



Historic England

WRITTEN REPRESENTATIONS

**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 References: PL00586663 / PL00756505

PINS Unique References: A66D-EIA007 & A66D-0004

Deadline 8 Submission

26 May 2023

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1. Introduction

- 1.1. The Historic Buildings and Monuments Commission for England is more commonly known as Historic England. We are the government's statutory advisor on all matters relating to the historic environment. It is our duty under the provisions of the National Heritage Act 1983 to secure the preservation and enhancement of the historic environment.
- 1.2. Historic England ("HE") has participated in the examination of the Application in order to ensure the historic environment is fully and properly taken into account in the determination of the Application and, if consented, that appropriate safeguards have been built into the Development Consent Order ("DCO"), Environmental Management Plan ("EMP") and supporting documents. We have also sought to ensure that opportunities are taken to enhance the historic environment over the lifetime of the Project where possible.
- 1.3. Our Written Representations ("WRs") at deadline 1 [REP1-026] set out our position on the issues which were presented by the Application. We made further representations at deadline 4 [REP4-031] as the examination developed. In addition, our engagement with the Applicant has continued throughout the examination and the progress of this engagement has been recorded in a number of draft Statements of Common Ground ("SOCG") and draft Principal Areas of Disagreement Summary Statements ("PADSS"), culminating in a final SOCG and PADSS submitted at deadline 8 [REP8-024 and REP8-078].
- 1.4. Although the concerns we have raised throughout the examination have broadly been addressed following discussions with the Applicant and consequential amendments to documents made to take account of those discussions, the final Statement of Common Ground between the Applicant and HE records a number of issues which are not agreed. This concluding submission has therefore been prepared to assist the Examining Authority ("ExA") in its consideration of the Application by setting out those issues we have raised which have been satisfactorily resolved (and on what basis)

together with our final position in relation to those issues which are not agreed.

2. Environmental Statement (“ES”)

- 2.1 As part of our review of the Application, we noted that there were locations over the length of the Project area where it was not possible to carry out all of the planned evaluation surveys for various reasons including: access, ecological or land drain issues¹. These issues occurred across all areas of the project, but the largest area not subject to pre-determination surveys was to the SE of Kirkby Thore between Sleastonhow Lane and the current A66. Consequently, the Applicant’s ES assessment of harm to heritage assets in these areas relies on those surveys which were able to be carried out and baseline data. It therefore assumes a reasonable worst-case scenario².
- 2.2 We understand that the Applicant has since conducted further survey work in preparation for the implementation of the Project should development consent be granted. We have not seen this additional work and we have not been asked to review it as part of the examination. We anticipate that the results of this additional survey work will feed into the production of the Detailed Heritage Mitigation Strategy and Site Specific Written Schemes of Investigation when they are produced, which is required by the Outline Heritage Mitigation Strategy [REP8-009 - paragraph B3.2.8]. The additional survey work carried out by the Applicant does not form part of the ES. In our view, the assumptions made in the ES area reasonable and allow a reasonable worst-case scenario to be considered. It is also our view that the ES contains sufficient information for the ExA to form its own view.
- 2.3 We also observed at the beginning of the examination³ that the potential impact of the Project on the Outstanding Universal Value of the Lake District World Heritage Site (“WHS”) was neither shown scoped in nor scoped out of the EIA, which meant that the way in which impacts on the WHS had been

¹ WRs - paragraphs 4.2-4.3

² ES (chapter 8.5) [APP-051]

³ WRs – paragraphs 4.4-4.7

considered was clear. In our view, if the impact of the Project had been scoped out of the EIA, a clear and convincing justification for this (together with appropriate evidence) needed to be provided. We maintained this view in our submissions at deadline 4.⁴

2.4 We have now been provided with a note by the Applicant to explain its approach to this issue. We have reviewed this note in relation to the Guidance and Toolkit for Impact Assessment in a World Heritage Context published by UNESCO (2022). We are satisfied that the note adequately explains the approach taken by the Applicant in relation to the Lake District WHS. In particular, we are satisfied that the Applicant's decision not to undertake a full heritage impact assessment is appropriate given the distance of the Project from the WHS and the negligible nature of any indirect impacts. The explanation provided by the Applicant resolves our concern on this point

2.5 Finally, our WRs⁵ requested greater links between the Historic Environment Research Framework contained in the ES, the Outline Heritage Mitigation Strategy, and the Community Engagement Plan, which is an annex to the EMP, to ensure a joined-up approach to public engagement on heritage issues during the construction of the Project. Changes made to the Community Engagement Plan [REP3-015, paragraph B11.4.6] and Outline Heritage Mitigation Strategy [REP8-009, paragraph B3.3.83] over the course of the examination have resolved these concerns.

