

A66 NORTHERN TRANS-PENNINE UPGRADE PROJECT (THE PROJECT)

POST-EXAMINATION POSITION STATEMENT ON BEHALF OF NATURAL ENGLAND

HABITATS REGULATION ASSESSMENT AND NORTH PENNINE MOORS SAC

Natural England (NE) provide the following comments in response to the Request for Information dated 30 August 2023 issued by the Secretary of State to Natural England and National Highways in relation to the Application for the A66 Northern Trans Pennine Project. This includes comments on the information contained in the Applicant's letter dated 25 August 2023 in relation to the Habitats Regulations Assessment and the information attached at Annex 1.

In summary:

- NE continue to engage and welcome discussions with National Highways on what mitigation measures might be achievable and that are used on other schemes, for example, the reduction in speed limits. NE remain happy to have dialogue with National Highways about mitigation and if necessary, what compensation would look like.
- We would still welcome further information/conversation with National Highways on the air quality impacts of the project proposals on the North Pennine Moors SAC in accordance with the statutory framework. The additional information supplied still does not resolve the concerns previously raised and highlighted in our submissions to the Examining Authority. We are currently unable to agree a joint position in relation to the air quality impacts on the SAC from the A66 proposals.
- We are in agreement with National Highways that the removal of Scheme 06 would not mitigate the air quality issue as noted by National Highways in their 25 August response. See Annex 1 of this letter for the full detail of our position. We do not consider that National Highways has adequately followed the processes to address the air quality impacts as set out in our published advice [Natural England's approach to advising competent authorities on the assessment of road traffic emissions under the Habitats Regulations - NEA001](#) or within Government's advice on [Habitats regulations assessments: protecting a European site - GOV.UK \(www.gov.uk\)](#) and the Planning Inspectorate [Advice Note Ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects | National Infrastructure Planning \(planninginspectorate.gov.uk\)](#). The justifications given do not engage with the legal framework and accordingly do not provide us suitable evidence to advise that there is no Adverse Effect on Integrity.
- Whilst we welcome the measures proposed in the Blanket Bog and Land Management Plan, they will not prevent the impacts from the road and read like compensatory rather than mitigation measures. They would be beneficial in their own right as part of wider measures to address some of the existing impacts of this road and in line with the [Environmental Sustainability Strategy - National Highways](#).
- NE have provided advice on the methodology and the results in the Appropriate Assessment of the HRA. Our current position is that the justification is not based on scientific evidence in relation to the specific site, if a potential adverse effect is accepted as the conclusion of the HRA we would be happy to continue discussions on mitigation. Where mitigation is not possible the applicant will need to apply to the Competent Authority for the derogation test, at which point, NE would be happy to review any compensation proposals.
- Due to the significance of the project and the timeline left for a decision from the SoS, the SoS may decide the case needs to go through the IROPI tests and may be the appropriate way forward. NE will be happy to discuss further compensation when consulted by the competent authority. There are likely to be effective compensation options available, although NE would need to carefully consider any compensation proposed, and how it would be effectively secured.

- We remain committed to working with National Highways to explore any appropriate ways forward to progress this project and to develop appropriate approaches for us to handle similar issues on other schemes, including through innovative pilot solutions which may include Protected Sites Strategies. We will be in touch with National Highways to offer a CEO to CEO conversation.
- During this final post-examination period NE has reached out, engaging with National Highways on the different options that may be available to them, including exploring derogations through IROPI and how that may allow the road scheme to proceed whilst securing an appropriate package of compensatory measures.

Annex 1 – Detailed Position Statement

The purpose of this document is to provide a high-level summary to the Secretary of State of Natural England's continuing position. Natural England remains committed to continued dialogue with National Highways to identify whether agreed positions can be reached.

1. IMPORTANCE OF THE NORTH PENNINE MOORS SAC AND BLANKET BOG

- 1.1 The North Pennine Moors Special Area of Conservation (SAC) contains extensive areas of Blanket Bogs which are a priority natural habitat. The Conservation Objectives for the SAC are to ensure that the integrity of the site is maintained or restored as appropriate, including that the site contributes to achieving Favourable Conservation Status by maintaining or restoring the blanket bog ([European Site Conservation Objectives for North Pennine Moors SAC - UK0030033 \(naturalengland.org.uk\)](https://www.naturalengland.org.uk/conservation/objectives/north-pennine-moors-sac)).¹
- 1.2 Peatlands, such as blanket bog, are key ecosystems that can deliver important services for the benefit of society and the economy. The UK's blanket bog comprises around 10-15% of the world's entire resource, with about a quarter of this in England. Peat and peatlands are among the most important habitat England has to offer, storing an estimated 580 million tonnes of carbon.
- 1.3 Degraded peatlands in England release an estimated 10 million tonnes CO₂ emissions into the atmosphere each year. Unfortunately, most of our peatlands, even remote areas of blanket bog, have been damaged and degraded. These ecosystems are especially sensitive to nitrogen-based air pollutants.
- 1.4 For further information, please see ([Blanket bogs, a natural asset - Natural England \(blog.gov.uk\)](https://www.blog.gov.uk/2019/03/blanket-bogs-a-natural-asset/))
- 1.5 There is ample evidence to describe the effect of nitrogen and ammonia on sensitive ecosystems, including bogs and peatlands. See [Nitrogen deposition :: Bogs | Air Pollution Information System \(apis.ac.uk\)](https://www.apis.ac.uk/nitrogen-deposition-bogs) and [Ammonia :: Bogs | Air Pollution Information System \(apis.ac.uk\)](https://www.apis.ac.uk/ammonia-bogs) for an overview of the known impacts of these pollutants specifically to bog habitats.

