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Nathan Dyer
Transport Infrastructure Planning Unit

29 November 2023

Sent by email to:
A66Dualling@planninginspectorate.gov.uk

Dear Mr Dyer,

A66 Northern Trans-Pennine Project TR010062 (the Project)
DCO Application (the DCO Application)

Applicant's response to the Secretary of State's sixth Request for Information dated 8 November 2023 (the RfI)

I am writing in response to the RfI dated 8 November 2023 issued by the Secretary of State to National Highways (**the Applicant**) in relation to the Development Consent Order (**DCO**) Application for the A66 Northern Trans-Pennine Project (**the Project**).

The RfI requests the Applicant to provide a response in relation to the following matters:

- Actions resulting from the completion of the Applicant's acquisition of Public Trustee (**PT**) land (plot 07-02-45);
- Updates on the outstanding side agreements;
- Comments on the proposed revised drafting of articles 53 and 54 of the draft DCO put forward by the Secretary of State; and
- Comments on any implications on the Project of the Government's response to the Climate Change Committee Progress Report 2023.

In this letter, the Applicant provides responses to these matters in turn, using the numbered paragraphs in the RfI for reference.

In relation to other points relevant to the Applicant that have been raised by other Interested Parties (IPs) in their submissions made in response to the Secretary of State's previous RfI of 18 October 2023, and the submission made on behalf of the Brough Hill Fair Community Association published 22 November 2023, the Applicant notes that it has

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not been asked to respond to these points by the Secretary of State in this (or any other) RfI, and notes that it has responded to materially the same points in detail throughout the examination of the DCO Application and in subsequent correspondence. Therefore, to avoid repetition and creating a paper chase, this response focuses on matters which the Applicant has been directly asked to respond to. The Applicant has therefore chosen not to repeat its previous submissions in this letter, which mirrors the approach taken by the Applicant in its response to previous RfIs. The Applicant refers IPs and the Secretary of State to previous submissions and correspondence on these matters, and these points raised by the IPs are not to be taken as accepted by the Applicant.

Attached to this response are the following documents:

- Annex 1 – updated Book of Reference for Scheme 07;
- Annex 2 – withdrawn Crown Land Plan for Scheme 07; and
- Annex 3 – comparison between the drafting of articles 53 and 54 of the draft DCO as proposed by the Applicant by the end of the examination and the drafting now proposed by the Secretary of State.

<u>Paragraph 3 – actions resulting from the completion of the Applicant's acquisition of Public Trustee land (plot 07-02-45)</u>

Following the Applicant's acquisition of the PT land, the question of whether or not it is Crown land falls away (as envisaged in the Applicant's Deadline 9 submission, *Update on land owned by the Public Trustee* **[REP9-037]**). In light of this, the Applicant has submitted an updated Book of Reference for Scheme 07 (Annex 1 – replacing **[REP8-046]**), withdrawn Crown Land Plans for Scheme 07 (Annex 2 – replacing **[APP-313]**) and a request for an amendment to the drafting of Schedule 10 to the draft DCO. These updates are summarised in turn below.

<u>Updates to the Book of Reference for Scheme 07</u>

The Applicant has updated paragraph 2.4.3 of the introductory text to remove the wording "*and the Public Trustee*", which is no longer required.

In Part 1, the Applicant has replaced references to the PT as the owner and occupier of plot 07-02-45 with references to the Applicant as the owner and occupier of that plot.

In Part 4, the Applicant has deleted references to plot 07-02-45 and to the PT as the owner of that plot. As there is no Crown land within the Order limits for Scheme 07, Part 4 of the Book of Reference for Scheme 07 is now blank.

The Applicant notes that no amendments are required to Parts 3 or 5 of the Book of Reference for Scheme 07.

Withdrawal of the Crown Land Plans for Scheme 07

As plot 07-02-45 was the only plot of Crown land for Scheme 07, there is no longer any need for Crown Land Plans for Scheme 07. The Applicant has therefore withdrawn this document **[APP-313]** and has produced a version watermarked 'withdrawn' throughout.

Amended drafting of Schedule 10 to the draft DCO

In light of the above, the Applicant requests that Schedule 10 to the draft DCO be amended to delete the reference to the Crown Land Plans for Scheme 07 from the list of certified documents.

The Applicant does not consider that any other amendments are required to the draft DCO, in consequence of the Applicant's acquisition of plot 07-02-45 from the PT.

In addition to the above, the Applicant notes that the RfI also requested that the Applicant provide updated Land Plans for Scheme 07, replacing **[REP8-063]**. However, the Applicant wishes to retain its proposed compulsory acquisition powers over plot 07-02-45 for precautionary purposes, in order to ensure that the title to this plot can be 'cleansed' if necessary (given that the Book of Reference indicates that there are separate third party interests under Category 1, in relation to mines and minerals, and Category 2), and to enable the exercising of temporary possession powers prior to the acquisition of those third party interests. Therefore, the Applicant does not consider that updates to the Land Plans for Scheme 07 are required.

Paragraph 4 – updates on outstanding side agreements

The Applicant notes the Secretary of State's request for an update on the outstanding side agreements, which is provided in turn below and demonstrates that no further side agreements remain outstanding.

North Yorkshire Council

The side agreement between the Applicant and North Yorkshire Council was completed on 3 November 2023.

Westmorland and Furness Council

The side agreement between the Applicant and Westmorland and Furness Council was completed on 1 November 2023.

Durham County Council

The side agreement between the Applicant and Durham County Council was completed on 24 November 2023.

