SUBMISSION AT DEADLINE 4

ON BEHALF OF THE
HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND
(HISTORIC ENGLAND)

Application by

National Highways for an Order granting Development Consent for the A66 Northern Trans Pennine Project

PINS Reference No: TR010062
Historic England Reference No: PL00586663 / PL00756505

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1. Introduction

1.1. The Historic Buildings and Monuments Commission for England (‘Historic England’, ‘HE’) has prepared the following submission to the Examination of National Highways’ application for a Development Consent Order (‘DCO’) for the nationally significant infrastructure project to construct the A66 Northern Trans Pennine Project (the ‘Project’).

1.2. This submission includes Historic England’s response to:

a. the ExA’s questions circulated on 31 January [PD-011];
b. the Applicant’s revised draft Environmental Management Plan (‘EMP’) submitted at deadline 3 [REP3-005];
c. the Applicant’s revised draft DCO submitted at deadline 2 [REP2-006]; and
d. the Applicant’s comments on HE’s Written Representations [REP2-016].

1.3. Discussions between the Applicant and Historic England in relation to the application are ongoing, and an updated Statement of Common Ground was submitted at deadline 3 [REP3-032].

2. Revised draft EMP

2.1 This section contains Historic England’s response to the revised draft EMP and to Article 53 of the revised draft DCO which relates to the EMP. This section therefore contains Historic England’s response the ExA’s question to Historic England [PD-011; question DCO 1.7], which specifically asked for comments on the revised wording of Article 53(7), (8) and (9) of the revised draft DCO [REP2-005].

2.2 A number of amendments have been made to the draft EMP and draft DCO following the submission of Written Representations; these amendments have sought to address the concerns expressed in relation to the novel approach to

the EMP which the Applicant is proposing for this Project. Historic England welcomes the efforts the Applicant has made to try to address the concerns of local and statutory bodies; however, we retain a number of concerns, and these are set out in the table below. We consider that further amendments are needed to ensure that the EMP (and associated DCO provisions) are robust.

Issue	Summary of HE Written Representation [REP1-026]	Applicant's response	HE D4 response
Production of second iteration EMP Should a DCO be granted, a second iteration of the EMP will be produced which will take into account the detailed designs being brought forward as part of the scheme. The Secretary of State will decide whether to approve the second iteration EMP. The first draft of the DCO [APP-285] provided that the second iteration EMP must be 'substantially based on the first iteration EMP…unless the Secretary of State is satisfied that any part of the second iteration EMP that is not substantially based on the first iteration EMP would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement' (Article 53(2)).	1. We accept that the Applicant will need a degree of flexibility in order to produce a second iteration of the EMP as it will be based on detailed designs which have not yet been produced. 2. We would prefer more robust wording in the DCO on this point, as recommended by the ExA during ISH2 (set out in our WR [REP1-026]) 3. Subject to our other concerns being addressed, and subject to the wording of the DCO being improved on this point, we could accept that the arrangements for producing and approving second iterations of the EMP are appropriate.	1. The DCO wording has been amended at Article 53(4)(a) [REP2-006] so that the second iteration EMP must be 'substantially in accordance with' the first iteration EMP rather than be 'substantially based' on it. 2. There is no change to 'materially worse or materially adverse', or 'in comparison with' – the Applicant considers this to be unnecessary [REP1-026 pg11-12]	HE welcomes the amendment made to the DCO by the Applicant and supports the change of wording at Article 53(4)(a) to 'substantially in accordance with'. We note the comments made by the ExA in its questions [PD-011] and support the ExA's request for a further change of wording.
Amending the second iteration EMP The first draft DCO and EMP provided a mechanism for the second iteration(s) of the EMP to be amended by the Secretary of State, or by the Applicant itself. The first draft of Article 53(3) of the DCO [APP-285] provided that the Applicant 'may' ask the Secretary of State to approve amendments to the second iteration of the EMP and that Article 53(2) would apply to the Secretary of State in considering such an amendment, which provided that the second iteration EMP must be 'substantially based on the first iteration EMP…unless the Secretary of State is satisfied	1. It was not clear from the documents submitted with the application when amendments would need to be approved by the Secretary of State rather than being approved by the Applicant. The Applicant had said that it will only approve minor amendments to the second iteration, however, it is not clear from the draft DCO (a) that this is in fact the case (b) how 'minor' is defined and (c) who would determine whether	The Applicant has proposed a call-in mechanism in the revised draft DCO (Article 53(7),(8)and(9)) [REP2-006] whereby, following consultation with HE and others: a. The Applicant cannot amend the second iteration EMP unless details of the proposed amendment have been provided to the Secretary of State. b. The Secretary of State either confirms that the Applicant can	The extent to which the Applicant has engaged with the Secretary of State in relation to this proposal is unclear. It would be helpful to know, in particular, whether the Secretary of State will be able to review and respond to any 'call-in' within the 14 day period, which is very short. In view of this, we do not support 'deemed approval' provisions being included in the draft DCO (Article 53(8)(b)(i)). In our view, the DCO should specify the basis on which the Secretary of State would allow the Applicant to amend the

