Response to:

Consultation 3 on A66 Northern Trans-Pennine DCO

Introduction

Transport Action Network (TAN) welcomes the opportunity to respond to the Secretary of State's 15 September letter (consultation 3). Our response is below. However, we note that the Secretary of State has only allowed the Applicant and Interested Parties (IPs) five working days to respond. He has also only allowed five working days for IPs to read through the 18 responses published late on 15 September and, if necessary, submit their responses. This is not sufficient time, and runs counter to the Aarhus Convention and to natural justice. Nor did the Secretary of State invite IPs to comment on the responses to the second consultation which were published on 15 September 2023. IPs should be given the opportunity to respond to the evidence published on 15 September.

We are a small organisation with limited resources and have not been given adequate time to respond to the submissions published on 15 September. We will be submitting a response to the matters raised on 15 September next week, and ask that the Secretary of State wait for our response and take this into consideration in his decision making.

We request this submission is put before the Secretary of State and is considered in his decision making. We draw the Secretary of State's particular attention to our submissions on the North Pennine Moors Special Area of Conservation.

The legal position

Section 104 of the 2008 Planning Act (**"the Planning Act"**) requires that the Secretary of State must not grant the DCO if doing so "would lead to the United Kingdom being in breach of any of its international obligations" (104 (4)), "would be unlawful by virtue of any enactment" (104 (6)), "the adverse impact of the proposed development would outweigh its benefits." (104 (7)).

Section 122(3) of the Planning Act 2008 also requires that permission should only be granted and property acquired compulsorily if "there is a compelling case in the public interest for the land to be acquired compulsorily".

Regulation 21 (1) (b) of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (**"EIA Regs"**) require the Secretary of State must "reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary"

Regulation 21 (2) of the EIA Regs require that "The reasoned conclusion referred to in paragraph (1)(b) must be **up to date** at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application."

NORTH PENNINE MOORS SPECIAL AREA OF CONSERVATION (SAC)

Transport Action Network (**"TAN"**) notes Natural England's (**"NE's"**) conclusion that adverse effects on the integrity ("AEoI") of the North Pennine Moors Special Area of Conservation (**"SAC"**), including in particular the extensive area of blanket bog within the SAC, cannot be ruled out. The blanket bog is a priority habitat and the conservation objectives of the SAC include maintaining and restoring this habitat.

National Highways (**"NH"**) have suggested that no AEoI to the SAC will arise, contrary to NE's advice. Their position is that, should the Secretary of State determine that measures are required to prevent AEoI from arising, then they would implement a series of measures set out in a Blanket Bog and Land Management Plan (**"BBLMP"**). A draft of the BBLMP has not at present been submitted by NH. Only a rough outline of what measures might be included in the BBLMP has been provided in NH's Habitats Regulations Assessment Second Supplementary Note dated 25 August 2023.

NH suggest that the BBLMP would prevent AEoI arising at all. NE disagree and conclude that the measures are of a compensatory nature. They would therefore not prevent AEoI and would require the derogation process to be followed before the project could be consented. TAN agrees for the reasons set out below.

The measures, even if they could be secured and shown to be effective, would aim, in NH's words:

"*…to restore and enhance the habitats in the 65m zone where there is potential for air quality changes by addressing the more dominant land management pressures that are currently affecting the condition of the Blanket Bog habitats in this area and adjacent. The aim of this would be to work towards bringing the habitats into favourable condition, by addressing the historic damage, and increasing the resilience of the habitats to the minor increase in pollutants predicted as a result of the Project.*" (para 4.1.5)

The European Commission's *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC*[1] defines "compensatory measures" as being measures which are:

"*independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained*".

The BBLMP clearly falls within this definition. It is not part of the project itself. It would involve external measures to improve the integrity of the SAC so that it will be more capable of absorbing the AEoI which the project will entail. That is compensation not mitigation.

TAN notes that NE suggest that the Secretary of State "*may decide that the case needs to go through the IROPI tests and [that] may be the appropriate way forward*". NE have not provided any advice as to whether the IROPI tests would be satisfied. TAN believes that they would not be in this case for the following reasons:

First, insufficient information has been provided to justify any assertion that the IROPI tests have been met. As set out in PINS' *Advice Note Ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects*, "*Applicants should include with their DCO application such information as may reasonably be required to assess potential derogations under the Habitats Regulations*". A significant amount of information will be required in order to demonstrate that the IROPI tests are met. The standard of proof is a high one, particularly in relation to any purported justification for the effectiveness of proposed compensatory measures, which must be shown to be effective beyond all reasonable scientific doubt. See for example *Grace, Sweetman* C-164/17:

"*51. It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out […]*

52. As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future […]

53. It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the

implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development…"

Furthermore, given the proposed BBLMP is necessary in order to assess the effects of the project on the SAC, the measures proposed in the BBLMP are "further information" which should be consulted on as part of a revised environmental statement. **The Secretary of State should therefore suspend consideration of the application until the information has been provided and consulted on in accordance with Regulation 20(3) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017**.

Second, there has been no assessment of alternative solutions that do not entail AEoI.

Third, there has been no assessment of what reasons would amount to IROPI and why. In this case, the habitat in question is a priority habitat, as identified by NE. The IROPI are therefore required to relate to human health, public safety or beneficial consequences of primary importance to the environment. None of these interests is engaged in this case. While NH has put forward some public safety arguments to justify the project, there is no suggestion (and nor could there be) that such public safety interests amount to IROPI. Even if such interests were to amount to IROPI, an explanation would be needed as to why any public safety benefits could not be achieved by an alternative solution (such as lower speeds, or small-scale junction improvements).

A significant amount of evidence is therefore required in order to justify any suggestion by NH that a derogation is appropriate. If NH does wish to rely on the derogation procedure, a timetable must be agreed for the submission of such evidence, including appropriate consultation with NE and interested parties.

PARTICULATE MATTER

We would like an opportunity to respond to the Applicant's response to Dr Boswell's submission, which is due on 22 September, particularly in the light of the 20 September announcement by the Prime Minister to delay the ban on the sale of new fossil fuel powered vehicles from 2030 to 2035. In particular, we would like to comment on the impact on nitrogen deposition in the two SACs that will be adversely affected by the A66 scheme.

INADEQUATE CONSULTATION TIME

TAN does not consider it fair and acceptable to give Interested Parties (IPs) just five working days (from late on 15 September to 22 September) to respond to the Secretary of State's 15 September letter and the 18 submissions published on 15 September.

There is a real risk that such short a consultation period will breach the provisions of the Aarhus Convention[1]. Article 6.3 requires "public participation procedures [to] include reasonable time-frames…for the public to prepare and participate effectively during the environmental decision-making".

We suggest that in future IPs should be given a minimum of 21 days to respond to post-examination consultation responses. All new evidence submitted to the Secretary of State should be published.

[1] Text of the Aarhus Convention (UNECE) (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998)

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Transport Action Network

Transport Action Network provides free support to people and groups pressing for more sustainable transport in their area and opposing cuts to bus and rail services, damaging road schemes and large unsustainable developments

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