Paragraph 6 – comments on the proposed drafting of articles 53 and 54 of the draft DCO put forward by the Secretary of State in the RfI

The Applicant has carefully considered the proposed amendments to the drafting of article 53 and 54 of the Applicant's draft DCO. To assist all concerned, the Applicant has provided in Annex 3 a comparison between the drafting of those articles as proposed by the Applicant by the end of the Examination and the drafting now proposed by the Secretary of State.

In this response, unless context suggests otherwise, a reference to the Applicant's draft DCO is a reference to the Deadline 9 version of the draft DCO **[REP9-013]** and references to the Secretary of State's proposals are references to the proposed drafting of articles 53 and 54 appended to the RfI.

Before considering the detail of those proposed amendments, it is necessary to set out the context in which those provisions have been developed, how they are intended to operate and the benefits to the timely delivery of this nationally significant infrastructure project and the wider public benefits they would bring.

'Project Speed'

To put the Applicant's response into its proper context it is important to acknowledge that, as is set out in paragraphs 1.4.1 to 1.4.7 of the first iteration Environmental Management Plan **[REP8-005]**, the Project was identified as one of the 'vital infrastructure projects' to be taken forward under the UK Government's 'Project Speed' initiative announced as part of a *'A New Deal for Britain'* (Prime Minister's Office, 2020). The Project Speed initiative aims to bring forward proposals to deliver public investment projects more strategically and efficiently, seeking to cut down the time it takes to design, develop and deliver the 'right things better and faster than before'.

The first iteration EMP and article 53 – the Applicant's response to Project Speed

To contribute to this initiative, the Applicant considered how it could streamline and improve the processes for post consent determinations that are required before the Project can proceed, if development consent is granted. This ethos underlies the first iteration EMP, intended to be a single document that sets out the post consent determinations that are required to be made before the Project can proceed. It is intended to be a single repository of both the substance of the environmental management required for the Project and the process by which those determinations are to be made, set out in plain English and without requiring the participants in the process to also have to cross-refer to detailed and potentially conflicting, as well as part duplicated, provisions set out in a statutory instrument.

It is also important to acknowledge that the Applicant did not embark on this approach alone; it is the product of a considerable amount of consultation and engagement with, and contributions from, key stakeholders through the development of the Project, from

pre-application through to Examination. This can be seen from the Project's Preliminary Environmental Information Report **[APP-265]** where the implications of the approach to EIA were clearly set out in the introduction section 1.3 of that report, (see pages 8 to 10 of the PDF / page 1-3 to 1-5 of the document contained in **[APP-265]**) and Appendix 4.1 (Outline Environmental Management Plan, see pages 125 to 133 of the PDF / pages A4-1.5 to A4-1.11 of **[APP-265]**) sought views on the approaches under consideration at that time, including the approach of replacing the typical requirements contained in a Schedule to National Highways' DCOs with an all-encompassing and iterative Environmental Management Plan process.

<u>The consultation and determination provisions contained in the first iteration EMP</u>

Importantly, the first iteration EMP contains a detailed process of consultation that must be followed prior to post consent determinations being made. This is set out in paragraphs 1.4.9 to 1.4.52 of the first iteration EMP and is defined in article 53(12) as "the consultation and determination provisions". Consistent with the 'front loading' approach underlying the Planning Act 2008 regime, this provides for a two-stage consultation process whereby consultee views are required to be sought on a draft application of the matters to be determined before they are submitted for determination.

In summary the consultation and determination provisions require, before a submission for a post consent approval is made:

- not less than 5 working days' advance notice before consultation begins, to enable consultees to prepare for the receipt of consultation materials;
- a period of 20 working days from receipt of the consultation materials to review, consider and return responses;
- a period for consideration of those consultation responses and for any resulting revisions to the consultation materials to be made and the production of a summary report on the consultation responses to be produced setting out, among other matters, how regard has been had to those responses;
- a further 10 working day period for consultees to review and respond to the changes to the consultation materials arising from the first round of consultation and to consider the summary report; and
- a period for consideration of those further consultation responses and for any resulting revisions to the consultation materials to be made and updates to the summary report to reflect the regard that has been had to those further responses.

The consultation provisions summarised above are the result of amendments during the course of the examination which reflect feedback received from those who would be consulted under its provisions. In addition to providing for consultation, the consultation and determination provisions contain measures to ensure a 'functional separation' between National Highways' role as an approval body and its role as a developer; these are set out in paragraphs 1.4.41 to 1.4.52 of the first iteration EMP.

It also important to acknowledge that the consultation and determination provisions are defined by reference to the first iteration EMP, which would be a certified document under article 49 and therefore effectively 'fixed' through the grant of development consent. As such, there is no risk that these provisions are subsequently altered, other than through the statutory processes that apply to changes to development consent orders.

Further, it is important to note that the Applicant's response to the Project Speed initiative avoids not only the need for a Schedule to the DCO containing requirements, but the typical provisions contained in Part 2 of that Schedule which set out the procedures that apply to post consent determinations, as these are effectively replaced by the 'consultation and determination provisions' contained in the first iteration EMP.

Overview of the operation of article 53 contained in the Applicant's draft DCO at the close of the examination

As drafted by the Applicant, article 53 provides that no part of the authorised development is to be commenced until a second iteration EMP has been approved by the Secretary of State for that part. The second iteration EMP is required to be prepared in accordance with the consultation and determination provisions outlined above.

This ensures that before construction begins the detailed construction environmental management measures contained in the first iteration EMP are developed in detail to an appropriate standard, following a front-loaded consultation process before they are submitted for the approval of the Secretary of State in the form of the second iteration EMP.