that any part of the second iteration EMP that is not substantially based on the first iteration EMP would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement'. The first draft of Article 53(5) of the DCO allowed the Applicant to approve amendments to the second iteration itself; it would have been able to approve amendments only where they are 'substantially in accordance with the relevant second iteration EMP approved by the Secretary of State' and where they 'would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement'.	an amendment is or is not 'minor'. 2. We would support a change to the DCO wording to (a) appropriately define a minor amendment, (b) limit the Applicant's ability to amend the EMP to amendments meeting such a definition, subject to consultation, and (c) include a requirement on the part of the Applicant to consult with the Secretary of State prior to making a minor amendment.	make the proposed amendment, or calls in the amendment for his/her own determination. c. If the Secretary of State has not responded within 14 days, the Applicant can make the determination itself.	EMP itself (Article 53(8)(b)(ii)). It is not currently clear what the threshold would be for the Secretary of State allowing the Applicant to make a determination itself; for example, it may be intended for self-approval to be limited to non-material amendments. This threshold would need careful consideration. We also request that a requirement is included in the DCO for the Applicant to notify consultees when its submission is provided to the Secretary of State and provides the consultees with a copy of its submission.
<u>Amending the second iteration EMP – Environmental Assessment</u>	We asked the Applicant to explain how amendments made to the EMP over the Project as a whole will be monitored to ensure that a number of amendments do not have a cumulative impact which is materially new or materially adverse than the effects assessed in the ES.	The Secretary of State (in some circumstances) or National Highways (in others) would need to be content that a proposed amendment to an approved second iteration EMP would not give rise to any materially new or materially worse adverse environmental effects when compared to those in the Environmental Statement. Clearly, to determine this, such an amendment would need to be looked at in the context of the regime implemented overall by that second iteration EMP, including any previous amendments, to establish the effects of the amendment. As such, the cumulative effects of any previous amendments to a second iteration EMP would be considered [REP1-016 at pg42].	We note the Applicant's response and consider that this is an issue on which the ExA will now need to take a view.

<u>Amending the second iteration EMP – version control</u>	We asked the Applicant to confirm how it intends to control and make available amended versions of the EMP and to explain how the Applicant will make earlier versions of the EMP publicly available.	The Applicant considers that to have multiple versions of the EMP on its website, could cause confusion. All consultees will have been provided with any approved submission, including those superseded. The Applicant is open to further discussion on this point [REP2-016 at pg42].	1. We would support different versions of the second iteration EMP being numbered consecutively (for example 'iteration 2.1, 2.2' etc). 2. We would support older superseded versions of the second iteration EMP being made available on the Applicant's website – it should be possible to label different versions clearly, or to put superseded versions in a different section of the website, so that they are available should anyone wish to consult them.
<u>Third iteration EMP</u> The first draft of Article 53(7) of the DCO [APP-285] provided that a third iteration of the EMP should be produced on completion of each part of the development. The third iteration is intended to deal with the mitigation involved with operating the road post-construction. The DCO as drafted did not allow for the third iteration (or amendments to the third iteration) to be approved by the Secretary of State. The DCO as drafted did not expressly require the consultation and determination provisions to be followed in relation to amendments to the third iteration of the EMP.	The case has not been made for the production of a third iteration EMP to be subject to less scrutiny than the second iteration. The third iteration of the EMP should therefore be approved by the Secretary of State following consultation, and any amendments to the third iteration should be handled in the same way as amendments to the second iteration	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); 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; 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	1. The DCO and EMP do not contain a clear requirement for consultation to take place on <u>amendments</u> to a third iteration of the EMP, which is anomalous. We are not persuaded that amending the third iteration EMP should be subject to less scrutiny than amending the second iteration. Allowing the Applicant to amend the EMP itself without recourse to an outside body leaves open the possibility that the provisions of the EMP could be downgraded for convenience. 2. Although the <u>production</u> of the third iteration EMP is subject to consultation, we would maintain that a new iteration of the EMP ought to be subject to the Secretary of State's approval, or at least be subject to the call-in mechanism being proposed for amendments to the second

