

The Council's response to the Applicant's Deadline 5 Post-Hearing submissions (including written submissions of oral case) relating to ISH3

This document represents a table of responses to the Applicant's Deadline 5 Post-Hearing submissions (including written submissions of oral case) relating to ISH3, in respect of National Highways' ("the Applicant's") application for development consent for the A66 Northern Trans-Pennine Project ("the Project"). It has been prepared by Westmorland & Furness Council (the "Council"), as statutory successor to Cumbria County Council ("CCC") and Eden District Council ("EDC") on 1st April 2023. The Council's comments for Deadline 6 are entered in the right-hand column and relate to the matters which the Council considered it relevant to respond to.

Agenda Item	Applicant's Response	Council's Response
<p>6.1 The ExA requires an update to the positions of the Applicant and the Local Authorities following response to ExQ1 [PD-011] in respect to:</p> <p>Diversion route arrangements. De-trunking arrangements. Private means of access and public rights of way arrangements. Traffic modelling in Penrith</p>	<p><u>Diversion route arrangements</u></p> <p>The ExA confirmed that the agenda item here refers in particular to Question TA 1.7 of the Examining Authority's Written Questions and requests for information [PD-011], and explained that Cumbria County Council, Eden District Council and Richmondshire District Council [although note that the question actually refers to North Yorkshire rather than Richmondshire District Council] want to know the diversion plans for the operational phase of the scheme.</p> <p>Paul Carey, for the Applicant confirmed that the Applicant is engaging with local authorities to understand this further. The ExA further queried how any operation diversion plans would be secured, and Robbie Owen, for the Applicant, confirmed that this would be via the third iteration of the EMP which deal with the operational phase.</p> <p>Post-hearing note: [The Applicant is aware that points of detail in respect to diversion routes will be raised by Cumbria County Council at Deadline 5. The Applicant will engage with Cumbria County Council thereafter providing an update in the SoCG with Cumbria County Council and to the Examination as appropriate.</p> <p><u>De-trunking arrangements</u></p> <p>The ExA explained that the agenda item here refers in particular to Question TA 1.1 of the Examining Authority's Written Questions and requests for information [PD-011] and the status of separate side agreements for asset transfers. Robbie Owen for the Applicant confirmed that there have been detailed discussions with all Highway authorities regarding principles around de-trunking, with a view to reaching agreement by the end of the Examination. Agreement in principle has not yet been reached on all issues. As highlighted by the local authorities, the Applicant thinks that they will be agreed by the end of the Examination – they have been underway for months, and the Applicant does want to move discussions to formal heads of terms and legal agreement as of this week. He went to say that he understands the concern raised by the ExA – there is a lot to resolve, but the Applicant is confident that it will be able to conclude the issues, and this is being given top priority. The ExA pointed out that the PADSS are not getting smaller.</p> <p>In relation to Caroline Horn's comments on the de-trunking arrangements, in particular, the potential for a temporary roundabout at Mainsgill, Robbie Owen confirmed that this is not provided for in the DCO and is not intended to be. It is a matter that the contractors are taking forward through the Town and Country Planning Act 1990 planning application process, and an application has not yet been made for it. Therefore, this is not a matter that is relevant to the examination of the DCO.</p> <p><u>Private means of access and public rights of way arrangements</u></p>	<p><u>Diversion route arrangements</u></p> <p>The Council wishes to clarify that points of detail were expected from the Applicant at Deadline 5, not from the Council. The Local Impact Report [REP1-019] appendices included the Council's detailed concerns on both temporary and operational diversion routes.</p> <p><u>De-trunking arrangements</u></p> <p>The Council continues to work closely with the Applicant to agree principles and details of de-trunking at pace. This topic will be included in side agreements between parties, expected to be signed off by the end of Examination.</p> <p><u>Private means of access (PMA) and public rights of way (PRoW) arrangements</u></p> <p>The clarification of separation between the PMA and PRoW is welcomed.</p> <p>However, there is a need for clarity related to the highway status of the PMA and adjacent PRoW and the associated maintenance liability. The Council is willing to maintain new PRoW including the cycle tracks, cycleways or equestrian tracks defined in the DCO, to an acceptable standard for the non-motorised users permitted. However, the liability for maintaining the PMA should not fall to the Council.</p> <p><u>Traffic Modelling in Penrith</u></p> <p>With regard to traffic modelling of the operation of M6 Junction 40 and Kemplay Bank, the Council anticipates undertaking a review of the base model and future options in April, although at the time of writing (03.04.2023), we are yet to receive the model information and associated documentation to comment on this issue.</p>

The **ExA** confirmed that the agenda item here refers in particular to the third part of Question TA 1.3 of the Examining Authority's Written Questions and requests for information [PD-011] and where private means of access will share access with public rights of way. Seeking clarity as to whether this is to be adopted highway with private vehicle access, or will it be private vehicle access with public footpath rights? **Robbie Owen** confirmed that this is highway with private rights of access where appropriate. The **ExA** queries whether this would be hard surface at 4m wide and pointed out that if this access looks like a road it will be regarded as one. **Robbie Owen** confirmed that this is an issue that will be taken forward through detailed design and this may include various mitigation measures. Detailed design will be subject to a Stage 2 Road Safety Audit to highlight safety considerations. He also pointed out that public access sharing private rights of way is not novel.

