

A66 Northern Trans-Pennine Project

TR010062

7.50 Applicant's Response to the Examining Authority's Rule 17 Request

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

Deadline 9

26 May 2023

Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning
(Examination Procedure)
Rules 2010**

A66 Northern Trans-Pennine Project
Development Consent Order 202x

**7.50 APPLICANT'S RESPONSE TO THE EXAMINING
AUTHORITY'S RULE 17 REQUEST**

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1. Introduction

1.1. Purpose of this document

1.1.1. This document sets out National Highways' ('the Applicant') response to the Rule 17 request ('the R17'), published by the Planning Inspectorate, on behalf of the Examining Authority (ExA) on 19 May 2023, addressed to the Applicant, Environment Agency, Natural England and Historic England.

1.2. Structure of this document

1.2.1. The document addresses each of the points raised in respect of each of the statutory environmental bodies and Protective Provisions, with the following sections.

- Section 2: The Applicant's approach to securing mitigation.
- Section 3: Matters concerning the Environment Agency.
- Section 4: Matters concerning Natural England.
- Section 5: Matters concerning Historic England.
- Section 6: Protective Provisions.
- Appendix A Joint Position Statement between National Highways and Historic England.
- Appendix B Joint Position Statement between National Highways and the Environment Agency.
- Appendix C: Joint Position Statement between National Highways and Natural England.

2. The Applicant's approach to securing mitigation

- 2.1.1. Before turning to each of the specific matters covered in the R17 (which are dealt with below), the Applicant considers it worth reiterating the approach it has taken to the securing of mitigation for the Project, the rationale for this and why this is a legally robust and enforceable mechanism. This is in the context of the ExA recommending in Annex A of the R17 amendments to the DCO rather than the first iteration Environmental Management Plan (EMP) to secure mitigation measures.
- 2.1.2. As set out in various documents (including the Case for the Project [APP-008]) that accompanied the DCO application, the Project has been identified as one of the 'vital infrastructure projects' subject to Project Speed. This Government initiative seeks to cut down the time it takes to design, develop and deliver the 'right things better and faster than before'.
- 2.1.3. As set out in paragraph 1.4 of the first iteration EMP [REP8-005], in the context of Project Speed the Applicant has considered alternative methods to securing mitigation to respond to challenges that routinely arise from the 'traditional' approach of standalone DCO requirements, as set out below (taken from paragraph 1.4.4 of the first iteration EMP):
- "One consequence of [the traditional DCO requirements approach] is that participants in the process, whether that is interested parties, public bodies with important statutory functions, contractors tasked with delivering the Project or National Highways itself, are required to review a range of documents, including a statutory instrument, to understand the post consent determinations that are required to be made and the process by which those post consent determinations are to be made, before important infrastructure projects can begin and their public benefits can be realised."*
- 2.1.4. To address these challenges, the Applicant has instead promoted an approach whereby a comprehensive set of mitigation measures is contained in one single document, or code, namely the first iteration EMP. This takes the place of a number of standalone requirements that would ordinarily be contained in the DCO.
- 2.1.5. This approach has been promoted for c. 2 years with key Project stakeholders, including the Department for Transport, the Planning Inspectorate, the host local authorities and the statutory environmental bodies. Indeed, a draft EMP was included as part of the Preliminary Environmental Information Report that was subject to statutory consultation in 2021.
- 2.1.6. Whilst the mitigation measures are not contained in a Schedule to the DCO, the measures contained in the first iteration EMP are secured by way of a DCO provision, namely article 53. In summary, this requires that prior to the commencement of any part of the Project, a second iteration EMP (substantially in accordance with the first iteration EMP) for that part must be developed, consulted on (in line with prescribed procedures set out in the first iteration EMP) and approved by the Secretary of State. The

approved second iteration EMP must then be complied with (subject to provisions in article 53 that permit a second iteration EMP to be amended in certain circumstances).

