applicant as special category land [SoR, APP-299, para 7.3.1]. The Applicant should also add this explanation to the Explanatory Memorandum***. | noise levels between the two sites (current and proposed replacement), there is a greater proportion of the proposed replacement site that has lower noise levels when compared to the existing site, so in terms of total areas, there is an improvement in terms of the overall noise levels. **Andy Johnson, for the Applicant** confirmed that these outcomes have been verbally shared with Mr Welch.<br><br>***Post Hearing Note:*** *An updated version of the plan shown on screen during ISH2, showing the location of existing and replacement Brough Hill Fair sites alongside and in relation to one another, can be found at Appendix 5.*<br>*The Applicant has acknowledged the ExA's request to provide the technical note from which the noise levels reported by Mr Hiller at ISH2 derive – this is appended at Appendix 7.*<br>*It is important to put this technical note into the context of the Environmental Statement. Chapter 12 Noise and Vibration of the Environmental Statement (ES) [Document Reference 3.2, APP-055] sets out the likely significant effects of the Project in terms of noise and vibration impacts in line with the guidance presented in the Design Manual for Roads and Bridges (DMRB) LA 111 Noise and Vibration, as well as relevant national and international guidance presented in section 12.3 of the ES Noise and Vibration chapter [Document Reference 3.2, APP-055].*<br>*The ES included the noise contour maps resulting from the operation of the Project in Figures 12.2 to Figure 12.7 of the ES [Document Reference 3.3, APP-112 to APP-118]. These maps showed the results of noise modelling for the Do-Minimum and Do-Something scenarios for the opening and future years, including the full extent of both the Brough Hill site (existing site) and the Bivvy site (proposed site).*<br>*However, the Brough Hill site was not identified expressly as a sensitive receptor in the ES based upon the temporary nature of its use. As such, the predicted noise levels were not expressly reported and were not required to be reported in the likely significant effects of the Project.*<br>*Having regard to comments made by Mr Welch in his relevant representation, and as a part of on-going engagement, the Applicant shared verbally with Mr* | |

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| | *Welch the main outcomes of a more granular level of detail on the noise levels at the Bivvy site. This was not required to be reported in the ES, as outlined above, but was provided to aid Mr Welch's understanding of the Applicant's proposals for the Bivvy site. This work demonstrated that the Bivvy site showed an improvement in terms of noise impacts for the bunded section of the site when comparing to the existing site.*<br>*The technical note will be updated at Deadline 3 to reflect the on-going work by the Applicant in respect of potential noise and horse barriers at this location.*<br>**Mr Owen** then explained the nature and status of the Brough Hill Fair rights, as referred to in article 36 of the draft DCO. He commented that the precise nature and legal status of those rights remains subject to a significant degree of uncertainty. The origins of the Fair are traced back to a Royal Charter granted by King Edward III in the 1300s to Robert de Clifford and his heirs of the Manor of Brough under Stainmore. The Charter authorised Robert de Clifford and his heirs to hold one market each week on a Thursday at his manor of Brough under Stainmore and "one fair there lasting for four days that is to say for two days before the feast of St. Matthew the Apostle, on the feast day itself and for one day following so long as the market and the fair do no harm to neighbouring markets and neighbouring fairs." (the feast day of St. Matthew the Apostle is 21 September).<br>**Mr Owen** confirmed that the Applicant has not been able to identify the precise location of the original Fair, or the locations in which it has been held prior to the modern era, but the Applicant is aware that the Brough Hill Fair is known to have been held on Brough Hill and then, approximately 70 years ago, began to be held at its current location. **Mr Owen** confirmed that neither of these locations are within the known boundary of the Manor of Brough under Stainmore.<br>**Mr Owen** further explained that the existing site was transferred to the Ministry of Defence in 1947. The Agreement for Sale dated 22 February 1947 stated that the land would be sold subject to "the ancient right of holding Brough Hill Fair annually and to all liberties and customs as heretofore enjoyed in connection therewith". He confirmed that the Applicant does not have any further information relating to this transfer, but the Applicant is proceeding on the assumption that | |

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| | whatever such rights were in existence prior to the transfer, were transferred with the land.<br>**Mr Owen** further noted that the Applicant is not, and does not purport to be, the arbiter of what legal rights, if any, exist in relation to the Brough Hill Fair. He confirmed that, this notwithstanding, the Applicant has considered the nature and status of those rights to ensure that the provisions of its draft DCO are effective in achieving their intended purpose of relocating the Fair. He further explained that there are a number of ways in which it could be said that there are rights to hold the Brough Hill Fair that the Applicant has considered:<br>1. Pursuant to the Royal Charter;<br>2. Prescriptive right; or<br>3. Customary or public rights.<br><br>**Mr Owen** noted that the Applicant does not have a view on which, if any, of the above considerations apply to the event known as Brough Hill Fair, but the drafting of article 36 in the draft DCO accounts for all of them. Article 36(5) defines the Brough Hill Fair Rights by reference to the "customary rights, prescriptive rights, rights derived from royal charter and public rights that relate to the event known as the Brough Hill Fair that may immediately subsist," before the relevant power in article 36 is exercised. As a result, article 36 cannot create new rights, but will affect the transfer so that the current rights are to continue.<br>**Mr Owen** clarified that there is nothing relating to the Brough Hill Fair rights within the Book of Reference because they have not been located on the Land Registry and that the Applicant is not of the view that they are proprietary rights. Furthermore, he confirmed that the Applicant is not aware of any local legislation updating the charter referred to by Mr Welch.<br><br>***Post hearing note:*** *Appendix 8 contains the results of the Applicant's research into the Royal Charter, including a translation hosted by Cumbria County Council's County Archives. A copy of the 1947 agreement for purchase of land that includes the Brough Hill Fair site is also contained within that appendix, the* | |