2. LEGAL TESTS IN A HABITATS REGULATION ASSESSMENT

- 2.1 The test to be considered is set out in the Conservation of Habitats and Species Regulations 2017 ("the 2017 Regulations"). For ease of reference, these state that:

"63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site...."

- 2.2 The precautionary burden of proof required when issuing an authorisation for operations affecting a European site has been repeatedly upheld in case law , most notably in case c-127/02 (Waddenzee),

¹ See also Supplementary Advice Document [UK0030033 North Pennine Moors SAC Published 07 Nov 2022 \(naturalengland.org.uk\)](https://www.naturalengland.org.uk/conservation/objectives/north-pennine-moors-sac) and Site Improvement Plan (SiP) [Site Improvement Plan: North Pennines Group - SIP154 \(naturalengland.org.uk\)](https://www.naturalengland.org.uk/conservation/objectives/north-pennine-moors-sac)

where the court stated (at paragraph 61 of the ruling) that competent national authorities should issue such an authorisation:

“only if they have made certain that it will not adversely affect the integrity of [the]... site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”

2.3 We note from National Highways SIAA (para 1.6.32) that this description of the level of scientific certainty needed (i.e. beyond reasonable scientific doubt) is agreed.

2.4 So, to summarise the position, the competent authority needs sufficient information to assess:

2.5 Question 1 – is the project likely to have a significant effect on a European site (the “screening test”)?

2.6 And if the answer to question 1 is yes, then to move to consider Question 2 – will there be an adverse effect on the integrity of the European site?

2.7 If, having assessed the scientific evidence, the competent authority decides that the answer to question 2 is either yes, there will be an adverse effect on the integrity of the site, or concludes that there is reasonable scientific doubt that there will not be an adverse effect on the integrity of the site, then unless there is sufficient mitigation, the competent authority should then proceed to consider the subsequent legal steps at Regulation 64 of the 2017 Regulations and whether consent should be granted due to imperative reasons of overriding public interest.

3. **NATURAL ENGLAND’S COMMENTS ON NATIONAL HIGHWAYS’ HRA**

3.1 Following a positive screening result (APP-234), (i.e. National Highways concluded that the project was likely to have a significant effect on a European site in response to question 1 above), National Highways submitted an HRA stage 2 to set out its analysis of whether there would be an adverse effect on the integrity of the North Pennine Moors SAC (APP-235) (the “**SIAA**” noted above).

3.2 They concluded that there would be no adverse effect on integrity of the site due to the proportion of blanket bog affected, because the critical load is already exceeded and the contribution of the project in the context of nitrogen sources from air pollution is “negligible” (paras 1.6.30-2). They therefore did not go on to consider mitigation measures (para 1.6.33).

3.3 National Highways also submitted a Supplementary Note to the HRA at Deadline 9 (REP9-036):

3.3.1 In particular they expanded their analysis to include gaseous NO_x and ammonia (not just nitrogen deposition). They confirmed a maximum 17.6% increase in nitrogen (para 2.1.7), up to 13.7% increase in ammonia (para 2.1.16) and up to 12.5% increase of NO_x (para 2.1.21). The existing background levels of air pollution at the site exceed the critical loads and levels, which are assigned to indicate the point at which harm is likely to occur, and the in-combination contribution from the project both exceed the 1% threshold applied to screen in projects.

3.3.2 National Highways conclusions in that Supplementary Note refer to other nitrogen sources of pollution, other pressures affecting the SAC, future reverses in air quality and the small area of the SAC potentially affected, concluding again adverse effects on the integrity of the SAC can be ruled out and therefore they did not need to proceed to the further step of looking at possible mitigation measures.

3.4 Natural England was provided with a draft second supplementary note to the HRA which National Highways finalised and submitted on 25 August 2023, in response to the Secretary of State’s letter of 11 August 2023. We have had two meetings with National Highways to discuss their proposed response to the Secretary of State’s letter of 11 August 2023, and whilst we found areas of common understanding, we were still unable to agree with their proposed conclusions.