- 2.1.7. If any part of article 53 is not complied with (including complying with an approved second iteration EMP), that would constitute a breach of the terms of the DCO which would be a criminal offence under section 161 of the Planning Act 2008 and could attract enforcement action under Part 8 of that Act by the local planning authority.
- 2.1.8. In this context, the Applicant has explained during the Examination why the mechanism in article 53 is legally robust and enforceable in exactly the same way as a standalone DCO requirement would be.
- 2.1.9. In particular, this issue was discussed at Issue Specific Hearing 2 on 1 December 2022. In oral submissions made by the Applicant at that hearing (as summarised in its post-hearing submissions [REP1-009] under agenda item 2), further background and justification for the promoted EMP approach was provided. The key point is that whilst this 'looks and feels' different to the conventional DCO requirement approach, the substance remains unchanged (including the substance of mitigation measures and how non-compliance can be enforced (and the implications of such non-compliance)).
- 2.1.10. Indeed, it is also worth bearing in mind that the concept of a first/second iteration EMP mechanism is by no means unusual in made highway DCOs (see, for example, the A417 Missing Link Development Consent Order 2022, the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 and the A57 Link Roads Development Consent Order 2022). The nuance in the case of the Project is that this concept is expanded to include *all* mitigation measures, with a view to expediting the delivery of the Project and making the process manageable for all parties. However, this does not dilute the efficacy of the mitigation measures in question (or the extent to which compliance with those measures can be enforced as a result of article 53 of the DCO).
- 2.1.11. It should be noted that the principle of the EMP mechanism proposed by the Applicant has been accepted by the host local authorities and statutory environmental bodies. This is demonstrated in the various Statements of Common Ground submitted at Deadline 8 and at this Deadline 9. Whilst the Applicant acknowledges that there are some differences as to certain specific drafting points (which is partly what the R17 relates to), the overarching concept of the EMP securing all mitigation measures has been accepted by the host local authorities and statutory environmental bodies.
- 2.1.12. For this reason, the Applicant does not agree with the drafting proposed in Annex A to the R17 in respect of securing mitigation measures. The Applicant submits that any mitigation required to be secured for the Project should be included in the first iteration EMP and not on the face of the DCO. To depart from this approach would result in an inherent inconsistency in terms of the securing mechanisms for necessary mitigation and would inevitably result in confusion for all parties involved in the development of the Project. This would cut across the entire

purpose of the EMP approach promoted by the Applicant and supported in principle by the host local authorities and statutory environmental bodies.

- 2.1.13. The Applicant would respectfully request that the ExA considers this key point when recommending changes to the DCO (if any) it considers necessary as part of its recommendation report to the Secretary of State. Should any amendments be required to the secured mitigation measures, it is open to the Secretary of State to request that an amended first iteration EMP be submitted during the three-month decision period.

3. Matters concerning the Environment Agency

In view of the EA's request for a pre-commencement requirement in relation to flood risk and flood compensation on Scheme 06 at Deadline 7 [REP7-176, Annex 3], the Applicant is requested to provide under Rule 17 of the EPR, acceptance of suggested wording in Annex A of this letter, or suitable wording of the level of pre-commencement requirement that is sought by the EA. The ExA requests an agreed position between the parties at the point of submission. This could then be added to any schedule of recommended amendments to the Applicant's draft DCO in the ExA's Recommendation Report if the ExA decided to recommend this course of action to the Secretary of State. The ExA requests response(s)...alongside any relevant updated documents.

- 3.1.1. As set out in various submissions at Deadline 8 by the Applicant (including its Closing Submissions [REP8-074], see para 6.4.4 onwards), the Applicant acknowledges the Environment Agency's request for a control mechanism in relation to flood risk on the Appleby to Brough scheme.
- 3.1.2. The Applicant strongly disagrees with the Environment Agency as to the location of this control mechanism (for the reasons set out in section 2 above, it is the Applicant's view that the first iteration EMP is the appropriate 'home' for all mitigation measures). However, the Applicant also acknowledges the Environment Agency's view on this issue and that it will ultimately be for the Secretary of State to make a decision on it.
- 3.1.3. In this context, the Applicant and the Environment Agency discussed prior to Deadline 8 the form a control mechanism could take. This resulted in the parties agreeing (on a without prejudice basis) two forms of drafting – one that could sit in the EMP and one that could sit in the DCO (depending on the Secretary of State's decision on the matter).
- 3.1.4. Accordingly, the Applicant included the agreed form of EMP wording in the version of the EMP that was submitted at Deadline 8 [REP8-005] as new commitment D-RDWE-15 in the Register of Environmental Actions and Commitments. It also included the agreed form of drafting for the DCO (on a without prejudice basis, depending on the Secretary of State's decision) in its Closing Submissions at paragraph 6.4.9.
- 3.1.5. To assist the ExA, the Applicant and the Environment Agency have agreed a short form joint position statement which is attached to this document as Appendix A. This sets out, for ease, the agreed wording between the parties (on a without prejudice basis) for a flood risk control mechanism both within the EMP and the DCO.
- 3.1.6. The Applicant understands that the Environment Agency will also be submitting this joint position statement at Deadline 9.
- 3.1.7. As such, both the Applicant and the Environment Agency respectfully disagree with the proposed drafting in Annex A of the R17 in respect of flood risk and request the ExA to endorse the wording included in the joint position statement between the parties.