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| | *third schedule of which includes the reservation in relation to the Brough Hill Fair rights mentioned in the hearing.*<br><br>***Post hearing note:*** *the Applicant agreed to supply further explanation and examples of the terms used in the definition of "Brough Hill Fair rights" contained in article 36(5) in its summary of oral submission. Article 36(5) of the draft Order defines the Brough Hill Fair rights by reference to "any and all customary rights, prescriptive rights, rights derived from Royal Charter and public rights". Taking each in turn:*<br><br>*<u>Customary rights</u>*<br>*Customary rights are not exercisable by the public at large, but by members of a particular community or class of persons. For customary rights to exist they must (i) be immemorial; (ii) be reasonable; (iii) be certain in their terms both of the locality over which they are exercisable and in terms of the persons entitled to exercise them; and (iv) have continued as of right without interruption since their time immemorial origin. An example of a customary right incudes the right of parishioners to walk across the local manor to the local church (*Brocklebank v Thompson *[1903]).*<br>*<u>Prescriptive rights</u>*<br>*Prescriptive rights are private rights that arise through long use as of right. Examples of prescriptive rights can include a private right of access over land.*<br><br>*<u>Rights derived from Royal Charter</u>*<br>*Royal Charters were used by the monarch to grant particular rights and privileges to individuals or localities under prerogative. In later years, they were used to create corporations, prior to the development of company law. There are numerous and varied examples of rights derived from Royal Charter, but they can include the right to hold a market or fair. For a recent discussion of some of the issues the courts have grappled with when construing ancient charters in a* | |

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| | *modern context (albeit in the Irish High Court) see* Listowel Livestock Mart Ltd v William Bird & Sons Ltd & Others [2007] IEHC 360.<br>*<u>Public rights</u>*<br>*A public right is a right that is exercisable over land by any person under the general law. Examples of public rights include the right of the public at large to use a highway or to navigate in tidal waters.*<br><br>***Post hearing note:** the Applicant was also asked to explain why the Brough Hill Fair rights are not listed in the Book of Reference.*<br>*Regulation 7 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 sets out what information is to be included in a Book of Reference.*<br>*Part 1 is required to contain the names and addresses for service of each person within Categories 1 and 2 as set out in section 57 of the Planning Act 2008. A person is in Category 1 if they are the owner, lessee, tenant or occupier of the land and in category if they have the power to sell or convey the land, or release the land. None of the types of rights that* could *comprise the Brough Hill Fair rights discussed above come within Categories 1 or 2 as whatever may be their nature, they do not comprise ownership, a lease, a tenancy or occupation of the land and nor do they convey a power of sale or release.*<br>*Part 2 of the Book of Reference is required to include persons within Category 3 which is persons entitled to make a "relevant claim". The relevant claims relate to (i) the depreciation in value of retained land that is not acquired, (ii) from the depreciation in value of land from physical factors and (iii) compensation under section 152(3) of the Planning Act 2008 (which relates to claims for nuisance). With the possible exception of prescriptive rights, none of the possible types of rights that could constitute the Brough Hill Fair rights would give rise to relevant claims as such rights do not attach to other land. In relation to possible prescriptive rights the Applicant's diligent inquiries have not identified evidence of the existence of such rights, or details of the land in relation to which the benefit of such rights would attach.*<br>*Part 3 of the Book of Reference is required to contain the names of all those entitled to enjoyment easements or other private rights over land which are* | |

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| | *proposed to be extinguished, suspended or interfered with. For much the same reasons as Part 2 with the possible exception of prescriptive rights, the different potential ways in which the Brough Hill Fair rights might have arisen are not in the character of private rights or easements over land. In relation to possible prescriptive rights the Applicant's diligent inquiries have not identified evidence of the existence of such rights, or details of the land in relation to which the benefit of such rights would attach.*<br>*Parts 4 and 5 deal with special category and Crown land, and whatever may be the nature of the Brough Hill Fair rights, they do not constitute special category land or rights of the Crown, albeit the site of the Brough Hill Fair itself is Crown land.*<br><br>***Post hearing note:** the Applicant was also asked to confirm whether there is any relevant local legislation in relation to the Brough Hill Fair rights and to explain the intended use of the power in article 36(3) to temporarily suspend the Brough Hill Fair rights.*<br>*The Applicant can confirm that its review of local legislation did not uncover any local legislation that was relevant to the Brough Hill Fair.*<br>*In relation to the power to temporarily suspend the Brough Hill Fair rights in article 36(3), the Applicant provided an update during the course of the Compulsory Acquisition Hearing held on Friday 2 December 2022 that the provision was included only on a precautionary basis and that further information as to construction methodology is now available. As such the Applicant confirmed that it is content to remove the power to temporarily suspend the Brough Hill Fair rights. This change will be made to the draft DCO when its next iteration is submitted at Deadline 2.*<br>The **ExA** queried what the Applicant's stance would be if Mr Welch (and the Gypsy and Traveller Community) were not content with the replacement site being offered. **Mr Owen** explained that whilst there is no obligation on Mr Welch to accept the proposed replacement site, it is what the Applicant believes to be the most appropriate. He explained that the Applicant has prepared an Equalities Impact Assessment [APP-243] which, amongst other matters, sets out the regard it has had to its public sector equality duty during the development of its | |