		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; 4. This approach would be consistent with the approval of other ‘downstream’ matters post-consent, after the initial approval of a second iteration EMP. [REP1-009 from pg23]	iteration (subject to our outstanding concerns in relation to the call-in mechanism being addressed). In our view, having an independent approval of a third iteration would provide greater certainty that all necessary mitigation measures will be included. We have set out our comments on the handling arrangements below.
<u>Consultation and determination provisions</u> The first draft DCO (at Article 53(2), (5) and (7)) [APP-285] required consultation to be undertaken for the production of each iteration of or amendment to the EMP. The first draft DCO provided that consultation must be undertaken in accordance with the ‘consultation and determination provisions’ of the EMP, defined at Article 53(10) of the first draft DCO as the procedure set out in paragraphs 1.49-1.4.51 of the first iteration EMP.	1. Referring to EMP paragraph numbers in the DCO risks uncertainty if the EMP document changes – we would prefer the consultation provisions being set out in the DCO itself. This would also ensure that the consultation provisions could not themselves be amended. 2. The EMP set out the scope of the single consultation procedure, which was limited to (1) the production of the second iteration EMP (2) determinations under the EMP and (3) as otherwise specified in the DCO. The scope of the single consultation procedure should include explicit reference to the production of amendments to the second iteration of the EMP and to the production of the third iteration of the EMP; both	1. The Applicant did not consider that there was a need for our suggested amendment to the DCO [REP2-016 at pg42]. However, the draft DCO was – in part - amended at so that it expressly refers to the consultation provisions in the first iteration of the EMP in relation to amending the second iteration EMP (Article 53(7)(b) [REP2-016]). 2. The Applicant did not consider that there was a need for our suggested amendment to the ‘scope’ section of the EMP [REP2-016 at pg43]. However, the revised draft EMP has amended the relevant section (paragraph 1.4.15, [REP3-005]) so that it now covers amending the second iteration EMP as well as the production of the	1. We support the ExA’s request for the consultation procedure to be set out in the DCO [PD-011]. In the alternative, the Applicant’s DCO amendment which refers to the consultation procedure as set out in the first iteration of the EMP could be a route to resolving this issue: if the definition of ‘consultation and determination provisions’ in the DCO referred to the ‘first iteration EMP’ specifically (rather than ‘the EMP)’. This would prevent the consultation provisions being amended in subsequent iterations of the EMP. It would also avoid confusion should paragraph numbers in the EMP change between iterations. 2. The Applicant has said that it sees the EMP as a ‘single source of truth’ [REP1-009, pg6]; a place where all mitigation information can be found. If this is the case, the totality of the consultation requirements should be

	of which are subject to the consultation and determination provisions by Article 53(2),(5) and (7).	second iteration EMP and as otherwise set out in the DCO.	clear on its face. Therefore, while we note the amendment made to the draft EMP, reference should be made in the 'scope' section (currently at paragraph 1.4.15, REP3-005) to all documents which will be subject to the consultation provisions, as required by the DCO. This will aid clarity and avoid confusion.
Consultation and determination provisions – clarity	1. We recommended that the wording which establishes the single consultation procedure is amended so that it lists more clearly which bodies will need to be consulted on each possible iteration or amendment proposed. 2. We highlighted issues with table numbering which were unclear.	Redrafted wording has been provided at paragraphs 1.4.12 1.4.14 and 1.4.17 [REP3-005].	We welcome the re-drafted wording which is clearer, however, we note that some errors remain in relation to table numbering – paragraphs 1.4.14 and 1.4.17 refer to 'table 2-1' rather than 'table 1-2'.
Consultation and determination provisions – time periods	The EMP provides that consultees will have 20 working days to respond to a consultation (paragraph 1.4.20) and will have 10 working days to respond to any revised consultation document produced in response to the original consultation (paragraph 1.4.26). We recommended including a mechanism for the parties to agree to extend the response times.	1. The Applicant has proposed a forum whereby it would give advance notice of amendments to consultees [REP1-026 at pg6]. 2. The revised draft EMP [REP3-005] includes a provision to agree an extension of time with consultees (paragraph1.4.22 and 1.4.29), however, the extension would apply to the requesting consultee only, it would be at the Applicant's sole discretion taking into account the nature of the material being	The idea of a forum is potentially helpful, but little information is available in relation to how it would operate in practice, or whether the relevant commitment in the EMP REAC table could be enforced. In view of this uncertainty, we are concerned that the forum, in combination with the proposed wording permitting extensions of time, gives rise to a concern that the existence of a forum could be given a reason to deny a reasonable request for an extension of time, irrespective of the quality or detail of the materials provided in the forum.