4. Matters concerning Natural England

In view of NE's request for a pre-commencement requirement in relation to provide satisfactory assurance that air quality impacts from nitrogen and ammonia to the North Pennine Moors SAC can be mitigated, the Applicant is requested to provide under Rule 17 of the EPR, acceptance of suggested wording in Annex A of this letter, or suitable wording to either to Article 53 of the draft DCO of the level of pre-commencement requirement that is sought by the NE, or within the EMP if it is capable of being controlled there. The ExA requests an agreed position between the parties at the point of submission. This could then be added to any schedule of recommended amendments to the Applicant's draft DCO in the ExA's Recommendation Report if the ExA decided to recommend this course of action to the Secretary of State. The ExA requests this response(s)...alongside any relevant updated documents.

- 4.1.1. As set out in its Closing Submissions [REP8-074], the Applicant has positively engaged with Natural England during the Examination on a number of issues, including in relation to Habitats Regulations Assessment (**HRA**) matters.
- 4.1.2. Natural England, in its response to the ExA's Report on the Implications for European Sites (RIES) [REP7-181], confirmed that they are, with one exception, content with the conclusions of the HRA carried out by the Applicant and how the required mitigation is secured through both the EMP and Project Design Principles.
- 4.1.3. The single outstanding point on the HRA relates to the Applicant's conclusion that the Project would not give rise to an adverse effect on the integrity of the North Pennines SAC.
- 4.1.4. The Applicant has continued to engage with Natural England on this point, which has resulted in the issue of a Habitats Regulations Assessment Supplementary Note – North Pennine Moors SAC/SPA (**the HRA Supplementary Note**) to Natural England. A final version of this Note has been submitted into the Examination at this Deadline 9 and provides supporting and clarificatory information in relation to the conclusions of the Applicant's HRA in respect of the North Pennines SAC (specifically those contained in the Applicant's Statement to Inform Appropriate Assessment [APP-235] (**the SIAA**)). The HRA Supplementary Note in no way alters the conclusions of the Applicant's HRA which, for the reasons set out below, it remains entirely confident in.
- 4.1.5. Despite the positive engagement between the parties, this point remains outstanding at the end of the Examination, pending further clarifications sought by Natural England. Nevertheless, the parties remain committed to continuing to engage positively during the ExA's three-month recommendation period with a view to reaching agreement. To this end, to assist the ExA, the parties have agreed a short form joint position statement which is attached to this document as Appendix B. Amongst other things, it demonstrates a clear commitment from both parties to actively engage on this outstanding point during the recommendation

period and provide a joint update to the Secretary of State as soon as possible after the ExA's recommendation period has ended or earlier.

- 4.1.6. The joint position statement also confirms the parties' views on the ExA's recommended drafting at Appendix A of the R17 around an air quality mitigation scheme. For the reasons set out therein, the parties do not consider this to appropriately address the issues and, as such, they will provide an update to the Secretary of State on a proposed control mechanism if considered necessary (albeit it is the Applicant's position that this is not the case).
- 4.1.7. The Applicant understands that Natural England will also be submitting this joint position statement at Deadline 9.

The Applicant's position on the impacts of the Project on the North Pennines SAC

- 4.1.8. To further assist the ExA, the Applicant has set out below a summary as to why it considers its conclusions in the SIAA as to the impacts of the Project on the North Pennines SAC (which would not give rise to an adverse effect on the integrity of the site) are correct. More information can be found in the HRA Supplementary Note submitted into the Examination at this Deadline 9.
- 4.1.9. The outstanding points between the parties relates to the Applicant's justification that the Project would have 'no adverse effect on site integrity' at the North Pennine SAC (and therefore there is no need for mitigation), irrespective of the current exceedance of the critical load and a calculated increase in N deposition (18%) to sensitive designated feature (blanket bog) at the site.
- 4.1.10. Based on the evidence presented in the SIAA and the supporting and clarificatory information contained in the HRA Supplementary Note, the Applicant considers that adverse effects on the integrity of the North Pennine Moors SAC, as a result of the Project in combination with background growth and committed developments, can be ruled out beyond reasonable scientific doubt.
- 4.1.11. Consequently, no mitigation and no further assessment is required and the HRA can be concluded at Stage 2: Appropriate Assessment. Accordingly, there is no requirement to move to HRA Stages 3 and 4 for the purposes of compliance with the Conservation of Habitats and Species Regulations 2017.
- 4.1.12. Whilst localised increases, as a result of the Project in combination with background growth and committed developments, in nutrient nitrogen deposition, Ammonia (NH₃) concentration and NO_x concentrations are high in the immediate vicinity of the existing road, modelling based on conservative principles has shown that the area of blanket bog subject to a potential adverse effect (to a varying degree, decreasing with distance from the road) will be limited to 8.28 ha. This equates to 0.021% of the total blanket bog feature (the only qualifying habitat affected) within the SAC, and 0.008% of the entire SAC.
- 4.1.13. Habitats Regulations Assessment Handbook (Tyldesley and Chapman, 2013) and Natural England guidance (NEA001) considers the 'integrity' of