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| | proposals for the Project. This includes in relation to its consultation with representatives of the Gypsy and Traveller Community on the proposed replacement for the Brough Hill Fair. **Mr Owen** continued, by confirming that, to date, the engagement and consultation with Mr Welch and the Gypsy and Traveller Community has been detailed and taken place over a long period of time, with a number of face-to-face meetings.<br>**Mr Owen** further confirmed that the Applicant will keep engaging with Mr Welch in the hope that he and the Gypsy and Traveller Community can be persuaded that the proposed replacement site is appropriate and better than a number of alternatives which have been considered. He confirmed that the Applicant understands the concern about the loss of cultural connection, but the Brough Hill Fair has not been at its current location for a particularly long time. Indeed, **Mr Owen** explained that the replacement site is next to the current Fair site and that the loss of the existing site can be mitigated by maintaining some of the old site layout within the replacement site, which the Applicant is consulting with Mr Welch on. **Mr Owen** confirmed that the Applicant is unable to move the Brough Hill Fair site to the AONB as Mr Welch proposed for reasons explained at ISH1.<br>The **ExA** queried why the land on which the Brough Hill Fair is currently held has not been identified by the applicant as special category land. **Mr Owen** explained that as noted in the Statement of Reasons [Document Reference 5.8, APP-299], the Applicant does not consider the site of the existing Brough Hill Fair to be special category land, more specifically, it is not considered to be 'open space' within the meaning of section 131(12) of the Planning Act 2008, as land used for the purposes of public recreation. He submitted that the use of land for an annual fair which takes place over a few days is similar to the use of a farmer's land for a popular music festival, the location of an annual sporting event or other regular events – these are not considered to render land as "open space". **Mr Owen** further submitted that it is also not clear that activities carried out at the Brough Hill Fair can be characterised as "public recreation". Whilst recreation is broad concept it isn't clear that the range of activities carried out at the Fair, when viewed in their totality, are recreation or carried out by the public at large. | |

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| | ***Post hearing note:*** *the Applicant was asked to provide further detail as to why it considers that the site of the existing Brough Hill Fair is not 'open space' special category land within the meaning of section 131(12) of the Planning Act 2008 as stated in paragraph 7.3.1 of the Statement of Reasons [APP-299].*<br>*"Open space" is defined in section 19(4) of the Acquisition of Land Act 1981 as "any land laid out as a public garden or used for the purposes of public recreation, or land being a disused burial ground.". The site is neither laid out as a public garden nor comprises a disused burial ground, so the key characteristic to consider is whether or not it can be said to be "used for the purposes of public recreation".*<br>*Considering the legal authorities that have addressed questions of when land can be said to be used for the purposes of public recreation:*<br>• *The characterisation of land as open space is not dependent on the legal basis upon which the public make use of the land (R v Doncaster Metropolitan Borough Council Ex p. Braim (1989) 57 P. & C.R. 1).*<br>• *The use of the land for the purposes of recreation must have an element of continuity of use. Whilst the ability to exclude the public from the land or for certain parts of the land, is not inconsistent with it being "open space" (Burnell v Downham Market Urban District Council [1952] 2 QB 55, at 66), the definition nonetheless suggests an ongoing, rather than occasional, if regular use.*<br>• *It would be surprising if the use of land for an annual fair or similar event had the effect of rendering it open space. Such an interpretation would risk for example, the site of a popular music festival, the location of an annual sporting event or other regular events being considered to have changed the character or use of private land such that they become "open space".*<br>• *It is not clear that activities carried out at the Brough Hill Fair can be characterised as "public recreation". Whilst recreation is a broad concept it isn't clear that the range of activities carried out at the fair, when viewed in their totality are recreation, or are carried out by the public at large.* | |

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| | • *The Applicant is content to add a brief note to the Explanatory Memorandum in its next iteration at deadline 2, confirming that the site of the Brough Hill Fair is not special category land.*<br><br>**Mr Owen** concluded by stating that article 36 of draft DCO provides that the Secretary of State must, following consultation, certify as being appropriate for the purpose, a scheme for the provision of a replacement Brough Hill Fair site. That scheme must be capable of dealing with the issues raised by Mr Welch. It is also important to note that there are improvements within the proposed replacement site in the form of electricity and water, amongst other elements previously mentioned.<br><br>***Post hearing note:*** *the Applicant was asked to consider amending article 36(2)(a) to include consultation with representatives of the Gypsy and Traveller community regarding the scheme for the provision of the replacement Brough Hill fair site to be certified by the Secretary of State. The Applicant has reflected on this request and is minded to amend article 36 to provide for consultation with representatives of the Gypsy and Traveller community on the scheme to be certified by the Secretary of State. The Applicant will make the appropriate amendments in the next iteration of the draft Order to be submitted at deadline 2.* | |

## APPENDIX 1 – LEGAL BASIS FOR INCLUDING MITIGATION OBLIGATIONS IN AN ARTICLE RATHER THAN A REQUIREMENT

**1.** This note provides submissions on the legal basis and enforceability of including commitments in an article of the DCO (in this case, articles 53 to 55 of the draft DCO [APP-285]), when compared to a 'requirement' in a separate Schedule to the DCO (as has been the position in DCOs to date).

**2.** The starting point in determining the nature of provisions a DCO can include, and their legal status and effectiveness, is the Planning Act 2008 (**the PA 2008**).

**3.** Section 120(1) of the PA 2008 provides that a DCO "…***may*** *impose requirements in connection with the development for which consent is granted*" (our emphasis).

**4.** Section 120(2) of the PA 2008 further provides that such requirements:

"…*may in particular include -*

*(a) requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation, or the giving of any notice, which (but for section 33(1)) would have been required for the development;*

*(b) requirements to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a)*."