Changes to the second iteration EMP

Once a second iteration EMP has been approved by the Secretary of State the construction of the part of the project concerned would proceed in accordance with its terms. However, should there be a need to make changes to the second iteration EMP, arising for example as a result of previously unforeseen circumstances that may delay the timely construction of the Project, paragraphs (5) to (9) make provision for changes to be made to a second iteration EMP by either the undertaker or the Secretary of State, depending on the nature of the changes required.

Article 53(7) provides that the undertaker may only determine to amend a second iteration EMP if the undertaker is satisfied that the amendments would be 'substantially in accordance' with the second iteration EMP that has been approved by the Secretary State and that the change would not give rise to any materially new or materially different environmental effects.

'Substantial accordance' is a high threshold for change, permitting only very minor, i.e. 'insubstantial' changes. The baseline against which that is measured is the second iteration EMP approved by the Secretary of State ensuring that successive undertaker-approved changes do not cumulatively allow for substantial changes to the second

iteration EMP approved by the Secretary of State. Importantly, the ‘consultation and determination’ provisions apply to any such changes, ensuring that consultees’ views are taken into account in any decision to change a second iteration EMP.

In response to matters discussed at Issue Specific Hearing 2 (see the Applicant’s Post Hearing Submissions (including written submissions of oral case) **[REP1-009]** under agenda item 2.2) the Applicant introduced the ‘call-in’ provisions contained in paragraphs (8) and (9), ensuring that the Secretary of State has oversight of the exercise of the limited discretion the undertaker is afforded to make changes to an approved second iteration EMP under paragraph (7).

Where a change is required that extends beyond the undertaker’s limited discretion, article 53(5) makes provision for the undertaker to apply for the approval of the Secretary of State to changes to the second iteration EMP. The application must be prepared in accordance with the consultation and determination provisions (summarised above) and, in accordance with paragraph (4), the Secretary of State may only approve a change that does not substantially accord with a previously approved second iteration EMP where such a change would not lead to materially new or materially different environmental effects to those reported in the Environmental Statement (**[APP-043]** to **[APP-233]**). This gives the Secretary of State the same discretion to approve a changed second iteration EMP as would be the case were it a first approval of a second iteration EMP, whilst remaining within the bounds of the environmental assessment.

Taken together:

- minor, i.e. ‘insubstantial’ changes can be made to a second iteration EMP previously approved by the Secretary of State by the undertaker, subject to the supervision of the Secretary of State who may ‘call-in’ such determinations;
- other changes, i.e. those that require a ‘substantial’ change to a second iteration EMP previously approved by the Secretary of State, may be approved by the Secretary of State; and
- all changes, whether ‘insubstantial’ or ‘substantial’ to a previously approved second iteration EMP, must follow the consultation and determination provisions and must not lead to any materially new or materially different environmental effects to those reported in the Environmental Statement (**[APP-043]** to **[APP-233]**).

The purpose and benefits of this approach, which is consistent with the Project Speed initiative, ensure that the delivery of the Project is not delayed by the requirement to obtain the Secretary of State’s approval to ‘insubstantial’ changes to the second iteration EMP during construction, within a framework that assures that the implementation of the Project remains within the bounds of the environmental impact assessment undertaken.

Third iteration EMP

Once the relevant part of the Project has been constructed in accordance with the second iteration EMP, paragraph (10) requires the operation and maintenance measures to be converted into a third iteration EMP following the 'consultation and determination provisions' and approved by the undertaker. The third iteration EMP must 'substantially accord' with the measures relevant to operation and maintenance contained in the relevant approved second iteration EMP.

The third iteration EMP will, in effect, be largely an administrative exercise of converting the operational and maintenance provisions contained in the previously approved second iteration EMP, such as the matters relevant to ensuring the maintenance of landscaping, etc., are carried over into operation. Importantly, the discretion afforded to the undertaker is again limited by the threshold of 'substantial accordance' with matters previously approved by the Secretary of State.

Proposed amendments to article 53 (Environmental Management Plans)

Having set out the context we then consider each of the proposed amendments to article 53 and the issues that arise as a result.

Proposed article 53(2) – Requirement for Secretary of State to consult on the approval of a second iteration EMP and any subsequent changes

The proposed article 53(2) requires the Secretary of State to consult the Environment Agency, Historic England and Natural England on matters relating to their functions, and the local authorities and local highway authorities on the submitted second EMP, allowing a period not exceeding 30 days for consultation responses to be provided.

As summarised above, the 'consultation and determination provisions' already require a front-loaded, two stage consultation process (comprising a 20 working days first stage, i.e. a month, followed by a 10 working days, i.e. a fortnight, second stage) to take place before an application is submitted for the Secretary of State's approval. It requires a Summary Report to be produced setting out the consultation that has taken place, the feedback received and the Applicant's responses to it. All of this information will then be put before the Secretary of State when approval is sought.

In that light it is difficult to foresee what value there would be in requiring ("the Secretary of State must consult…") the Secretary of State to hold a further third round of consultation when consultees will already have had two opportunities to make their views known and for the Applicant to take those views into account when preparing its submission to the Secretary of State. While the duration of the consultation period is expressed to be a period "not exceeding" 30 days, given the need to justify the giving of a shorter period, it is very likely that the maximum period of 30 days would become the default. This would take the aggregate of the three consultation periods to around two and a half months given the differences in accounting between 'Working Days' as defined

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in the consultation and determination provisions and '30 days' as referred to in the proposed article 53(2).

In addition, the 'consultation and determination provisions' already make provision for the relevant bodies to be consulted on the matters that relate to their areas of expertise and interest, which has been developed and agreed with those bodies during the consenting process to date. While the proposed article 53(3) does, through the parenthetical "(on matters related to their statutory functions)" attempt to direct relevant material to the relevant bodies, there is a significant risk of consultees being burdened with material not relevant to them.