a site to be *'the coherence of its ecological structure and function across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species which the site is (or will be) designated'*. In this regard, 99.98% of the blanket bog feature and twelve of the thirteen qualifying habitats remain unaffected by the Project.

- 4.1.14. The SAC target for the air quality sub-attribute is considered to be *"restore as necessary the concentrations and deposition of air pollutants to below the site-relevant Critical Load or Level values"* as the North Pennine Moors SAC is already exceeding the lower nitrogen critical load of 5kg N/ha/yr.
- 4.1.15. In the short term, the Project would not inhibit restoration measures being implemented across the vast majority (99.98%) of the SAC, which remains unaffected by the Project. In the long term the effects presented immediately adjacent to the ARN are not permanent and there is potential for recovery and reversibility of the impacts presented in future years.
- 4.1.16. It is considered that adverse effects on the integrity of the North Pennine Moors SAC as a result of the Project can be ruled out (beyond reasonable scientific doubt). Consequently, the Applicant considers that no mitigation and no further assessment is considered.

5. Matters concerning Historic England

At Deadline 8 (EL reference unknown at the time of writing), Historic England stated, in relation to matters of limited oversight and pre-commencement works on archaeology, that “it has not been possible to resolve these issues in the examination” and “amendments to the EMP to require external approval of the internal arrangements to put in place by the Applicant to handle post-consent determinations” are required. The ExA requests...a brief joint position statement on the position of the parties and, should the Secretary of State agree with Historic England, how this issue might be addressed within the draft DCO (as the Secretary of State will not be able to amend the EMP).

- 5.1.1. As set out in its Closing Submissions [REP8-074], the Applicant has positively engaged with Historic England during the Examination on a number of issues, including the content and approach to the EMP. However, it has not been possible to reach agreement on all issues.
- 5.1.2. As requested by the ExA, the Applicant and Historic England have therefore agreed a short form joint position statement which is attached to this document as Appendix C. This sets out, in a tabular form, the two principal areas of disagreement between the parties and a brief commentary on the parties' respective positions in relation to each.

Handling arrangements for post-consent determinations

- 5.1.3. The first principal area of disagreement relates to the handling arrangements to be put in place by the Applicant to deal with post-consent determinations. It is Historic England's position that such arrangements should be subject to external approval by the Secretary of State. As set out in the joint position statement, it is the Applicant's firm view that it is unnecessary and inappropriate for the handling arrangements of the Applicant in relation to post-consent determinations to be subject to Secretary of State approval. This would be without precedent and would unreasonably constrain the Applicant's ability to organise itself internally.
- 5.1.4. It is not possible to set out the exact steps that may be needed to achieve a functionally separate determination (via 'handling arrangements') at this point. Subjecting such arrangements to specific Secretary of State approval would result in a cumbersome, slow and inflexible arrangement running counter to the whole rationale underlying article 53 and the approach being taken to the EMP.
- 5.1.5. The key principles for the handling arrangements are already contained in the first iteration EMP, the content of which will be fixed should the DCO be made. As such, any detailed handling arrangements put in place will need to be within the parameters set by those overarching principles.
- 5.1.6. It is worth noting, by way of analogy, the arrangements put in place to handle the UK Holocaust Memorial and Learning Centre planning application, whereby the applicant and ultimate decision-maker were the same person (the Secretary of State for Levelling-Up, Housing and

Communities). This was not subject to external oversight or approval, instead, transparent arrangements were simply published.

- 5.1.7. Given all of this, it is the Applicant's view that no further approval/oversight is reasonable or necessary.