**5.** There are three preliminary points to make in this context:

5.1 first, it is clear that the PA 2008 does not mandate that a DCO must include requirements – see use of the word "may";

5.2 secondly, in any event, the term 'requirement' as used in the PA 2008 does not introduce a unique, legal concept (for example, it is not defined in any special way). Instead, the use of the term 'requirement' in the PA 2008 is referring to the *effect* of any provision that *may* be included in the DCO. As such, the term needs to be given its ordinary meaning, such as "..*a thing that is compulsory; a necessary condition*", taken from the Oxford Dictionary of English; and

5.3 thirdly, nowhere in the PA 2008 is it mandated that requirements, where included in a DCO, must be included in a separate Schedule to the DCO.

**6.** The Applicant notes the content of the Planning Inspectorate Advice Note 13 *Preparation of a draft Development Consent Order and Explanatory Memorandum*[13], which states that a draft DCO "should" include requirements (para 2.10). However, the Applicant also notes

[13] Version 3 – November 2019

that the Planning Inspectorate Advice Notes provide advice (and do not have any statutory status) and submits that this does not reflect the legal position and therefore affect the approach the Applicant is taking in relation to the securing of mitigation on the Project.

**7.** Indeed, the Planning Inspectorate Advice Note 15 *Drafting Development Consent Orders*[14] introduces more nuance on this point at paragraph 16.1:

"*An application may have significant adverse environmental effects that require mitigation; such effects will be identified in the accompanying ES and/ or relevant environmental information.* ***Any mitigation measures relied upon in the ES must be robustly secured and this will generally be achieved through Requirements in the draft DCO****. Mitigation that is identified in the ES as being required must also be clearly capable of being delivered*." (our emphasis)

**8.** Two points arise from this, namely that the Planning Inspectorate, reflecting the PA 2008:

8.1 recognises that 'requirements' are not the only way that mitigation can be secured in a DCO; and

8.2 does not suggest any requirements included in a DCO need to be in a separate Schedule to that DCO.

**9.** As can be seen, therefore, there is no legal (or indeed policy) requirement in the PA 2008 for a DCO to include requirements or, where it does include requirements, for a DCO to have a separate requirements Schedule. As such, the Applicant submits that the approach taken in the draft DCO for the Project is entirely lawful and consistent with these principles.

**10.** In this context, there are two alternative legal interpretations as to the approach the Applicant has taken:

10.1 articles 53 to 55 of the DCO are 'requirements' as contemplated by section 120(1) of the PA 2008, but simply drafted as articles of the DCO, as opposed to paragraphs of a Schedule to the DCO; or

10.2 articles 53 to 55 of the DCO are not 'requirements' but provisions (for example) "*relating to, or to matters ancillary to, the development for which consent is granted*"[15] or "*necessary or expedient for giving full effect to any other provision of the [DCO]*"[16].

**11.** Ultimately, the answer to that question is irrelevant in legal terms – there is a legal basis for including the provisions in the DCO in either case. As the Planning Inspectorate Advice Note 15 states, the key point in all of this is simply whether mitigation measures are "robustly secured". The Applicant submits its approach ensures commitments given in articles 53 to 55 of the DCO are robust and legally enforceable and therefore are robustly secured.

[14] Version 2 – July 2018
[15] Section 120(3) of the 2008 Act
[16] Section 120(5)(c) of the 2008 Act

**12.** The Applicant acknowledges the general approach taken to date on DCOs has been for 'requirements' to be included as paragraphs of a Schedule to the DCO. This stems from the, no longer in force, DCO 'Model Provisions'[17]. Such 'requirements' are routinely referred to as 'Requirement 1, Requirement 2', etc. However, that does not reflect the legal status of those provisions – they are simply the same as any other paragraph of any other Schedule to a DCO, or indeed any article of a DCO. The entirety of a DCO is a statutory instrument, a piece of secondary legislation, and *all* of its terms have the same status.

**13.** As such, *where* in the DCO a commitment is secured has no bearing from a legal, and therefore enforceability, perspective. Indeed, anything within the DCO is a legal obligation, enforceable by way of the regime set out in Part 8 of the PA 2008. By way of an example, section 161(1) of the PA 2008 provides that:

"*A person commits an offence if without reasonable excuse the person—*

*(a) carries out, or causes to be carried out, development in breach of* ***the terms*** *of an order granting development consent, or*

*(b) otherwise fails to comply with* ***the terms*** *of an order granting development consent*." (our emphasis)

**14.** As can be seen, all of 'the terms' of a DCO are legally enforceable – that includes *both* articles of a DCO and Schedules to a DCO, which are given equal status in terms of enforceability. As such, should the Applicant not comply with, for example, the provisions in article 53 governing the Environmental Management Plan regime, that would be a criminal offence. It matters not one jot whether such an obligation sits in a Schedule to the DCO or in an article of the DCO.

**15.** In terms of why the Applicant considers articles 53 to 55 of the DCO are most appropriate as articles, rather than paragraphs of a Schedule to the DCO, the Applicant has had regard to the Office of the Parliamentary Counsel Drafting Guidance (June 2020)[18]. This states that, in relation to Bills (but the principle of which applies to DCOs as subordinate legislation, too): "*Schedules can assist clarity by providing a home for material that would otherwise interrupt and distract from the main story you are trying to tell*" (para 3.9.1) but "*relegating text to the end of the Bill may not always help the reader. It may break up the story you are telling; or make the structure of the Bill more complicated than it needs to be. So don't dispatch material to Schedules without good reason…*" (para 3.9.3). The Applicant submits here that there is no good reason in this case. Simply adding a new Schedule and including articles 53 to 55 as paragraphs of that Schedule wouldn't add anything in legal terms and would, as the guidance says, 'break up the story' of the DCO unnecessarily.