In the unlikely event that there remained an issue of controversy outstanding at the point of a submission of a second iteration EMP for the Secretary of State's approval it remains open to the Secretary of State, of his own initiative, to seek the views of relevant consultees to assist with his determination. Article 53 does not need to make provision for that to be the case.

Consequently, the Applicant considers the proposed article 53(3) to be wholly unnecessary, liable to cause material delay to the delivery of the important public benefits of the Project and to be wholly inconsistent with the objectives of Project Speed in which the Applicant's approach is founded, and likely to impose a further and unnecessary administrative burden on the consultees.

Removal of the undertaker's functions to approve 'insubstantial' changes to a second iteration EMP previously approved by the Secretary of State – deletion of paragraphs (5) to (8) of article 53 in the Applicant's draft DCO

The proposed amendments delete the provisions for the Applicant's approval of 'insubstantial' changes to the second iteration EMP approved by the Secretary of State and the related supervision of this function by the Secretary of State through the 'call-in' mechanism. The reasons for, and benefits of, the Applicant's drafting in this regard are outlined in the overview above.

The Applicant notes that since it introduced the 'call-in' mechanism following Deadline 1, the key statutory stakeholders did not raise any further concerns with the concept of the undertaker approving changes to the second iteration EMP during the remainder of the examination.

The proposed amendments replace this drafting with a requirement for all changes to a second iteration EMP to be approved by the Secretary of State.

As such, the benefits to timely delivery of the Project Speed approach outlined in the summary above would be lost and the proposed amendments risk a requirement for a minor 'insubstantial' change to a second iteration EMP to cause delay while the Secretary of State's approval is sought. Such a delay would be compounded by the mandatory third

round of Secretary of State consultation required by the proposed new paragraph (2) discussed above.

Requirement for the Secretary of State's approval of the third iteration EMP – amendments to the Applicant's paragraph (9) / the Secretary of State's proposed paragraph (8)

The amendments here require the Secretary of State's approval of a third iteration EMP.

As outlined in the summary above, a third iteration EMP must be substantially in accordance with the relevant previously approved second iteration EMP. In effect, the proposed amendment provides for the approval of matters that have previously been approved. It is therefore inherently unnecessary to require it to be approved again.

The Applicant understands that its approach to the third iteration EMP as reflected in its preferred drafting in its article 53(9) was not a matter of contention with the statutory bodies. While Historic England had raised concerns previously, in its Final Submission Statement **[REP9-042]** it said:

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

The Applicant further notes that there is a substantial body of previous National Highways DCOs where such operational and maintenance matters were not made subject to an obligation to obtain the Secretary of State's approval.

Indeed, all 15 of National Highways' development consent orders granted between 2016 and 2022 (from the grant of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 on 2 September 2016 to the grant of the M25 Junction 28 Development Consent Order 2022 on 16 May 2022) adopt a broadly similar position, whereby the Construction Environmental Management Plan (or "CEMP", which is the equivalent of the second iteration EMP) is to be converted into a Handover Environmental Management Plan (or "HEMP", which is the equivalent of a third iteration EMP) in the equivalent requirement in Schedule 2 to those orders dealing with "construction environmental management plans", on which the Applicant's article 53 was initially modelled.

While the Applicant acknowledges that the 7 National Highways development consent orders granted since the M25 Junction 28 Order on 16 May 2022 have required the Secretary of State's approval of the 'operational and maintenance' management plan (however labelled) the Applicant's approach in its article 53 follows the precedents that prevailed at the time it was developed, and has progressed through the Planning Act 2008 examination process on that conventional basis without controversy.

To require Secretary of State approval of matters of maintenance and operation, when no statutory body is calling for such an administrative step, runs wholly contrary to the Project Speed ethos underlying the Applicant's approach to this project. It is unnecessary as National Highways is itself, as the strategic highways company with the responsibility for operating and maintain England's strategic road network, best placed to approve the relevant operation and maintenance measures.

Amendments to the Applicant's article 53(4) and the Secretary of State's proposed article 53(6) to require a second iteration EMP to contain an Arboricultural Impact Assessment

The Applicant notes from its Statement of Common Ground with Westmorland and Furness Council **[REP9-007]** (see page 4.5-68 of 72) that the issue of Arboricultural Impact Assessment remained outstanding at the close of the examination.

The Applicant's response is set out in that Statement of Common Ground. In summary, the Applicant's position is that the first iteration EMP, and by extension, article 53, already includes such a provision and so it is unnecessary for it to appear on the face of article 53. The relevant measures in the first iteration EMP are those with references D-LV 01, D-LV02 and D-LV04. D-LV-01 in particular, requires the Arboricultural Impact Assessment to be prepared and Tree Protection Plans prepared for the protection of trees to be retained.

If, despite the submissions received in response to this RfI, the Secretary of State is minded to nonetheless proceed with this change to article 53 the Applicant would urge the Secretary of State to consider and address the risk of requiring an AIA in a second iteration EMP submitted for approval, or for a change to a previously approved second iteration, where an AIA is plainly not relevant. For example, by amending the Secretary of State's proposed article 53(6)(b) to state "include an Arboricultural Impact Assessment or confirmation of the reasons why one is not required, or in the case of an application for approval of an amendment to a second iteration EMP, a statement confirming that no changes are sought to the previously approved Arboricultural Impact Assessment".

It should also be noted that because the Project is likely to be implemented in more than one part it is not appropriate to use the definite article in relation to an Arboricultural Impact Assessment because there will likely be more than one such assessment.