3. Scheme-specific issues

3.1 The Project is divided into a number of 'schemes' over the length of the A66. While the Project will provide some heritage benefits, which were noted in our WR, harm to the historic environment will be caused by the Project. Section 6 of our WRs set out the harm caused to the historic environment within Historic England's remit on a scheme-by-scheme basis. Our WRs also noted where the proposed mitigation measures are supported by Historic

⁴ Deadline 4 submission – paragraphs 4.1-4.2

⁵ WRs - paragraph 4.12-4.13, appendix 6

England should the Secretary of State grant development consent. Our assessment of the harm caused by individual schemes has not changed over the course of the examination. The purpose of this section is to update the ExA in relation to further information which has been provided in relation to scheme-specific issues raised in our WRs.

- 3.2 Our WRs⁶ discussed the need to ensure that parkland at Carleton Hall is restored when the construction compound to be situated there has been removed. Following engagement with the Applicant, we are satisfied that Article 29 of the DCO [REP8-028] and principle 0102.05 of the Project Design Principles (“PDP”) [REP8-061] together ensure that the parkland will be appropriately restored following the cessation of temporary construction impacts.
- 3.3 We also recorded in our WRs⁷ that we support the reinstatement of a walking and cycling access from Brougham. We are pleased to note that the change accepted by the ExA to the application has restored this and we are content with the plans for the access as drawn [REP7-152].
- 3.4 We provided advice to inform the Project during early pre-application discussions with regards to the potential impacts on highly designated heritage at Rokeby. Our main concern was that the Grade II* Registered Park and Garden could be severed and suffer a permanent impact as a consequence of the Project. We gave advice on the relative level of harm by the various options proposed. However, we advised that it was for the Applicant to take this factor into account with other relevant ones when determining which option to take forward. We set out our view on the harm caused by each of the proposed routes for the A66 at Rokeby [REP1-026, paragraph 6.49] and we are content with the proposed scheme for Rokeby. Additional information provided in the examination relating to predicted traffic flows has not altered our view.

⁶ WRs - paragraph 6.18

⁷ WRs - paragraph 6.28

- 3.5 We accept the location of a roundabout where the de-trunked A66 meets the C-road to Barnard Castle (sheet 3 [APP-323][APP-016]) as set out in our WRs⁸. The PDP requires that the detailed design of the Project must 'support the legibility of heritage assets' and 'maintain and, where reasonably practicable, enhance historic, designated and designed views and vistas with which the project interacts' (principles HEC02 and HEC03). In relation to the impact of lighting and signage⁹ we are content with the final version of the final PDP [REP8-061, principle 08.18] which adequately deals with these issues.
- 3.6 Finally, in relation to Warrener's Lane (Scheme 09), we suggested in our WRs¹⁰ that a new principle be added to the PDP to reduce the impact that a proposed cutting in this location could have on scheduled monument. We are pleased to note the inclusion of this additional principle in the final PDP [REP8-061, table 4-14, principle 09.05].

4. DCO

- 4.1 In our WRs [REP1-026] we suggested that Article 7 (3) should be updated to correctly reflect the lines of deviation at Scheme 09 (Carkin Moor). This was to ensure that the impact to the scheduled monument at Carkin Moor of both the cutting for Warrener's Lane and the retaining wall on the south side of the widened A66) is minimised. These issues were clarified, and we are content that the updated DCO submitted for Deadline 8 [REP8-082] and the relevant Works Plan for Scheme 09 [REP7-115] reflect this.
- 4.2 Our WR¹¹ requested two amendments to Article 54 of the DCO, however, following assurances provided in the examination, we are no longer seeking these amendments and confirm that we are content with the drafting of Article 54 of the DCO submitted at deadline 8 [REP8-028].