**16.** Given all of this, the Applicant submits that its approach in the draft DCO to not including a separate requirements Schedule:

[17] As contained in the now lapsed Infrastructure Planning (Model Provisions) (England and Wales) Order 2009
[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf

16.1 is entirely consistent with the legal principles and obligations set out in the PA 2008; and

16.2 in no way dilutes the obligations contained within articles 53 to 55 of the draft DCO, which are all legally enforceable in the same way as provisions contained in a separate requirements Schedule would be and which are therefore robustly secured.

**17.** As a final point, the Applicant acknowledges that a number of commitments that may ordinarily have been included on the 'face' of a DCO (e.g. in a requirements Schedule) are, in the case of the Project, contained in other 'control' documents. These include the first iteration Environmental Management Plan and the Project Design Principles, both of which are proposed to be 'certified' documents, or the second iteration Environmental Management Plan, which is proposed to be subsequently approved by the Secretary of State post consent. The Applicant wishes to reiterate the point that this approach also has no bearing in legal enforceability terms. Where the DCO compels compliance with a named document, that obligation is a 'term of' the DCO and fully enforceable. The content of that document can, in effect, be 'read in' to the DCO and, as such, non-compliance with that document would equate to non-compliance with the 'terms of' the DCO and be enforceable against (under the PA 2008) accordingly.