Amendment to the definition of "commence" in the Applicant's article 53(12) / Secretary of State's proposed article 53(10)

The Applicant is aware of Historic England's concerns in relation to the carrying out of archaeological investigations and mitigations.

The Applicant's position remains that the exclusion of pre-commencement archaeological investigations and mitigation works from the requirement of a Heritage Mitigation Strategy being in place has been accepted on a number of DCOs[1], 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 a Heritage Mitigation Strategy (as a result of article 53 of the DCO). This is set out in the parties' joint position statement **[REP9-034]**.

The Applicant notes that the Secretary of State's proposed amendment is consistent with the 'without prejudice' drafting agreed between National Highways and Historic England, should the Secretary of State be minded to adopt Historic England's position.

Proposed amendments to article 54 (detailed design)

While article 53 seeks to secure environmental mitigation through management measures, article 54 (detailed design) operates to secure the embedded mitigation contained in the Project's design and which is relied upon in the Applicant's Environmental Statement (**[APP-043]** to **[APP-233]**). As drafted by the Applicant, article 54 is based upon the "detailed design" requirement that features in all but two of National Highways' development consent orders, where it frequently appears as Requirement 3. That is to say, there are 22 other National Highways development consent orders containing a similar provision that contains all of the familiar ingredients that feature in the Applicant's article 54.

Where the Applicant's drafting of article 54 goes further than many other development consent orders, it does so by also securing compliance with the design principles, a control document that sets out project-wide and scheme-specific design principles to secure that 'good design' is applied throughout the Project.

In common with the typical 'detailed design' requirement, article 54 as drafted by the Applicant requires compliance with the relevant design documents, but it also includes scope to seek the consent of the Secretary of State to a design that departs from the works plans, the engineering section drawings and the design principles (the **"design**

[1] See for example, the A47 Wansford to Sutton Development Consent Order 2023, the A57 Link Roads Development Consent Order 2022, the A47/A11 Thickthorn Junction Development Consent Order 2022, the A47 North Tuddenham to Easton Development Consent Order 2022, the A47 Blofield to North Burlingham Development Consent Order 2022, the M54 to M6 Link Road Development Consent Order 2022 and the A303 (Amesbury to Berwick Down) Development Consent Order 2023.

documents") provided that to do so would not lead to any materially new or materially different environmental effects. Other than its location within the Order (i.e. in an article rather than in a Schedule of requirements) and the addition of compliance with the design principles, article 54 is entirely conventional and accords with the established precedents.

<u>Secretary of State's proposed paragraphs (2), (3), (4), (7) and (8); relevant planning authority approval functions</u>

This established precedent is important. It is wholly exceptional for a relevant planning authority to have an approval function in relation to <u>any</u> requirement of a National Highways DCO. Where exceptional circumstances have arisen on other projects such that a relevant planning authority has been given an approval function it has generally been constrained to areas of that authority's expertise, such as upper-tier authorities in relation to certain archaeological requirements. Of the 23 development consent orders granted to National Highways since the grant of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order in May 2016, none has given a relevant planning authority an approval function in relation to design.

While the relevant planning authority possesses knowledge and experience of the local conditions that are relevant to the approval of development carried out in its administrative area, the relevant planning authorities do not have the resources, experience or expertise of designing, building and operating the strategic road network. The important contributions that the relevant planning authorities can make to decisions under article 54 are secured, in the Applicant's draft article 54, by providing that the relevant planning authority is to be consulted prior to a decision of the Secretary of State to approve a departure under article 54(1).

National Highways is the body with the responsibility for operating and maintaining England's strategic road network. Critically, it is also the body that issues the design standards for England's strategic road network. Put simply, there is no other body in England that possesses the expertise and experience of strategic highway design and it is right that National Highways ought to be permitted to carry out the detailed design of its projects in accordance with the design documents established in the development consent order. It is appropriate that the Secretary of State for Transport (with all the resources, experience and expertise of strategic highways matters of the Department for Transport as his disposal), rather than the relevant planning authority, should hold the approval function where departures from those design documents require approval.

The proposal to give the relevant planning authorities approval functions is so unconventional that it was not contemplated by any party during the examination. As such there was no discussion on the procedures that ought to apply to relevant planning authority determinations. Consequently, the Applicant's draft DCO does not contain the provisions that would normally be found in Part 2 of the typical requirements Schedule that set out the procedure and timeframes for decisions to be made by the relevant planning authority, nor is there any provision for such decisions to be appealed.

The Applicant considers the Secretary of State's proposal in article 54 to provide the relevant planning authority with any approval function is a serious and fundamental risk to the timely delivery of the Project and the delivery of the important public benefits that the Project would bring. The relevant planning authorities do not possess the expertise, experience and knowledge of strategic highway design to properly and efficiently discharge these functions. The relevant planning authorities may not have at their disposal the resources required to compensate for these deficiencies. The Secretary of State's proposed drafting does not contain any procedures for the determination of such applications and so there are no safeguards around timely decision-making nor any prospect of appeal should a matter be refused or not determined in a timely fashion. The proposed drafting poses a fundamental and wholly unacceptable risk to the delivery of the Project, by proposing to give the relevant planning authorities an approval function that they have expressed no desire to possess.

It should further be borne in mind that much of the concern expressed by the relevant planning authorities in relation to the detailed design of the Project related to the design of highways that they would subsequently be liable to maintain, either through the de-trunking of parts of the current A66, changes to local roads or through the provision of new public rights of way. These design concerns have been allayed by the completion of the side agreements referred to above.