⁸ WRs – paragraph 6.53

⁹ WRs - paragraph 6.54

¹⁰ WRs – paragraph 6.65

¹¹ WRs – paragraphs 7.5-7.6

5. EMP

- 5.1 As the ExA is aware, Historic England has had a number of concerns about the intended operation of the EMP. These have been expressed in our WRs, subsequent submissions, PADSS, and in our SOCG with the Applicant.
- 5.2 The Applicant has proposed to locate requirements in the EMP rather than in the DCO itself, and to include in the DCO a mechanism which would allow it to issue its own post-consent determinations, including on making amendments to the EMP. This is a departure from the usual practice in DCOs. Historic England considers that this novel approach can only be appropriate if the EMP is clear, robust and enforceable.¹²
- 5.3 We recognise the many changes made to the Applicant's proposal since the pre-submission EMP and DCO were shared with us. These changes include a greater role for the Secretary of State in approving the second iteration EMP and amendments thereto. Nevertheless, there remain some issues which we have not been able to resolve with the Applicant. We have set these out below together with details of those issues which have been agreed, and the basis for our agreement.

Second iteration EMP

- 5.4 At the beginning of the examination,¹³ we stated that (subject to issues relating to the consultation process and the wording of the DCO submitted with the Application being resolved) the process contained in the draft DCO for the approval of the second iteration EMP was acceptable. We raised concerns, however, that the Applicant would be able to make and approve amendments to the second iteration EMP itself with limited external oversight: in our view the DCO submitted with the application did not provide sufficient clarity about the circumstances in which the Applicant would be

¹² WRs – paragraph 8.6

¹³ WRs – paragraph 8.13

able to amend the EMP itself and the type of changes which could be made.¹⁴

- 5.5 In response, Article 53(8) of the draft DCO submitted at deadline 2 [REP2-028] required the Applicant to refer proposed amendments to the second iteration EMP to the Secretary of State who will then have an opportunity to decide whether or not to approve the amendment, or alternatively, to allow the Applicant to decide whether or not the amendment should be approved. We welcomed this revision as it provided a means of ensuring external and independent oversight of any amendments to the second iteration EMP. However, we expressed a concern at deadline 4¹⁵ that the 14-day time limit which would apply to the Secretary of State when deciding whether or not to 'call in' a proposed amendment might be too short. The Applicant's response to this was a mechanism to allow the time period to be extended by the Secretary of State. This is contained in Article 53(8) of the final DCO [REP8-028] and is considered to be appropriate.
- 5.6 If the Secretary of State does not choose to determine an application for an amendment, the draft DCO provides that the Applicant can only approve amendments 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 different environmental effects in comparison with those reported in the environmental statement' (Article 53(7)(a) [REP8-028]).
- 5.7 Early in the examination this wording was characterised by the Applicant as permitting it to make only 'minor' amendments to the EMP [EV-025, at 5:26]. This gave rise to a consideration of whether the DCO should further define a 'minor' amendment¹⁶ or another threshold (such as 'non-material') to more clearly define the types of amendment which it would be acceptable for Applicant to approve¹⁷. The Applicant has not considered that any further limit in the DCO is necessary or practical given the range of issues included

¹⁴ WRs – paragraph 8.16-8.17

¹⁵ Deadline 4 submission – pages 3-4

¹⁶ WRs – paragraph 8.16-8.17

¹⁷ Deadline 4 submission – page 3-4

in the EMP. We have not pursued this point as the referral mechanism now contained in the DCO gives us greater confidence that inappropriate amendments would not be made to the EMP post-consent. We note, however, that given the range of issues covered by the EMP, the ExA may choose to consider this further.

- 5.8 In view of the above, Historic England accepts the provisions of Article 53(6)-(9) of the DCO submitted at deadline 8 [REP8-028] in relation to the production and amendment of the second iteration EMP. Our view in relation to the consultation process is addressed below.