# APPENDIX 2 – LA120 ENVIRONMENTAL MANAGEMENT PLANS

**[Document to be inserted when pdf generated located in folder ISH2-13 currently a pdf]**

# APPENDIX 3 – Photo locations

**[2# Documents to be inserted when pdf generated from folder ISH2-14:**

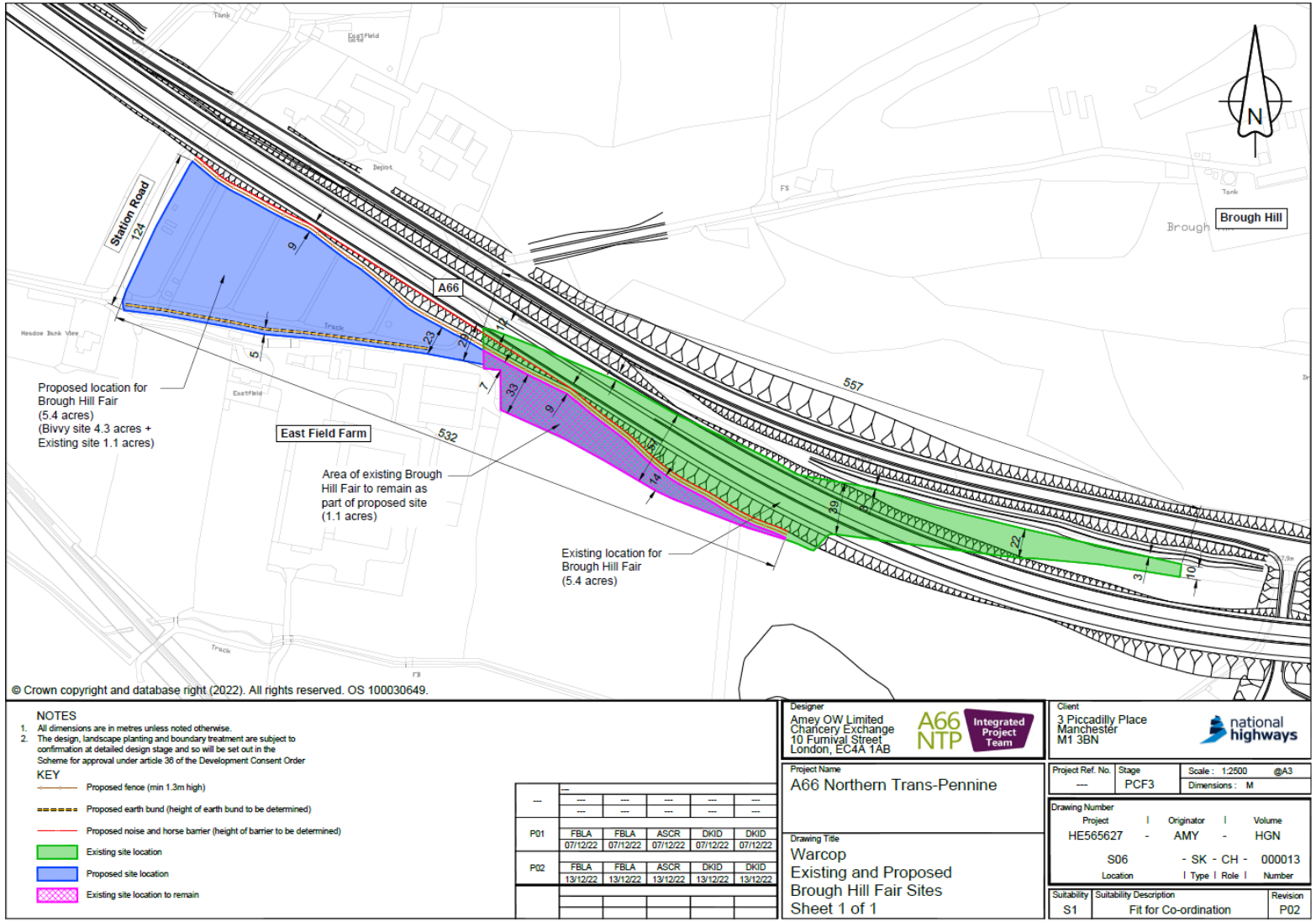
**Viewpoint figure 1**

**Viewpoint figure 2]**

# APPENDIX 4 – LI Technical Guidance Note 06/19: Visual Representations of development proposals

**[1 document to be inserted when pdf generated – ISH2-14 – visual representations technical note]**

# APPENDIX 5 – BROUGH HILL FAIR PLAN: EXISTING AND REPLACEMENT

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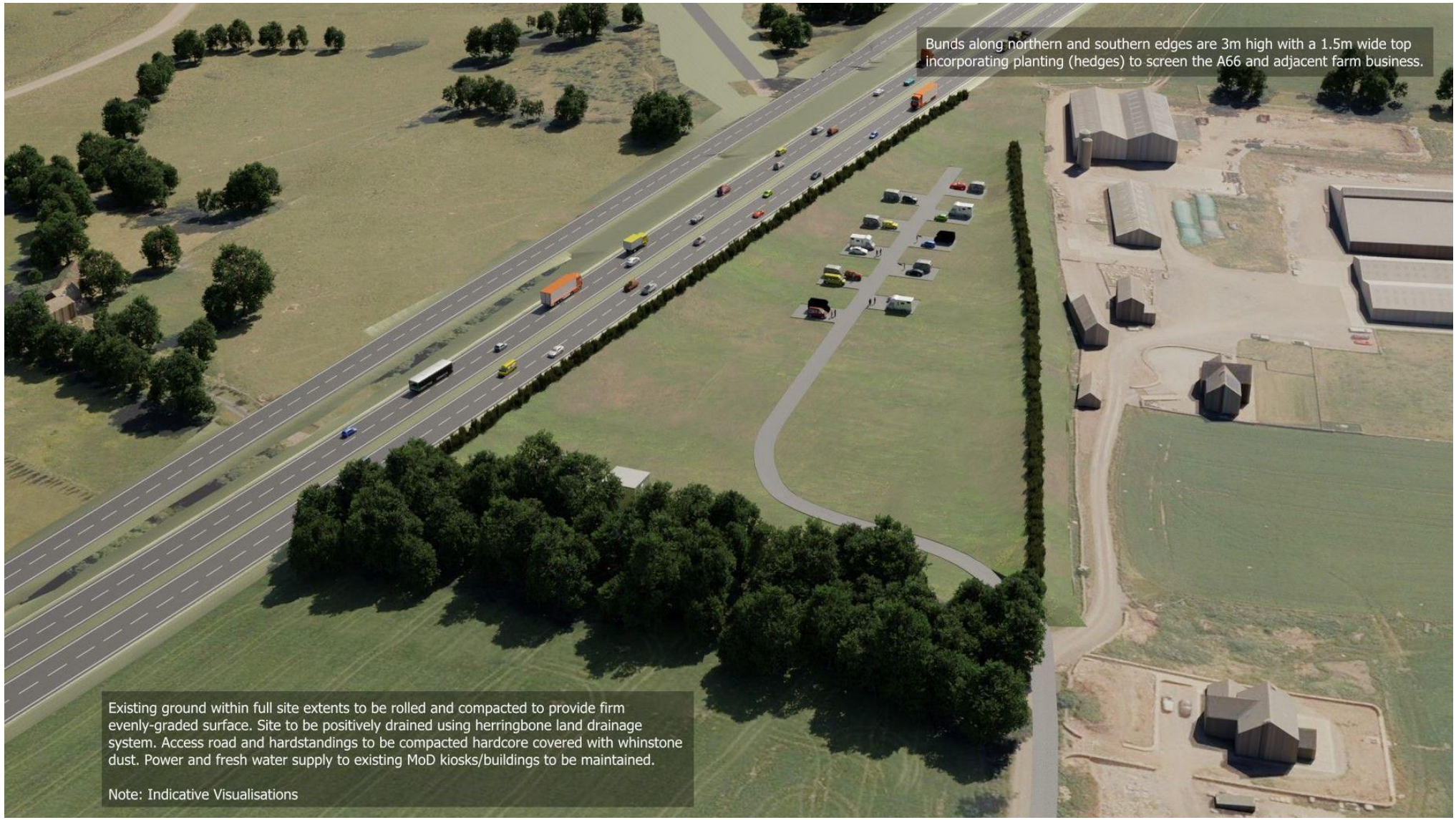
# APPENDIX 6 – BROUGH HILL VISUALISATIONS


Bunds along northern and southern edges are 3m high with a 1.5m wide top incorporating planting (hedges) to screen the A66 and adjacent farm business.
Existing ground within full site extents to be rolled and compacted to provide firm evenly-graded surface. Site to be positively drained using herringbone land drainage system. Access road and hardstandings to be compacted hardcore covered with whinstone dust. Power and fresh water supply to existing MoD kiosks/buildings to be maintained.
Note: Indicative Visualisations


Bunds along northern and southern edges are 3m high with a 1.5m wide top incorporating planting (hedges) to screen the A66 and adjacent farm business.
Existing ground within full site extents to be rolled and compacted to provide firm evenly-graded surface. Site to be positively drained using herringbone land drainage system. Access road and hardstandings to be compacted hardcore covered with whinstone dust. Power and fresh water supply to existing MoD kiosks/buildings to be maintained.
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Bunds along northern and southern edges are 3m high with a 1.5m wide top incorporating planting (hedges) to screen the A66 and adjacent farm business.
Existing ground within full site extents to be rolled and compacted to provide firm evenly-graded surface. Site to be positively drained using herringbone land drainage system. Access road and hardstandings to be compacted hardcore covered with whinstone dust. Power and fresh water supply to existing MoD kiosks/buildings to be maintained.
Note: Indicative Visualisations

# APPENDIX 7 – Brough Hill Noise Assessment Technical Note

**[document received – 16/12 – ISH2 – item 18]**

# APPENDIX 8 – Evidence of Brough Hill Fair Rights following Applicants research

# APPENDIX 9 – CLIMATE EFFECTS – NOTE CONTAINING EXPLANATION OF COSTS IN THE COMBINED MODELLING AND APPRAISAL REPORT (DOCUMENT REFERENCE 3.8, APP-237)

The following note explains how the Carbon Tonnages reported in Tables 7-21, 7-22, and 7-23 of ES Chapter 7 Climate [Document Reference 3.2, APP-050] are valued, arriving at the total value of emissions reported in Table 6-9 of the Combined Modelling and Appraisal Report [Document Reference 3.8, APP-237].