To conclude, the proposal to have certain design matters approved by the relevant planning authority, rather than the Secretary of State, is wholly inconsistent with established practice, was not contemplated by the Applicant and the relevant planning authorities, places burdens on the relevant planning authorities that they are ill-equipped to discharge, sits outside of the consultation and determination provisions of the first iteration EMP and therefore poses significant and wholly unacceptable risks to timely delivery of the Project. In effect, the Applicant's efforts to respond to the Project Speed initiative (in relation to which key stakeholders have made important contributions) would result in it being placed in a considerably worse position, in terms of timely delivery, than would be the case had a more conventional (i.e. non-Project Speed) approach been followed.

Having set out its strong objection to the principle of relevant planning authority approval, rather than the Secretary of State's approval, being required in relation to the design of the Project, the Applicant now turns to consider each of the new paragraphs proposed.

<u>Secretary of State's paragraphs (4) to (6) in relation to scheme 06 floodplain compensation area</u>

The issue of floodplain compensation in relation to Scheme 6 (Appleby to Brough) was the subject of positive and collaborative engagement between the Applicant and the Environment Agency.

As is set out in the parties' position statement (Appendix A of **[REP9-034]**), the Applicant and the Environment Agency agreed on the principle of a control mechanism being

required. The parties disagreed whether this ought to sit in the first iteration EMP or on the face of the DCO.

As set out in the Applicant's Closing Submissions (see paragraphs 6.4.6 to 6.4.10 of **[REP8-074]**), the Applicant considers that the most appropriate location to secure the floodplain compensation mechanism for Scheme 06 would be in the first iteration EMP. This would be consistent with how other control mechanisms are treated in the draft DCO. This is consistent with the Applicant's desire, consistent with the Project Speed initiative, to use the EMP mechanism as the single repository of all environmental management provisions and so that it could be progressed in accordance with the "consultation and determination" provisions that would apply to it under article 53. As a provision that sits outside of the first iteration EMP, there can be no certainty as to the timescales for consultation and it would lack the clarity of the clear consultation process set out in the first iteration EMP.

Despite this disagreement, the Applicant and the Environment Agency agreed the drafting of an appropriate control mechanism to account for the mechanism being located in either the first iteration EMP or on the face of the DCO.

The Secretary of State's proposed paragraphs (4) to (6) are, with one vital exception, consistent with the without prejudice drafting contained in the agreed position statement (Appendix A of **[REP9-034]**). That key difference being that the body with the function of approving the floodplain compensation scheme is proposed to be the relevant planning authority, rather than the Secretary of State. For the reasons outlined above, National Highways objects to this proposal in the strongest of terms.

<u>Secretary of State's paragraph (7) in relation to approval of design of viaducts</u>

The issue of the appearance of the viaducts comprised in the Project was discussed in detail at Issue Specific Hearing 3 under agenda item 2.2.

The Applicant's post hearing submissions (including written submissions of oral case) **[REP5-024]** set out the Applicant's view that there are sufficient controls contained in the first iteration EMP and in the Project Design Principles (**"PDP"**, being the "design principles" secured by article 54(1)(a)) such that there should be no requirement to obtain approval of the design of the viaducts prior to commencement of their construction.

Appendix A to the Applicant's post hearing submissions for Issue Specific Hearing 3 **[REP5-024]** sets out the extensive controls, under the PDP and EMP, that the design of the viaducts would be subject to. Without prejudice to that position, the Applicant also provided drafting that could be included in article 54, should it be considered that approval of the appearance of the viaducts is required as follows:

"(4) The undertaker must not commence construction of each of the viaducts comprised in Work Nos. 0405-01A(xii), 0405-2A(x), 06-1C(vi) and 06-01(x) until details of the

external appearance of the viaduct have been submitted to, and following consultation with the relevant planning authority, approved in writing by the Secretary of State."

That without prejudice drafting is reflected in the Secretary of State's proposed article 54(7) although there are two key changes from the Applicant's without prejudice proposals.

First, the Secretary of State's proposed paragraph (7) requires the relevant planning authority to grant its approval. The Applicant objects to this proposal in the strongest of terms for the risks it would pose to the timely delivery of the scheme and for the other reasons articulated above. The Applicant assumes that the reference to "..approved in writing by the relevant planning authority following consultation with the relevant planning authority." is a typographical error, as there would appear to be little merit in requiring the relevant planning authority to consult with itself.

Secondly, the Secretary of State's proposed article 54(7) expands the scope of the matters for which approval is required in relation to the viaducts from "external appearance" to "design and external appearance". This is a very significant broadening of the scope of this provision from matters that were expressed to be the concern of the Examining Authority, being the external appearance of the viaducts, to technical details of design which ought to remain a matter for National Highways alone as the strategic highway company responsible for the strategic road network in England. As outlined above, with respect, the relevant planning authorities do not possess the technical knowledge, expertise and resources to properly discharge this function.

It also merits mention that when the Examining Authority sought views on its proposal to recommend the adoption of the Applicant's without prejudice drafting (on which it appears the Secretary of State's proposed drafting article 54(7) is based) Westmorland and Furness Council supported the Examining Authority's proposal (i.e. the adoption of the Applicant's without prejudice drafting) and did not express any desire to have the function of approving the design of an important structure on the strategic road network (see the fourth page of **[REP7-189]** in the row beginning "Part 5 Article 54 (4) *Detailed Design*").