Third iteration EMP

- 5.9 A third iteration of the EMP will be developed post-construction to manage the maintenance and operation of the development. Our WR¹⁸ argued that a third iteration EMP (and any amendments thereto) should be approved by the Secretary of State rather than the Applicant. When the review mechanism described above had been included in the DCO for the second iteration EMP, we suggested, in the alternative, that this could also apply to the production of the third iteration EMP¹⁹. Additionally, we considered that an express requirement should be included in the DCO to require consultation on any amendments to the third iteration EMP.²⁰
- 5.10 As a result of further discussions with the Applicant, we accept that the process contained in Article 53(10) of the DCO submitted at deadline 8 [REP8-028] for approving and amending the third iteration EMP is acceptable in relation to the Project. This is because the third iteration EMP is more limited in scope than we had previously understood based on the information available and the 'third iteration' label. In our view, the level of scrutiny provided by the approach contained in Article 53(10) is proportionate to the limited nature of the matters the third iteration EMP will control in this instance. We note, however, that the approach taken in relation to approving and amending the third iteration EMP for the Project

¹⁸ WRs – paragraphs 8.22-8.24

¹⁹ Deadline 4 submission – pages 5-6

²⁰ Deadline 4 submission – pages 5-6

may not be appropriate in other DCO applications and we reserve our position on the use of this approach in other circumstances.

Consultation arrangements

- 5.11 The EMP requires the Applicant to undertake consultation with relevant bodies prior to publishing second and third iterations of the EMP, and prior to making an amendment to the second iteration of the EMP [REP8-005, paragraph 1.4.15]. The EMP provides that consultees will have 20 working days to respond to a consultation and will have 10 working days to respond to any revised consultation document produced in response to the original consultation (paragraphs 1.4.21 and 1.4.28). Historic England considered this to be too short given the large volume of documents appended to the EMP and the possibility that a number of separate consultations could overlap.²¹ We requested that provision to allow extensions of time to be agreed was included, and also extending the consultation periods.
- 5.12 The Applicant has been unwilling to increase the time limits contained in the EMP. The EMP does now include a provision for the Applicant and consultees to agree an extension of time (paragraphs 1.4.22 and 1.4.28): this 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 consulted on, the extent of prior informal engagement and any other material factors.
- 5.13 Additionally, the Applicant proposed to set up and run regular engagement forums with the prescribed consultees. This mechanism would be secured by a commitment in the REAC table of the EMP [REP8-005, table 3-2, commitment D-GEN-22]. It remains unclear on the face of the application documents how much information would be provided by the Applicant to the forum; and when, how far in advance of a formal consultation beginning the forum would meet; how often the forum would be convened, or how targeted the forum will be to consultees' areas of expertise.

²¹ WRs – paragraph 8.31; Deadline 4 submission – page 7

- 5.14 The current drafting of the commitment in the EMP which would set up the forum creates uncertainty as to how the forum system would be enforced. The only part of the commitment which would appear to be enforceable is the initial establishment of the forum 'as soon as reasonably practicable'. For these reasons, we query the worthwhile nature of the commitment to a forum given the information absent from the application documents.
- 5.15 In view of the inclusion of a mechanism to agree extensions of time, we do not oppose the time limits for responding to consultations contained in the EMP. However, we do anticipate relying on these extensions of time should the amount of consultation material become excessive, or if consultations overlap, or for other capacity reasons. Unfortunately, the proposed forum does not provide sufficient reassurance that the time limits contained in the EMP could be met on every occasion.

Handling arrangements

- 5.16 The EMP provides that determinations made under the EMP by the Applicant would be made by persons who are 'functionally separate' from the project team [REP8-005, paragraph 1.4.44]. The EMP contains an obligation on the Applicant to publish the arrangements it will put in place to handle post-consent determinations and contains a basic list of what these arrangements should include (paragraph 1.4.47-48). However, the practical steps the Applicant proposes to take to achieve separation of functions are not set out. In addition, the draft EMP provides that these arrangements may be changed from time to time by the Applicant provided that the changes are published (paragraph 1.4.49).
- 5.17 If it is not possible for the Applicant to provide further information about the proposed handling arrangements 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. While the amended DCO involves greater external oversight of the Applicant than earlier drafts, the Applicant will nevertheless be responsible for approving a number of important

documents, including amendments to the second iteration EMP (where the Secretary of State allows the Applicant to do so) and the third iteration EMP. In view of the novel approach being taken to post-consent determinations, it is crucial that the general public, participants in the planning process and, ultimately, the decision maker, can have confidence in the integrity and transparency of the process.