Post-hearing note:

Whilst the project has included Private Means of Access that are shared with Public Rights of Way the Applicant is of the view that there are measures that can be implemented to enable the routes to be used safely by all users. These measures will be considered on a case-by-case basis as part of the detailed design process but could include options to differentiate the surfacing either through its finish or via demarcation at key points along the route. Access to these routes can be controlled by physical measures such as gates or bollards which will act as a deterrent to unauthorised vehicles, but landowners would be provided means to remove them to facilitate their access when required. All affected Public Rights of Way will have a signing strategy review as part of detailed design to determine how any re-routing needs to be signed both in advance of the change and more local to it.

In response to **Mr Salvin's** request for clarification on design criteria for Footway 08-03-01, and the diversion of the existing roadside footpath to the front of Rokeby Grove, which is a Grade II listed building, **Robbie Owen** confirmed that clarification would be given.

Post-hearing note:

A route for the proposed cyclepath was considered north of Tack Room Cottage and Rokeby Grove. The development of the proposed A66 westbound carriageway occurs in this location, widening out into the existing verge and cutting. This leaves very limited room for the proposed cyclepath without impacting on the Tack Room Cottage plot of land. The proposed cycle track would have to elevate up to meet the level of Greta Bridge bank. This would require reinforced earthworks or a structural solution at the pinch point between Tack Room Cottage and the propose A66 to avoid excessive earthworks impacting Tack Room Cottage. Allowing for the additional landtake, it would still require the removal of a considerable length of existing tree belt (approx 160m) on this existing cutting which results in landscape and ecological impacts. By locating the proposed cyclepath to the south of Tack Room Cottage and the Grove, the path follows the existing topography which minimises earthworks and reduces the number of trees and foliage impacted by the provision.

Traffic modelling in Penrith

Paul Carey, for the Applicant, explained that modelling has been discussed with Cumbria County Council. In response to requests for revised modelling to be shared with the Council, **Mr Carey** agreed that more dialogue is needed and will be moved forward.

Post-hearing note:

A meeting was held on the 9 March between the Applicant and Cumbria County Council at which the Applicant presented further material to Cumbria County Council. The Applicant will present the traffic model to Cumbria County Council at a meeting scheduled for the 17 March such that the Applicant considers an agreement on the issues can be made and closed out by mid April 2023.

Bivvy MOD site (Brough Hill Fair)