		consulted on, the extent of prior informal engagement and any other material factors.	We note that the ExA has suggested extending the time period for consultees to respond to consultation, and we would welcome such an amendment.
<u>Handling arrangements</u> The first draft EMP [APP-019] provided that determinations made under the EMP by the Applicant would be made by persons who are ‘functionally separate’ from the project team. A very basic framework for these arrangements was set out at paragraphs 1.4.42-1.4.49 of the first draft EMP, however, the practical steps the Applicant proposes to take to achieve separation of functions were not set out. In addition, the first draft EMP provided that these arrangements may be changed from time to time provided that the changes are published (paragraph 1.4.46).	1. We recommend that the draft EMP is updated as part of the examination to set out details of the arrangements the Applicant proposes to put in place in order to achieve a separation of functions so the arrangements can be considered by the ExA and approved by the Secretary of State. 2. We also consider that the arrangements for the separation of functions should be excluded from the amendments the Applicant is able to make to the EMP without the Secretary of State’s approval, and that any amendments to the arrangements are subject to consultation. 3. Any changes to the wider EMP framework, such as to the handling arrangements, should be subject to consultation with all statutory consultees.	1. The current drafting in the first iteration EMP (in paragraph 1.4.38 onwards) is appropriate and is no different to the situation where a local planning authority or a local highway authority approves applications to itself. 2. A degree of flexibility is required as, for example, organisational changes within the Applicant may mean arrangements made now are no longer workable. The Applicant intends to the arrangements to be fully transparent, as per the requirements in the first iteration EMP, albeit that the detail of the arrangements cannot be finalised at this point in time. [REP3-005]	1. While we note the need for a degree of flexibility on the part of the Applicant, and recognise that it may not be possible to set out comprehensive details of its internal arrangements for handling self-approvals at this stage, the draft EMP contains only a check list of details which will be provided in future (paragraph 1.4.48). We maintain that more information is needed so that all parties can be satisfied that the arrangements proposed by the Applicant are robust. 2. If no further information is to be provided at this stage, it is especially important that the arrangements the Applicant does eventually put in place are consulted on and approved by the Secretary of State, rather than simply being published by the Applicant (paragraph 1.4.47 and paragraph 1.4.49). The obligation for a consultation on the proposed handling arrangement to take place should be included in the DCO and reflected in the ‘single consultation procedure’ section of the EMP. Similarly, proposed amendments to the handling arrangements should be subject to consultation.

Heritage Mitigation Strategy (HMS) The first draft EMP [APP-015] provided 'before the start of any part of the authorised development', the HMS (and other documents) must be approved as part of a second iteration EMP (paragraph 1.4.11), however, archaeological investigations carried out in accordance with the HMS are excluded from the definition of 'start' in paragraph 1.4.9.	We suggested that there needed to be mechanism to ensure that the HMS is approved before any archaeological investigations it governs can commence.	The Applicant's note following ISH2 [REP1-009, pg 14 and 15] set out the Applicant's position. The Applicant is now proposing to remove the reference to HMS from the definition of 'start', but still allow archaeological investigations and mitigations works to be undertaken prior to commencement.	It is not acceptable that sensitive pre-commencement archaeological investigations are not managed in accordance with an approved document. Without such a document in place, it is unclear how any issues which may arise during archaeological investigations (such as unexpected finds) would be dealt with, or how the relevant authorities can ensure that archaeological investigations take place to an appropriate standard. HE would like the Heritage Mitigation Strategy to be approved as part of the examination so that it can be used to control pre-commencement works. This would need to be reflected in the definition of 'start' in the EMP and the definition of 'commence' in the DCO. Reference should also be made in the HMS document itself, for example at paragraph B3.3.5, and in the relevant REAC commitment (D-CH-01).

2.3 Historic England has reviewed the amendments made to the contents of the REAC table in the draft EMP [REP3-005, table 3-2] and comment on the following specific commitments:

- D-GEN-22 is a new commitment which requires the Applicant to set up a forum with consultees during the construction period. No specific details in relation to the format, frequency or content of the forum are provided in the wording of the commitment. The objective of the forum is stated to be 'to provide an opportunity for the Authority and the PC to share information with the consultees on the construction of the Project, enable engagement and discussion in relation to the construction of the Project and to provide, as far as reasonably practicable, advance notice of information to be shared with the consultees under the procedures set out in Section 1 of this EMP'. In our view the wording of this commitment is insufficient to provide confidence that a forum will make a meaningful contribution to engagement between the Applicant and consultees and more information about the format, frequency, timing and content of the proposed forums needs to be provided.