- 5.18 For the same reason we also consider that any substantive change in 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 subject to consultation.
- 5.19 We have not been able to reach agreement about this with the Applicant. Following consideration of the Applicant's position and the ExA's request for a solution which does not involve amending the EMP [PD-016], our advice to the ExA would be for the DCO to require that handling arrangements (and any amendments thereto) are approved by Secretary of State. Proposed draft wording has been provided in the joint position statement submitted by Historic England and the Applicant at deadline 9.

Pre-commencement archaeological investigations and mitigation

- 5.20 Article 53(1) DCO requires that the works may not commence until a second iteration EMP is approved, and that works should be carried out in accordance with the second iteration EMP. However, the definition of 'commence' at Article 53(12) of the DCO allows archaeological investigations and mitigation works to be undertaken without triggering commencement and does not make provision for how these investigations and works will be carried out. The same wording is used in the EMP definition of 'start' [REP8-005, paragraph 1.4.9].
- 5.21 Our concern is the risk of pre-commencement archaeological investigation works not being properly supervised or completed to recognised professional standards.

- 5.22 Archaeological investigations and mitigation works undertaken post-commencement will be controlled with reference to a Heritage Mitigation Strategy (HMS). An outline version of this will be annexed to the first iteration EMP and therefore be part of a certified document. A detailed HMS, based on the outline HMS, will be produced as part of the second iteration EMP based on the detailed design of the Project.
- 5.23 The outline HMS contains an overarching written scheme of investigation setting out the framework for archaeological works which will be used as a reference for site specific written schemes of investigation. Paragraph B3.3.4 of the Outline HMS [REP8-009] provides that all works should be carried out in line with the standards set out in the Chartered Institute for Archaeologists' Code of Conduct, standards and guidance, and policy statements.
- 5.24 We have discussed this matter with the Applicant, and we have been provided with further information about the types of pre-commencement work the Applicant intends to undertake. While this has provided some reassurance in relation to the risk posed by pre-commencement archaeological works to the historic environment, it remains the case that the DCO and related documents will not control the standard to which the pre-commencement works are done. In order to ensure that there is clarity as to the standard of work, our advice to the ExA is for the definition of 'commence' in Article 53(12) of the DCO to specify that pre-commencement archaeological mitigation and investigation works are undertaken in accordance with the measures specified in paragraph B3.3.4 of the Outline HMS. Proposed draft wording has been provided in the joint position statement submitted by Historic England and the Applicant at deadline 9. In our view, this is a reasonable request and will ensure that pre-commencement works are undertaken to the same standard as works carried out post-commencement.

Conclusion on EMP

- 5.25 The novel approach to the EMP promoted by the Applicant for the Project has given rise to a range of issues we have needed to work through in order

to be confident that the historic environment will not be put at risk by either the relocation of requirements from the DCO into the EMP, or by the ability of the applicant to issue its own post-consent determinations. Over the course of the examination of the Application, the points of difference between Historic England and the Applicant have reduced significantly.

5.26 We have, however, been unable to reach agreement with the Applicant in relation to two principal issues:

5.26.1 The need for appropriate oversight of the Applicant's handling arrangements in relation to post-consent determinations.

5.26.2 The need for the DCO to ensure that pre-commencement archaeological investigation and mitigation works are carried out to an acceptable standard.

5.27. We consider that both issues should be addressed in order to ensure the historic environment is suitably safeguarded during the construction of the Project. The ExA has requested [PD-016] details of how the DCO could be amended should the Secretary of State agree with Historic England on these points, and proposed wording is contained in the joint position statement submitted by Historic England and the Applicant.