**Data Sources**

The data sources used within the appraisal are listed in Table 1.

**Table 1: Data Sources**

| Data | Source | Notes |
|---|---|---|
| GDP Deflator | TAG Databook v1.17 (November 2021) | https://www.gov.uk/government/publications/tag-data-book |
| Discount Rate | TAG Databook v1.17 (November 2021) | https://www.gov.uk/government/publications/tag-data-book |
| Social Cost of Carbon | BEIS (2021, as reported in TAG Databook v1.17) Valuation of Greenhouse Gas in Appraisal | https://www.gov.uk/government/publications/valuing-greenhouse-gas-emissions-in-policy-appraisal/valuation-of-greenhouse-gas-emissions-for-policy-appraisal-and-evaluation |
| UK ETS Permit Price | BEIS (2022) UK ETS reporting | https://www.gov.uk/government/publications/taking-part-in-the-uk-emissions-trading-scheme-markets/taking-part-in-the-uk-emissions-trading-scheme-markets. Applies to 2022 only, with permit prices inflated according to EFC Inflation Index for all other years. This is to be reviewed annually by the end of March each year. 2022 'starting price' is the arithmetic mean of monthly prices from May 2021 to January 2022 (all available data at time of publication) |
| EFC Inflation Index | National Highways Commercial Services Division | |

**Construction Emissions**

Table 7-21 of ES Chapter 7 Climate [Document Reference 3.2, APP-050] states that the total Construction Stage (tC02e) is 518,562. This is split between Construction Emissions (PAS 2080 modules A1-15), and Land Use Change Emissions (PAS 2080 module D). The Construction Emission tonnages are then assigned to the years in which they arise based on the timing of the construction of each of the individual schemes from the construction programme in the ES (Plate 2.1 [Document Reference 3.2, APP-045]) and the EMP (Plate 1.1 [Document Reference 2.7, APP-019]). The Land Use emissions have been spread evenly over the construction period. Finally the emissions are split into those sectors that are included

within the UK Emissions Trading System (UK ETS) – the 'traded sector' – and those that are not – the 'non-traded sector', in line with Paragraph 4.1.4 of TAG UNIT A3 Environmental Impact Appraisal.

**Table 2: Construction Tonnages**

| **Construction Emissions (PAS 2080 module A1-A5)** | | | | | | |
|---|---|---|---|---|---|---|
| Year | 2024 | 2025 | 2026 | 2027 | 2028 | Total |
| Traded tCO2e | 31,341 | 74,218 | 82,945 | 35,278 | 6,494 | 230,276 |
| Non-traded tCO2e | 9,093 | 21,533 | 24,065 | 10,235 | 1,884 | 66,809 |
| **Total tCO2e** | | | | | | **297,085** |
| **Land Use Change (PAS 2080 module D)** | | | | | | |
| Year | 2024 | 2025 | 2026 | 2027 | 2028 | |
| Traded tCO2e | | | | | | 0 |
| Non-traded tCO2e | 44,656 | 44,656 | 44,656 | 44,656 | 44,656 | 223,280 |
| **Total tCO2e** | | | | | | **223,280** |
| **Total – Construction Stage** | | | | | | **520,365** |

The social cost of non-traded carbon is calculated by:

1. Converting the BIEIS Central Social Cost of Carbon Forecast Rates for each year (see **Table 1**) to 2010 prices using the GDP deflator (see **Table 1**).
2. Applying the value calculated in 1. above to the traded tonnages of carbon (see **Table 2**).
3. Discounting the value calculated in 2. above for each year to 2010 present values using the discount rate (see **Table 1**).

The value of traded carbon is calculated by:

1. Calculating the social cost of carbon, using the same method as that described above, but using the traded tonnages (from **Table 2**).
2. Calculating the permit price (See **Table 1** – UK ETS Permit Price) for each year using the current traded price with forecast based on inflation (See **Table 1** – EFC Inflation Index), and then converting to 2010 prices using the GDP deflator (see **Table 1**). The Permit costs for the Project are then calculated by applying the permit price calculated for each year to the traded tonnages (from **Table 2**). These costs are then discounted to 2010 present year values using the discount rate (see **Table 1**).
3. The final value of traded emissions is then the social cost of carbon netting off the permit cost, i.e. 1) minus 2) above.

This is a more conservative approach than TAG requires, as TAG only values the non-traded carbon (see paragraph 4.1.5 of TAG UNIT A3 Environmental Impact Appraisal). National Highways consider it appropriate to value all types of carbon in the appraisal.
The valuation of these emissions is shown in **Table 3**. The Land Use Change (D) has been classed as an operating emission by National Highways within this reporting system.

**Table 3: Valuation of Construction related Emissions over 60 Years (£m 2010 Values, positive value represents a cost)**

| | Tailpipe Emissions | Construction & Maintenance Emissions | Operating Emissions | Total |
|---|---|---|---|---|
| Value of non-traded emissions | - | 8.23 | 27.32 | 35.55 |
| Value of traded emissions | - | 20.64 | - | 20.64 |
| **Total Value of emissions** | **-** | **28.88** | **27.32** | **56.19** |

**Land Use and Forestry (PAS 2080 module D): future ability to sequester carbon from habitats gained (over the 60-year assessment period)**
Table 7-23 of ES Chapter 7 Climate [Document Reference 3.2, APP-050] states that the total emissions from Land use and forestry relating to the future ability to sequester carbon from habitats gained by the project is 146,666 tCO2e over the 60-year appraisal period (2029-2088). This equates to an average annualised value of 2,444 tCO2e per year.