Carve out of certain archaeological investigations and mitigation works from the definition of "commence" in article 53

- 5.1.8. The second principal area of disagreement relates to the 'carve out' of "archaeological investigations and mitigation works" from the definition of "commence" in article 53 of the DCO.
- 5.1.9. It is Historic England's position that this carve out would mean such activities could be undertaken without sufficient oversight (as a second iteration EMP (and therefore Heritage Mitigation Strategy) would not need to be in place).
- 5.1.10. As set out in the joint position statement, the Applicant disagrees with this view. The carve out of pre-commencement archaeological investigations and mitigation works has been accepted on a number of DCOs, and will give the Applicant necessary flexibility to carry out pre-commencement works ahead of the start of the main works. Any main works that could have an impact on cultural heritage receptors could not be carried out without a second iteration EMP being in place, and therefore the Heritage Mitigation Strategy (as a result of article 53 of the DCO).
- 5.1.11. It would not be in the Applicant's interests to undertake any pre-commencement works that could fetter its ability to comply with subsequent archaeological mitigation obligations contained in a second iteration EMP, in the process of undertaking the main works, as that would introduce the risk that those main works could not be lawfully carried out.
- 5.1.12. In addition, the Applicant fully intends to continue to engage with Historic England (and the relevant planning authorities) on this point, to update them on the proposed 'pre-commencement' activities to be undertaken.
- 5.1.13. Nevertheless, notwithstanding the Applicant's position on both of these issues, the joint position statement at Appendix C does contain an agreed form of drafting for the DCO (on a without prejudice basis) to address this issue, should the Secretary of State agree with Historic England.
- 5.1.14. The Applicant understands that Historic England will also be submitting this joint position statement at Deadline 9.

6. Protective Provisions

Following a check of the protective provisions in D7 draft DCO [REP7-092], the ExA has made some minor changes to three of the protective provisions set out in Schedule 9. These seek to correct the term “temporary stopping up” which has been used in four places. The Applicant is requested to consult on these changes with the relevant undertaker(s) and provide any comments on the changes.

- 6.1.1. The Applicant has made the amendments suggested by the Examining Authority to the general protective provisions included in Part 1 of Schedule 9 contained in the draft DCO submitted at Deadline 9.
- 6.1.2. In relation to the Examining Authority's recommended amendments to the protective provisions contained in Parts 3 and 4, which are for the protection of National Grid Electricity Transmission PLC and National Gas Transmission PLC respectively, the Applicant has, with the agreement of those parties, included those recommended amendments in the draft DCO submitted at Deadline 9.

Appendix A: Joint Position Statement between National Highways and the Environment Agency

A66 NORTHERN TRANS-PENNINE PROJECT

JOINT POSITION STATEMENT BETWEEN THE APPLICANT AND THE ENVIRONMENT AGENCY

FLOOD RISK AND FLOOD COMPENSATION AT SCHEME 6 (APPLEBY TO BROUGH)

1. INTRODUCTION

- 1.1 This document responds to a request for information from the Examining Authority (**ExA**) under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) dated 19 May 2023 (**the R17**).
- 1.2 In the R17, the ExA requested an agreed position between the Applicant and the Environment Agency in respect of flood risk and flood compensation at Scheme 6 (Appleby to Brough). This document is therefore intended to provide the ExA with a clear understanding of the position of both parties in respect of this matter.
- 1.3 This document has been agreed by both the Applicant and the Environment Agency and has been submitted into the Examination by both parties at Deadline 9.

2. POSITION OF THE PARTIES

- 2.1 The Applicant and the Environment Agency have collaborated positively throughout the Examination. Both parties agree that in principle a secured control mechanism is required in relation to flood risk and flood compensation at Scheme 6.
- 2.2 However, **the parties disagree** as to which document that control mechanism should be contained in.
- 2.3 For the reasons set out in various submissions, including the Closing Submissions [REP8-074] and the overarching response to the R17 submitted at this Deadline 9, National Highways considers the control mechanism to most appropriately be located within the first iteration Environmental Management Plan.
- 2.4 For the reasons set out in, for example, in its PADSS submitted at Deadline 7 [REP7-175], the Environment Agency considers the control mechanism to most appropriately be located within the DCO.
- 2.5 **The parties agree** that the final decision on this point will need to be made by the Secretary of State in determining the DCO application.
- 2.6 However, notwithstanding this disagreement, the parties have worked collaboratively to agree acceptable wording for either scenario on a without prejudice basis.
- 2.7 **The parties agree** that should the Secretary of State determine that the control mechanism should be contained in the first iteration EMP, the wording included as the new commitment in table 3-2: 'Register of environmental actions and commitments', row reference D-RDWE-15, of the revised first iteration EMP submitted at Deadline 8 (REP8-005) is acceptable, namely:

(1) No part of the Appleby to Brough scheme can start until a detailed floodplain compensation scheme for that part has been (a) developed, (b) consulted on with the Environment Agency and the relevant planning authority as described in Chapter 1 and (c) approved by the Secretary of State as part of a second iteration EMP for that part.