- D-CH-02 relates to maintaining the historic form, fabric and significance of listed buildings and structures. We would like to see included a requirement on the part of the Applicant to have regard to the consultation responses it receives under this commitment.

- D-CH-03 relates to consultation requirements for the detailed design of the Project. We suggest that the 'achievement criteria' are updated to make clear that evidence of the design having been undertaken in accordance with the HMS and PDP must be provided to demonstrate compliance with the commitment. We would also like to see included a requirement on the part of the Applicant to have regard to the consultation responses it receives under this commitment.

- MW-CH-01 relates to the recording of historic buildings and structures. We would welcome a requirement that HE and local authorities are notified of the dissemination and publication of the recording.

- MW-CH-02 relates to the protection of milestones. We would welcome further clarification of the phrase ‘under archaeological supervision’ so that there is clarity as to the nature and quality of such supervision.

2.4 We have also reviewed the amended draft Annexe B3 to the EMP (Heritage Mitigation Strategy) [REP3-010], and have noted the following minor points which we consider require amendment:

- Figure 2 nomenclature needs amendment from ‘DAMS’ to ‘DHMS’ in the flow chart;

- Paragraph B3.3.5 deals with site specific written schemes of investigation (‘SSWSI’). In our view, this paragraph should include reference to the necessity of works (including pre-commencement works) being carried out in accordance with the prepared SSWSI for each site.

- Paragraph B3.3.60 deals with geoarchaeology. We request that in addition to works following HE guidance on geoarchaeology, the Applicant liaises with the HE Regional Science Advisor to agree sampling strategies and other geoarchaeological work.

- Paragraph B3.3.21-22 refers to fencing and exclusion zones (to be agreed with Historic England) which will be put in place around scheduled monuments. We would welcome further information in relation to the process for agreeing the extent of the exclusion zones including, for example, an indication of the timeframe in which exclusion zones will be proposed and plans showing their extent which we can review and respond to.

2.5 We would like to comment further on the draft Scheduled Monument Method Statement (Annexe C3 to the EMP) [APP-038]. We consider that the control measures set out at paragraph 3.5 would benefit from further clarification as it is currently unclear how the contractor will agree the control measures and what is required to be submitted to HE for approval. We therefore request that the wording of this section is revised to make clear that exclusion zones and fencing proposals should be submitted to HE for approval, and the time frame for submission.

2.6 In relation to the revised draft Project Design Principles [REP3-041], it would be helpful if the Applicant could explain the removal of reference to lighting design at section 08-18; in particular, if the Applicant could confirm that no lighting is proposed for the Rokeby roundabout.

3. Revised draft DCO

Article 54 of the DCO deals with the detailed design of the Project and contains provisions in relation to consultation should the Secretary of State wish to approve a detailed design which departs from the Project Design Principles. Historic England requested that the DCO should include a requirement for it be consulted on any departure from the Project Design Principles affecting designated heritage assets and we maintain this request for the reasons in our Written Representation [REP1-026 at 7.6].

4. Lake District World Heritage Site ('WHS')

4.1 In our Written Representation [REP1-026 at 4.4 and 11.5], we noted the issue raised by the Lake District National Park Authority regarding the need for a heritage impact assessment ('HIA'). We noted that if a WHS has been screened out of a detailed EIA in an Environmental Statement, there would need to be a clear and convincing justification, with appropriate evidence, to demonstrate the lack of impact that has been assessed. This was not made

clear in the ES and, in our view, this needs to be addressed through an appropriate HIA.

4.2 We note the Applicant's response [REP2-016 at pg36 and PDL-011 at pg103], however, in our view, the Applicant needs to go further than asserting a lack of impact on the Outstanding Universal Value of the WHS from any increase in traffic or parking within its boundaries as a result of the Project. In order to show that it has explicitly and demonstrably considered these potential impacts and reached an evidenced conclusion, the Applicant should conduct an appropriate HIA. There is extensive guidance in place on HIAs in these circumstances, and the HIA should be proportionate to the issue and scale of the potential harm.

5. Conclusion

5.1 Historic England welcomes the Applicant's attempts to address our concerns relating to this application, however, we consider that a number of issues in relation to the Project, and in particular, the Applicant's proposed approach to the EMP, which need to be resolved.

5.2 We will continue to engage with the Applicant on the issues within our remit.