**Table 4: Land Use and Forestry (PAS 2080 module D)**

| **Year** | **Traded tCO2e** | **Non-traded tCO2e** | **Total tCo2e** |
|---|---|---|---|
| Per Year | 0 | -2,444 | -2,444 |
| Total 60 Year Appraisal | 0 | -146,666 | -146,666 |

The social cost of traded and non-traded carbon is calculated using the same methodology as described above, using the annual stream of traded tonnages from renewal and maintenance described in **Table 8** above.
The valuation of these emissions is shown in **Table 5**. The Land Use Change has been classed as an operating emission by National Highways within this reporting system.

**Table 5: Valuation of Land Use and Forestry related Emissions over 60 Years (£m 2010 Values, positive value represents a cost)**

| | Tailpipe Emissions | Construction & Maintenance Emissions | Operating Emissions | Total |
|---|---|---|---|---|
| Value of non-traded emissions | - | - | -10.48 | -10.48 |
| Value of traded emissions | - | - | -10.48 | -10.48 |
| **Total Value of emissions** | **-** | **-** | **-10.48** | **-10.48** |

**Tailpipe Emissions**

Table 7-23 of ES Chapter 7 Climate [Document Reference 3.2, APP-050] states that the total emissions from vehicles using the highway infrastructure (B9) is 2,068,844 tCO2e over the 60-year appraisal period (2029-2088). This is based on interpolating between the (traffic) modelled years of 2029 and 2044 for the first 15 years of the appraisal, and assuming emissions remain constant at 2044 levels for the subsequent 44 years of the appraisal. This is summarised in **Table 6** below.

**Table 6: Emissions Vehicles using the highways infrastructure (PAS 2080 module B9)**

| Year | Traded tCO2e | Non-traded tCO2e | Total tCo2e |
|---|---|---|---|
| 2029 | 435 | 38,769 | 39,204 |
| 2044 | 594 | 33,160 | 33,754 |
| **Total 60 Year Appraisal** | **34,395** | **2,034,449** | **2,068,844** |

The social cost of traded and non-traded carbon is calculated using the same methodology as described above, using the annual stream of tonnages from vehicle emissions described in **Table 6** above.
The valuation of these emissions is shown in

**Table 7**.

**Table 7: Valuation of Vehicles using the highways infrastructure Emissions over 60 Years (£m 2010 Values, positive value represents a cost)**

| | Tailpipe Emissions | Construction & Maintenance Emissions | Operating Emissions | Total |
|---|---|---|---|---|
| Value of non-traded emissions | 147.89 | - | - | 147.89 |
| Value of traded emissions | 1.79 | - | - | 1.79 |
| **Total Value of emissions** | **149.68** | **-** | **-** | **149.68** |

**Renewal and Maintenance Emissions (PAS 2080 module B2-B5)**

Table 7-23 of ES Chapter 7 Climate [Document Reference 3.2, APP-050] states that the total emissions from renewal and maintenance (B2-B5) is 121,608 tCO2e over the 60-year appraisal period (2029-2088). This equates to an average annualised value of 2,027 tCO2e per year.

**Table 8: Maintenance and replacement (PAS 2080 module B2-B5)**

| Year | Traded tCO2e | Non-traded tCO2e | Total tCo2e |
|---|---|---|---|
| Per Year | 223 | 1,804 | 2,027 |
| Total 60 Year Appraisal | 13,377 | 108,231 | 121,608 |

The social cost of traded and non-traded carbon is calculated using the same methodology as described above, using the annual stream of traded tonnages from renewal and maintenance described in **Table 8** above.
The valuation of these emissions is shown in

**Table 9**.

**Table 9: Valuation of Renewal and Maintenance Emissions over 60 Years (£m 2010 Values, positive value represents a cost)**

| | Tailpipe Emissions | Construction & Maintenance Emissions | Operating Emissions | Total |
|---|---|---|---|---|
| Value of non-traded emissions | - | 0.96 | - | 0.96 |
| Value of traded emissions | - | 5.70 | - | 5.70 |
| **Total Value of emissions** | - | 6.66 | - | 6.66 |

**Total Project Carbon Valuation**

Adding together the valuations set out in **Table 3**, **Table 5**,

**Table 7** and

**Table 9** provides the total valuation of the Project, as shown in Table 6-9 of the ComMA [Document Reference 3.8, APP-237].

**ComMA Table 6-10: Summary of Carbon Impacts - Value of Emissions over 60 Years (£m 2010 Values, positive value represents a cost)**

| | Tailpipe Emissions | Construction & Maintenance Emissions | Operating Emissions | Total |
|---|---|---|---|---|
| Value of non-traded emissions | 147.89 | 9.19 | 16.84 | 173.91 |
| Value of traded emissions | 1.79 | 26.34 | 0.00 | 28.13 |
| **Total Value of emissions** | **149.68** | **35.53** | **16.84** | **202.05** |

# APPENDIX 10 – IEMA GUIDE: ASSESSING GREENHOUSE GAS EMISSIONS AND EVALUATING THEIR SIGNIFICANCE

**[Document to be inserted when pdf generated – ISH2-26 already in pdf format]**

# APPENDIX 11 – DMRB LA105, LA107 AND LA114

**[3# pdf Document to be inserted when pdf generated ISH2-35]**