<u>Secretary of State's proposed paragraph (8) in relation to detailed design approval Langrigg link</u>

Work No. 06-7 was discussed in some detail at Issue Specific Hearing 1 under agenda item 2.2, as noted in the Applicant's Post Hearing Submission (including written summary of oral case) **[REP1-006]**. As a result of the concerns expressed by interested parties during the early stages of the examination, the Applicant sought to change its proposals at this location and a change request was consulted upon and thereafter accepted for examination by the Examining Authority. The changes were largely welcomed by relevant interested parties; see for example, the comments by Dr Martin on behalf of her parents who are resident in the area **[REP7-200]**.

Notwithstanding the Applicant's changes to this numbered work, the Examining Authority continued to express its concerns and included in its Consultation Draft Development Consent Order **[PD-015]** a new paragraph (5) to the Applicant's draft article 54 that would require the Secretary of State's approval of its detailed design.

The Applicant responded to this proposed drafting in the Applicant's Response to the ExA's comments on the Schedule of Changes to the Draft DCO **[REP7-166]** (see page 9) where the Applicant maintained its opposition to the requirement to obtain approval of the design of this numbered work. Its reasons for opposing the requirement for approval are the same as outlined above in relation to the viaducts; as the body responsible for setting design standards for the strategic road network and for operating and maintaining it, National Highways is the appropriate body to approve the design of Work No. 06-7. However, to address the concerns expressed by interested parties the Applicant amended the PDP at Deadline 8 **[REP8-062]** to include a scheme-specific measure 06.17. This provides as follows:

"*Construction of Work No. 06-7 must not start until the relevant planning authority has been consulted (in accordance with the provisions of Chapter 1 of the EMP) on:*

- *The proposed final alignments of any highway comprised in that work (where the lateral or vertical limits of deviation are proposed to be utilised in accordance with article 7 of the DCO); and*
- *The proposed final position of any attenuation pond required for that work.*

For the purposes of this design principle:

"start" has the same meaning as in Chapter 1 of the first iteration EMP;

"the relevant planning authority" has the same meaning as in article 2(1) of the DCO; and

"Work No. 06-7" has the same meaning as in Schedule 1 to the DCO."

The inclusion of this project design principle ensures that under article 54, the Applicant must consult the relevant planning authority in accordance with the "consultation and determination provisions" (summarised above in relation to article 53), before Work No. 06-7 is constructed.

The Applicant considers that this measure addresses the concerns underlying the Examining Authority's proposed drafting, which appears to be partly adopted by the Secretary of State's proposed drafting.

Again, the Applicant assumes that the "..approved in writing by the relevant planning authority f<u>ollowing consultation with the relevant planning authority.</u>" is a typographical error, as there would appear to be little merit in requiring the relevant planning authority to consult with itself.

Secretary of State's proposed paragraph (9) applying the definition of commence contained in article 53 to article 54

The Applicant notes that by applying the definition of 'commence' from article 53 to article 54, it would import the issues outlined above (see the text under the heading "Amendment to the definition of "commence" in the Applicant's article 53(12) / Secretary of State's proposed article 53(10)") in relation to the Applicant's article 53(12) / Secretary of State's proposed article 53(10). The Applicant also notes that the cross reference contained in the Secretary of State's proposed article 54(9) does not align with the location of the definition of definition of 'commence' which is contained in the Secretary of State's proposed article 53(10).

Paragraph 8 – comments on any implications of the Government's response to the Climate Change Committee Progress Report 2023 on the Project

The Applicant notes the Climate Change Committee (CCC)'s Annual Progress Report 2023 (published in June)[2], the CCC's October 2023 update to that Report[3], and the Government's Response to the CCC's Report[4], which was published on 26 October 2023.

The CCC's Annual Report, as updated (the CCC Report), reviews Government's progress on its net zero targets and makes recommendations to Government in reference to those targets. A number of these recommendations are in the transport sector, covering a wide array of transport infrastructure including roads, rail, air traffic and electric vehicle charging point support.

In its 26 October 2023 Response (the Response), Government sets out its reply to these recommendations, including noting how current law and policy addresses the relevant recommendation, or by directing the reader to ongoing and upcoming policy reviews.

By way of summary, the Applicant notes firstly that the CCC Report and the Response relate to matters of overarching law and policy, including recommendations for future law and policy, that are not specific to the Project. Therefore, to the extent that the CCC Report and Response address matters of future law and policy, or matters that are not specific to the Project, the determination of the Applicant's DCO application for the Project is not an appropriate forum to address generalised comments on the CCC Report and the Response.

The Applicant notes secondly that it has reviewed the Response in light of the CCC Report and has considered any implications these may have for the Project. The Applicant sets out its detailed comments below, which in summary are that neither the CCC Report or the Response give cause to amend the Applicant's DCO application for the Project or its assessment of the likely significant effects arising from the Project on

[2] https://www.theccc.org.uk/publication/2023-progress-report-to-parliament/
[3] https://www.theccc.org.uk/uk-action-on-climate-change/progress-snapshot/
[4] https://assets.publishing.service.gov.uk/media/65393f4ae6c968000daa9b0e/ccc-annual-progress-report-2023-government-response.pdf

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the environment as presented by the Applicant in its Environmental Statement (**[APP-043]** to **[APP-233]**), during examination and in the determination period.

Government's Response to the CCC Report

The Applicant notes that the CCC's Report includes a recommendation on Government to review current and future roadbuilding projects to assess their consistency with Government's environmental goals (see, CCC Report, Recommendation PA2023-148). In its Response, the Government states that:

"This Government supports motorists. The plan for drivers sets out how government is working to improve the experience of driving and services provided for motorists. We are committed to ensuring that transport plays its part in decarbonising the economy and protecting the environment. National Highways undertake comprehensive environmental impact assessments to establish the likely significant effects of a road project on the natural, built and social environment, to allow consenting authorities to assess a project's consistency with the Government's environment goals and legislation. Clearly in making decisions on the Roads Investment Strategy 3 (RIS3), we will ensure that it is in line with the Government's legal obligations relating to Carbon Budgets, Net Zero, Environment Act 2021 targets and the duty to have regard to the Environmental Principles Policy Statement. We have also ensured that "Improved environmental outcomes" is one of six strategic objectives in the RIS3 process which will shape the initial evidence gathering for RIS3. This will conclude in late 2023 with the publication of the draft RIS. As set out in the Transport Decarbonisation Plan, the Government will continue to adapt and take further action if needed to decarbonise transport".