(2) The scheme prepared under paragraph (1) must provide suitable flood storage such that flood risk during construction and operation of the Appleby to Brough scheme to any land or property situated downstream is not increased as a result of flood waters that would be displaced by the

Appleby to Brough scheme when compared to the baseline scenario as reported in the baseline hydraulic modelling agreed with the Environment Agency (in document HE565627-JBAU-XX-06-RP-HM-S3-P05-0001-Scheme6_Modelling_Report accepted on 15th May 2023) and arise from events with a magnitude up to and including the 1% annual exceedance probability, plus allowance for climate change in line with Environment Agency guidance applicable at the date the DCO is made.

(3) The floodplain compensation scheme approved under paragraph (1) must be implemented and maintained for the lifetime of the Appleby to Brough scheme unless otherwise agreed with the Environment Agency.

(4) Paragraphs (1) to (3) do not apply where alternative provision is made in the DCO for a detailed floodplain compensation scheme to be approved by the Secretary of State in relation to the Appleby to Brough scheme.

2.8 **The parties agree** that should the Secretary of State determine that the control mechanism should be contained in the DCO, the following wording is acceptable and in that event would need to be included as part of article 54:

(4) No part of the authorised development comprised in S06 is to commence until a detailed floodplain compensation scheme for that part has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority and the Environment Agency.

(5) The scheme prepared under paragraph (4) must provide suitable flood storage such that flood risk during construction and operation of S06 to any land or property situated downstream is not increased as a result of flood waters that would be displaced by the Appleby to Brough scheme when compared to the baseline scenario as reported in the baseline hydraulic modelling agreed with the Environment Agency (in document HE565627-JBAU-XX-06-RP-HM-S3-P05-0001-Scheme6_Modelling_Report accepted on 15th May 2023) and arise from events with a magnitude up to an including the 1% annual exceedance probability, plus allowance for climate change in line with the Environment Agency guidance applicable on the date when this Order was made.

(6) The floodplain compensation scheme approved under paragraph (4) must be implemented and maintained for the lifetime of S06 unless otherwise agreed with the Environment Agency.

(7) In this article “commence” has the same meaning as in article 53(12).

2.9 It should be noted that should the Secretary of State determine the control mechanism should be contained in the DCO, the obligations under the first iteration EMP would fall away as a result of paragraph (4) of that wording: *“Paragraphs (1) to (3) do not apply where alternative provision is made in the DCO for a detailed floodplain compensation scheme to be approved by the Secretary of State in relation to the Appleby to Brough scheme.”*

2.10 The parties therefore respectfully disagree with the ExA’s proposed drafting contained in Annex A of the R17 in relation to flood risk and flood compensation at Scheme 6. It is considered that the wording agreed between the parties set out above more appropriately addresses issues of flood risk and flood compensation at Scheme 6 to the Environment Agency’s satisfaction.

26 May 2023

Appendix B: Joint Position Statement between National Highways and Natural England

A66 NORTHERN TRANS-PENNINE PROJECT (THE PROJECT)

JOINT POSITION STATEMENT BETWEEN THE APPLICANT AND NATURAL ENGLAND

HABITATS REGULATION ASSESSMENT AND NORTH PENNINES MOOR SAC

1. INTRODUCTION

- 1.1 This document responds to a request for information from the Examining Authority (**ExA**) under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) dated 19 May 2023 (**the R17**).
- 1.2 In the R17, the ExA requested an agreed position between the Applicant and Natural England (**NE**) in respect of the conclusions of the Applicant's *Habitat Regulations Assessment (HRA) Stage 2 Statement to Inform Appropriate Assessment [APP-235]* (**the SIAA**) at North Pennines Moor SAC. This document is therefore intended to provide the ExA with a clear understanding of the position of both parties in respect of this matter at the close of Examination.
- 1.3 This document has been agreed by both the Applicant and Natural England and has been submitted into the Examination by both parties at Deadline 9.