- 3.4.1 We understand National Highways still focus on other pressures which in their view are impeding the ability to restore the site and propose potential opportunities to enhance the resilience of the habitats through a “Blanket bog land management plan” to better accommodate the impacts of the damaging emissions from the project. However even if those pressures are tackled then it will still not negate the impact of the emissions produced by the project and would appear to be more compensatory rather than mitigation. The arguments that the contribution of emissions from this project are not significant because there are other significant sources impacting the site, are not relevant to the purpose of the HRA for this project.
- 3.4.2 We understand that National Highways conclude that because the pollutants from the project will only be a relatively small proportion of the nitrogen deposited at the site, there are other management challenges at the site, and future (medium/long-term) developments may reduce emissions, that the project will not have an adverse effect on the integrity of the site.
- 3.4.3 We understand that National Highways refer to the prediction that NOX emissions will decline post 2030 – however, ammonia emissions are not decreasing. Ammonia is also a pollutant from vehicle emissions. The Emission Factor Toolkit also makes it clear that where emissions are to be used after 2030 to inform air quality assessments that the appropriate limitations of the analysis must be provided as part of the assessment. It is currently unclear whether National Highways has considered these limitations in their assessment. It is also currently unknown if future predictions are overly optimistic – especially given the lack of current incentives for consumers to switch to electric vehicles.
- 3.4.4 We understand that because National Highways continue to conclude that the project will not have an adverse effect on the integrity of that site, they are not proposing to put forward any mitigation proposals to address the air quality impacts of the project.

4. **NATURAL ENGLAND’S ADVICE**

- 4.1 Whilst we would not disagree with many of the factors affecting the SAC described by National Highways, they are not relevant at the stage of assessing whether the project will have an adverse effect on the integrity of the site. Although Natural England would welcome engagement on more positive management practices at the site (and this could potentially be an element of compensation considered should the derogations route under the 2017 Regulations be followed) we are disappointed that National Highways still do not sufficiently address the key question which is whether, beyond reasonable scientific doubt, the increase of air pollution due to the project will (or will not) have an adverse effect on the integrity of the site by reference to the effect that the increased air emissions caused by the project will have on the North Pennine Moors SAC and in particular the bog habitat. Please note that Natural England has published guidance regarding emissions from roads and the advice we have provided is consistent with this approach ([Natural England’s approach to advising competent authorities on the assessment of road traffic emissions under the Habitats Regulations - NEA001](#)).
- 4.2 It is Natural England’s view that if National Highways are unable to demonstrate beyond reasonable scientific doubt that the project will not have an adverse effect on the integrity of the site, then the derogation tests in Regulation 64 of the 2017 Regulations should be considered.
- 4.3 The blanket bog and its surrounding mosaic habitat is an irreplaceable habitat and the main designated feature of the North Pennine Moors SAC. National Highways has concluded that it does not have an adverse effect on the integrity of the site due to it being less than 1% of the entire SAC. However, in our view, this is not the correct approach to the determination of whether there is an adverse effect on integrity. It is the relative importance of the area affected in terms of the rarity, location, distribution, vulnerability to change and ecological structure which is most important. The contribution the affected area makes the overall integrity at the site (and hence that site’s contribution

to the conservation status of that habitat type) should exert a stronger influence over decision makers than the spatial extent of the effect (see [Small-scale effects: NECR205 \(naturalengland.org.uk\)](https://naturalengland.org.uk)). Accordingly, the appropriate assessment needs to explore the ecological function of this section of the site, including the level and function of species on this site and its ability to reach favourable condition. This analysis hasn't been adequately covered in the HRA, despite being raised by NE consistently in its submissions throughout the examination. Natural England discussed and outlined our concerns regarding the air quality methodology and conclusions in the HRA at both Relevant Representations (3rd September 2022), Written Representations (16th December 2022) and Primary Areas of Disagreement Summary Statements (PADSS) stages of the examination.

- 4.4 It remains Natural England's position that, based on the current evidence and analysis provided by National Highways in support of its application, it is not possible to conclude that the further deterioration of 8.25ha (20.39 acres) of Blanket Bog and its surrounding mosaic habitat will not have an adverse effect on the integrity of the North Pennine Moors SAC. It is important to assess the potential for the 8.25ha and surrounding habitats to return to favourable condition and the project should not hinder the sites' ability to reach its conservation objectives.
- 4.5 Aside from potential speed reduction measures, which we understand National Highways are not proposing, Natural England has not received any mitigation proposals for the project. In the absence of potential mitigation options, NE are concerned that adverse impacts of the project on the SAC may not be sufficiently mitigated.
- 4.6 In situations where adequate mitigation is not available, the competent authority is able to consider the use of derogations, utilising its three tests to determine the application status (see regulation 64 of the Conservation of Habitats and Species Regulations 2017). The process for moving through the derogation tests can be found in further detail through the following link, as there are specific requirements when compensating priority habitats. [Habitats regulations assessments: protecting a European site - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site)
- 4.7 Natural England are happy to continue engagement to explore appropriate mitigation solutions and/or to be part of discussions to assess the suitability of compensation if needed through the derogation tests. During this final post-examination period Natural England has reached out, engaging with National Highways on the different options that may be available to them, including exploring derogations through IROPI and how that may allow the road scheme to proceed whilst securing an appropriate package of compensatory measures.

Natural England's letter of 08 September 2023