6. Outline Heritage Mitigation Strategy and Scheduled Monument Method Statement

6.1 We have reviewed a number of drafts of the Outline Heritage Mitigation Strategy and Scheduled Monument Method Statement over the course of the examination. Both documents will be submitted as detailed documents as part of the second iteration EMP. They will, at that stage, contain a finer grain of detail with reference to the areas of the Project to which they relate.

6.2 In relation to these documents, we can confirm that the issues reported in our WRs²² and deadline 4 submission²³ have been addressed to our satisfaction in the versions submitted at deadline 8 [REP8-009 and REP8-017].

7. Other issues

7.1 Our WR and submissions at deadline 4 recorded a number of minor issues with: incorrect referencing in the EMP;²⁴ the clarity of the EMP's wording in relation to consultation²⁵; the scope of the single consultation procedure set out in the EMP²⁶; cross referencing EMP paragraph numbers in the DCO²⁷; and how different versions of the EMP will be controlled and published.²⁸ We confirm that these issues have all been resolved to our satisfaction in the EMP and DCO submitted at deadline 8 [REP8-005 and REP8-028].

7.2 We have reviewed a number of drafts of the commitments in the EMP REAC table. We confirm that the issues raised in our WRs²⁹ and deadline 4 submission³⁰ have been addressed; and that, save for our comments on commitment D-GEN-22 which relates to the creation of a forum (discussed above at paragraph 5.13), we are content with the commitments in the EMP REAC table contained in the EMP submitted at deadline 8 [REP8-005].

7.3 We have also reviewed a number of drafts of the PDP and confirm that the issues raised in our WRs and deadline 4 submission³¹ have been addressed to our satisfaction in the PDP submitted at deadline 8 [REP9-061].

²² WRs – Paragraphs 8.40-8.49, 9.1-9.3; Appendix 2, Appendix 3, Appendix 4

²³ Deadline 4 submission – paragraph 2.3-2.6

²⁴ WRs - paragraph 8.32; deadline 4 submission – page 7

²⁵ WRs – paragraph 8.29 - 8.30; deadline 4 submission – paragraph 7

²⁶ WRs – paragraph 8.27-8.28; deadline 4 submission – page 6

²⁷ WRs – paragraph 8.26; deadline 4 submission – page 6

²⁸ WRs – paragraph 8.20; deadline 4 submission – paragraph 5

²⁹ WRs – Appendix 5

³⁰ Deadline 4 submission – paragraph 2.3

³¹ WRs – section 9 and appendix 4; Deadline 4 submission – paragraph 2.6

8. Conclusion

- 8.1 Historic England considers that the historic environment has generally been addressed appropriately in the Application.
- 8.2 As a consequence of pre-application discussions between ourselves and the Applicant the Project has avoided and or minimised harms to the historic environment where possible. Effective mitigation measures have been proposed where the Project will cause some harm to the historic environment. We have set out, within our remit, where there are harms to the historic environment together with any identifiable heritage benefits. The ExA will now need to balance this harm against public benefits (alongside other relevant issues).
- 8.3 Alongside the scheme-specific impacts of the Project on the historic environment, we have also been concerned to ensure that the novel process for securing mitigation through the EMP, which allows the Applicant to grant its own post-consent determination in some circumstances, adequately safeguards the historic environment. Given the amendments and assurances we have requested and received during the course of the examination, and the safeguards now built into the DCO and supporting documents, we have greater confidence in this novel process being adopted in relation to this particular Application.
- 8.4 However, there remain two points which we do not consider have been addressed satisfactorily:
- 8.4.1. The need for appropriate oversight of the Applicant's handling arrangements in relation to post-consent determinations.
- 8.4.2. The need for the DCO to ensure that pre-commencement archaeological investigation and mitigation works are carried out to an acceptable standard.
- 8.5 For the reasons provided above, we advise the ExA and Secretary of State to amend the DCO in order to address these points. Suggested wording has been provided in our joint submission with the Applicant at deadline 9.

- 8.6 If consented, Historic England will continue to advise the Applicant on the detail of the design and delivery of the Project. This will help to ensure that any impacts on the historic environment are minimised and that the potential benefits for the historic environment are put in place.
- 8.7 We are grateful to the ExA and to the case officers for their consideration and assistance throughout the examination.