2. POSITION OF THE PARTIES

- 2.1 The Applicant and Natural England have collaborated positively throughout the Examination with a view to reaching agreement on all matters relating to the SIAA. The **parties agree** that all matters relating to the SIAA are agreed¹, **with the exception** of the assessment and conclusions of the SIAA in relation to the potential impacts of the Project on the North Pennines Moors SAC.
- 2.2 For the reasons set out in various submissions, including its overarching response to the R17 submitted at this Deadline 9 and the HRA supplementary note also submitted at this Deadline 9, **National Highways remains confident in the conclusions contained in the SIAA** that the Project would not have an adverse effect on the integrity of the North Pennines SAC.
- 2.3 For all of the reasons set out in, for example, its PADSS [REP7-180], its comments on the RIES [REP7-181] and its response to the R17 submitted at this Deadline 9 **NE cannot at this stage confirm that it agrees with the assessment and conclusions of the SIAA** that the Project would not have an adverse effect on the integrity of the North Pennines Moors SAC.
- 2.4 NE are currently reviewing the HRA Supplementary Note, received on Tuesday 23rd May 2023. Whilst this is still under review, NE is concerned that an adverse effect on the integrity of the North Pennines Moors SAC cannot be discounted and mitigation measures may be necessary.
- 2.5 Notwithstanding the disagreement existing at this stage, both parties are committed to continuing meaningful engagement on the issue of the assessment and conclusions of the SIAA in relation to the North Pennines Moors SAC with a view to reaching agreement on them. Given this, **the parties agree:**
- 2.5.1 to put in place regular meetings (commencing as soon as reasonably practicable after the close of the Examination) for the duration of the ExA's three month recommendation period to discuss the SIAA's assessment and conclusions in relation to the North Pennines Moors SAC; and

¹ This is evidenced in the Statement of Common Ground between the parties.

2.5.2 to jointly report to the Secretary of State, as soon as possible after the ExA's recommendation period has ended or earlier, on progress between the parties on reaching agreement on the issue of the assessment and conclusions of the SIAA in relation to the North Pennines Moors SAC.

2.6 The parties have reviewed the ExA's proposed drafting contained in Annex A of the R17 in relation to an air quality mitigation scheme. Whilst acknowledging the aim of the ExA in suggesting this wording, the **parties agree** that the drafting as suggested would not be effective or appropriate in the proposed form. This is because whilst discussions are on-going, the need for and/or nature of any mitigation cannot be determined.

2.7 Given this, **the parties agree** that as part of the update provided to the Secretary of State referenced in paragraph 2.5.2 above, the parties will provide (if considered necessary following the continued engagement) proposed drafting for a control mechanism to aid the Secretary of State in their determination.

26 May 2023

Appendix C: Joint Position Statement between National Highways and Historic England

A66 NORTHERN TRANS-PENNINE PROJECT

JOINT POSITION STATEMENT BETWEEN THE APPLICANT AND HISTORIC ENGLAND

OUTSTANDING MATTERS RELATING TO THE ENVIRONMENTAL MANAGEMENT PLAN

1. INTRODUCTION

- 1.1 This document responds to a request for information from the Examining Authority (**ExA**) under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) dated 19 May 2023 (**the R17**) [PD-016].
- 1.2 In the R17, the ExA requested an agreed position between the Applicant and Historic England in respect of various outstanding matters relating to the Environment Management Plan (**EMP**) process, primarily as set out in Historic England's Deadline 8 submission: Final Principal Areas of Disagreement Summary Statement [REP8-078].
- 1.3 This document is therefore intended to provide the ExA with a clear understanding of the position of both parties in respect of these matters at the close of Examination.
- 1.4 This document has been agreed by both the Applicant and Historic England and has been submitted into the Examination by both parties at Deadline 9.

2. POSITION OF THE PARTIES

- 2.1 The Applicant and Historic England consider that there has been positive engagement between them throughout the Examination, as recorded in the relevant Statement of Common Ground submitted at Deadline 8 [REP8-024]. In particular, this engagement has resulted in the parties being able to narrow the issues raised in Historic England's Deadline 8 submission to two principal points:
 - 2.1.1 whether any external oversight of the Applicant's internal handling arrangements for post-consent determinations arising under the EMP is required; and
 - 2.1.2 the standard to which archaeological investigations and mitigation works 'carved out' of the definition of "commencement" in article 53 of the DCO are carried out and supervised pursuant to the DCO.
- 2.2 **For the avoidance of doubt, the parties have not been able to reach agreement on these two points. The parties therefore agree that they will need to be determined by the Secretary of State.**
- 2.3 To aid the ExA and the Secretary of State, the parties have summarised their respective positions on these points in the table below.