	<p>In relation to this matter which was not included in the Agenda, the ExA set out that Mr Welch, Mr Heron and Miss Horn have all raised concerns about the safety of the Bivvy site for the purpose of accommodating the annual Brough Hill Fair. Mr Owen confirmed that as is standard practice for new junctions, safety assessments will have been done. The Applicant's view is that there is a distinct improvement to the current position, but confirmation will be provided as to what assessments have been done to support this position. In response to specific concerns raised by Billy Welch, Caroline Horn, for the Heron Family, and David Keatley, Mr Owen pointed out that the Local Highways Authority has not raised concerns, and that the Applicant recognises the importance of Brough Hill Fair which is why the Applicant has decided not to prejudice the future of the fair and the replacement site for the fair is proposed as part of the Project. The Applicant has done detailed work and a supplementary consultation on alternative sites.</p> <p>Post-hearing note: The Applicant has provided a technical note relating to the selection of the proposed Brough Hill Fair replacement site for users. This response is provided at Deadline 5, titled as follows: <i>Issue Specific Hearing 3 (ISH3) Post Hearing Submission – Response to Examining Authority's Request Under Agenda Item 10: Replacement Sites Considered for Brough Hill Fair (Document Reference 7.32)</i>.</p> <p>A Road Safety Audit was undertaken on the Project based on the design that was presented at Consultation in Autumn 2021. Those accessing the Brough Hill Fair site will do so from Station Road which forms part of the local road network, and is not within the Order limits and therefore not included within the Road Safety Audit. An Operational Risk Assessment of the proposed site is currently being planned following Deadline 5 in response to the request by Ms Horn. This will assess the potential risks for the intended use of the Bivvy site for the period of Brough Hill Fair. It will also consider if any mitigation measures will need to be considered during the detailed design stage of the Project. It is our intention to engage with the Gypsy community (via Mr Welch) and Mr Heron (via Ms Horn) as part of this process.</p>	
<p>9.1 The ExA wishes to discuss the draft DCO including:</p> <ul style="list-style-type: none"> • Cycle track/ cycleway definition in Article 2 • Maintenance period for new highways, Article 9 (1) and (2) • Further questions in respect to the wording of Article 53 (Environmental Management Plan) and Article 54 (Design) following the Applicant's response to Written Questions [REP4-011] and other responses. 	<p>Cycle track/cycleway definition in article 2 Robbie Owen, for the Applicant confirmed that the Applicant amended the definition of "cycleway" in the Deadline 2 revision to make it clear that a "cycleway" is always comprised in another highway by deleting the words "constituting or", which is a standard approach in DCOs.</p> <p>Post-hearing note: The Applicant has reflected on the definitions of "cycle track" and "cycleway", and has amended the definition of "cycle track" in revision 3 of the draft DCO submitted at Deadline 5 such that a cycle track as defined by the Order can only be a highway in its own right.</p> <p>Maintenance period for new highways – article 9(1) and (2) Mr Owen submitted that article 9 reflects standard established drafting for setting out who is to be responsible for maintaining highways constructed and altered under the powers conferred by the draft DCO.</p> <p>The local highway authorities have all responded to question DCO 1.2 in broadly similar terms, that is to say, that they wish there to be a legal side agreement fleshing out in practical terms the arrangements for the handover of highways from the Applicant to the relevant local highway authorities and which deals with a maintenance period (during which the Applicant will maintain such assets pending their formal adoption by the local highway authority).</p> <p>In response to question TA 1.1 the Applicant provided an update on progress with the local highway authorities on a side agreement. The response also sets out that the relevant provisions of the draft DCO (article 9(1), (2) & (5) and article 40(6)) set out a default position which can be modified by written agreement between the parties. It follows that the relevant provisions of the Order do not stand in the way of the parties reaching a settled position via a side agreement.</p>	<p>The amendments to the DCO text are welcomed to bring clarity to the definitions of cycle track and cycle ways. The Council will require engagement as to the appropriate designation of different sections of routes throughout the project between these definitions and the accompanying "Equestrian Track" definition. The maintenance liability for these Public Rights of Way needs to be clarified.</p>

Further questions on article 53 (Environmental Management Plan) and article 54 (Design) following the Applicant's response to Written Questions [REP4-011] and other responses.

The ExA queried whether statutory environmental bodies and relevant authorities ought to be included within the article 53 process in relation to the second iteration EMP. **Mr Owen** submitted that such public bodies would be notified of the event, but this can be made clearer in the EMP, in that consultees must be notified when a referral has been made.

In relation to the 14-day "call in" process being adequate for the Secretary of State, **Mr Owen** noted that the Secretary of State is the decision-maker on the DCO, and therefore has discretion (during the determination period) to suggest an amendment to the timeframe if it is considered necessary. If the call-in process remained at 14 days, and the Secretary of State required more time to make a decision, the Applicant is of the view that the request would be called in. The Secretary of State would not be bound by any time limit at this stage, in deciding whether to accept the request.

Following a query from the ExA, **Mr Owen** submitted that the consultation provisions remain within the first iteration of the EMP, which will be approved if the Project is approved and certified. These will govern how the second iteration is dealt with, so the Applicant is of the view that the consultation provisions do not need repeating within the second iteration as they have served their purpose.

Mr Owen emphasised the importance of the EMP remaining a self-contained document that does not cut across what is in the DCO, as the Applicant seeks to update accepted practice which currently inserts some obligations in various control documents and others in the body of the DCO.

The Applicant took the feedback from various consultees on board, so the EMP has been amended to provide consultees with the ability to submit a request to extend the relevant consultation period. The Applicant is in the process of discussing and explaining this to local authorities. The Applicant remains of the view that an extended consultation period to apply across the board is not necessary or proportionate, particularly in light of Project Speed. The amendment to the EMP therefore provides the Applicant with the requisite degree of flexibility for individual consultees where this is necessary.

Article 54(2) of the draft DCO is required to provide the Applicant with flexibility if, as part of the detailed design process for example, a departure from article 54(1) is required. This enables the Secretary of State to consult with local authorities and subsequently consider whether to approve the Applicant's proposed departure. It is implicit within article 54(2) that the Applicant consults the Secretary of State before any decision is made. The baseline position also remains that any departure must not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the Environmental Statement. This therefore confines the extent to which a departure can be sought.

The Applicant commits to publish the approved EMP on a publicly accessible website (as stated in paragraph 1.4.54 of the EMP [REP3-004]).