	Issue	Historic England position	Applicant's response
1.	<p>Whether any external oversight of the Applicant's internal handling arrangements for post-consent determinations arising under the EMP is required.</p>	<p>The Applicant proposes that it will be responsible for post-consent approvals of 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.</p> <p>Historic England consider that if it is not possible for the Applicant to set out the proposed handling arrangements at this stage, the arrangements the Applicant does put in the place should be consulted on and approved by the Secretary of State rather than being published by the Applicant. The obligation for consultation to take place should be included in the DCO and reflected in the EMP.</p> <p>Any substantive change in the arrangements for the separation of functions should be excluded from the amendment the Applicant is able to make to the EMP and should be subject to consultation.</p>	<p>The Applicant considers it is not reasonable or practicable for the EMP, established at a specific point in time, to set out the required governance procedures that would need to work effectively and appropriately within the Applicant's wider organisation. It is not therefore possible to set out the exact steps that may be needed to achieve a functionally separate determination (via 'handling arrangements') at this point. Subjecting such arrangements to specific Secretary of State approval would result in a cumbersome, slow and inflexible arrangement running counter to the whole rationale underlying article 53 and the approach being taken to the EMP, and it would also be disproportionate and unprecedented.</p> <p>The Applicant recognises the need to provide clarity on the efficacy of the arrangements, but must retain sufficient flexibility for future organisational change. As such, it has set out in the EMP (section 1.4) defined principles that the handling arrangements at any one particular time must be in accordance with (which are 'secured', as they are captured by the definition of "the consultation and determination provisions" in article 53(12) of the DCO, which cannot be amended without amendment to the DCO itself).</p>
2.	<p>The standard to which archaeological investigations and mitigation works 'carved out' of the definition of "commencement" in article 53 of the DCO are carried out and supervised</p>	<p>Although the archaeological investigation and mitigation work taking place post-commencement will be controlled with reference to a Heritage Mitigation Strategy, the draft DCO and EMP allows archaeological investigations and mitigation works to be undertaken without triggering commencement and does not specify the standard to which these works will be carried out.</p> <p>There are a significant number of scheduled monuments which could be affected by pre-commencement archaeological investigations.</p>	<p>The exclusion of pre-commencement archaeological investigations and mitigation works from the requirement of the Heritage Mitigation Strategy being in place has been accepted on a number of DCOs, and will give the Applicant flexibility to carry out pre-commencement works ahead of the start of the main works (which could streamline the programming of works, reducing disruption). Any main works that could have an impact on cultural heritage receptors could not be carried out without a second iteration EMP being in place, and therefore the Heritage Mitigation Strategy (as a result of article 53 of the DCO).</p>

	Issue	Historic England position	Applicant's response
	pursuant to the DCO.	Historic England request a change of wording in the DCO to require that any pre-commencement archaeological investigation and mitigation works are carried out to the same standard as works taking place post-commencement.	It would not be in the Applicant's interests to undertake any pre-commencement works that could fetter its ability to comply with subsequent archaeological mitigation obligations contained in a second iteration EMP, in the process of undertaking the main works, as that would introduce the risk that those main works could not be lawfully carried out.

2.4 Notwithstanding the parties' respective positions set out above, in the event that the Secretary of State agrees with Historic England on these points, the parties have **agreed** (on a without prejudice basis from the Applicant's perspective) drafting to address both issues.

2.5 In respect of Issue 1, should the Secretary of State agree with Historic England, the **parties agree** that the following drafting should be added to article 53 as a new paragraphs (12) and (13):

“(12) The undertaker must not make a determination under-

- (a) *a second iteration EMP approved under paragraph (1);*
- (b) *paragraph (6); or*
- (c) *paragraph (10),*

until the arrangements for the undertaker to make such a determination (including details on how the matters contained in paragraph 1.4.48 of the first iteration EMP are to be addressed) have been submitted to and approved in writing by the Secretary of State, following such consultation as the Secretary of State considers to be appropriate.

(13) The undertaker must make any determination under the provisions listed in paragraph (12) in accordance with the arrangements approved under that paragraph unless the Secretary of State subsequently approves alternative arrangements in writing, following such consultation as the Secretary of State considers to be appropriate.”

2.6 In respect of Issue 2, should the Secretary of State agree with Historic England, the **parties agree** that the definition of “commence” in article 53(12) should be amended to the following (amendments underlined and in bold):

*““commence” means beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of archaeological investigations and mitigation works **(but only to the extent undertaken in***

accordance with the guidance documents specified in paragraph B3.3.4 of Annex B3 of the first iteration EMP, 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 and erection of construction plant and equipment and the temporary display of site notices or advertisements, and “commencement” is to be construed accordingly.”

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