It should be noted that the Project is a Road Investment Strategy 2 project. Furthermore, the Applicant confirms that it has carried out a robust and comprehensive assessment of the impacts and likely significant effects of the Project on the environment, including in terms of impacts on Climate, as presented in the Environmental Statement and throughout examination (**[APP-043]** to **[APP-233]**). The Application and the Applicant's Climate assessment (Chapter 7, Climate, of the Environmental Statement **[APP-050]**) complies with all applicable law and policy and the Government's Response to the CCC Report does not give cause to alter the Applicant's assessment conclusions. The test for decision making remains that an increase in carbon emissions is not a reason to refuse development consent unless the increase in carbon emissions resulting from the proposed scheme is so significant that it would have a material impact on the ability of the Government to meet its carbon reduction targets as set out in the National Carbon Budgets. The Applicant has already explained why that is not the case[5] for this Project, with the Climate Environmental Statement Chapter 7 **[APP-050]** concluding "that the Project's GHG emissions, in isolation, will not have a significant effect on climate or a

[5] The key climate document references are as follows: Climate Environmental Statement Chapter 7 **[APP-050]**, Appendix 7.1 Greenhouse Gas Assessment **[APP-176]**, Applicant's Response to Written Representations made by other Interested Parties at Deadline 1, Appendix 1 **[REP2-017]**, Applicant's Response to Deadline 3 and 4 Submissions **[REP5-030]**, Deadline 8 Submission on Climate Matters **[REP8-076]**, Deadline 9 Submission on Climate Matters **[REP9-033]**.

material impact on the ability of the Government to meet its carbon reduction plan targets", particularly in a context where the Government can take further action within the economy as a whole if needed.

The Applicant also notes that the funding of future road schemes via the RIS process is also in line with the Government's carbon reduction targets. The Government is not saying that there is no need for road improvement schemes in the future; rather it identifies that there is a need for such schemes and that the Government will ensure that the schemes that come forward are compatible with the trajectory set out in the Government's carbon reduction targets as set out in the National Carbon Budgets.

The Applicant also notes that its Case for Project **[APP-008]** identifies why there is a compelling need for the Project to come forward and includes detailed narrative and assessment of the Project against relevant national policies and standards. The Applicant has previously commented on other carbon and climate-related policies such as the Transport Decarbonisation Plan and the Net Zero Strategy in previous submissions (see, e.g. paragraph 7.10.3 of Chapter 7, Climate, of the Environmental Statement **[APP-050]** and paragraph 2.5.14 of the Applicant's Submission on Climate Matters **[REP9-033]**).

The Applicant notes also that many of the transport-sector recommendations made in the CCC Report and responded to in the Response relate to the rollout of infrastructure for Electric Vehicles, and to the introduction of the Zero Emissions Vehicle (ZEV) mandate . Within the ZEV mandate the government set out the percentage of new zero emission cars manufacturers will be required to produce each year up to 2030, following the Prime Minister's decision to delay the ban on new diesel and petrol cars from 2030 to 2035. As the Applicant explained in its submission dated 5 October 2023[6], the Applicant's assessment is based on the road traffic forecasts published in Sheet 1.3.9 of DfT's TAG Databook, which were used in the development of the Emissions Factor Toolkit v11 (published by Defra), and these do not currently assume the introduction of the ZEV mandate which is a precautionary approach for the purposes of the greenhouse gas assessment. The Applicant, therefore, does not consider that it needs to update its carbon assessment or any other assessment that supports the Applicant's DCO application for the Project.

The Applicant also notes a further recommendation made in the CCC Report relating to whole life carbon assessment, as follows:

[2022-252] "Set out a plan to make an assessment of whole-life carbon and material use of public and private construction projects mandatory by 2025, to enable minimum standards to be set. The whole-life carbon assessment should be sought at the planning stage to enable efforts to reduce embodied carbon and materials."

The Applicant notes that the assessment of emissions from the Project adopts a whole life carbon approach in line with DMRB LA 114, as set out in Table 7-5 of Chapter 7,

[6] https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010062/TR010062-002280-National%20Highways.pdf

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Climate, of the Environmental Statement **[APP-050]**. The methodology for the Project's climate assessment also follows the guidance, standards and methodologies set out in Transport Appraisal Guidance Unit A3 which aligns with the whole life carbon approach taken in the Environmental Statement **[APP-050]**. Section 7.10 – Essential mitigation and enhancement measures, Chapter 7 Climate of the Environmental Statement **[APP-050]**, includes the measures proposed to avoid, reduce and mitigate whole life greenhouse emissions associated with the Project. Furthermore, the assessment concludes at paragraph 7.11.24 that:

"The analysis following DMRB LA 114 shows that emissions from the Project to be low when compared against the relevant carbon budgets. As set out by DMRB LA 114 and in line with the National Policy Statement for National Networks, the assessment concludes that the Project's greenhouse gas emissions, in isolation, will not have a significant effect on climate or a material impact on the ability of the Government to meet its carbon reduction plan targets and Carbon Budget

The Outline Carbon Strategy **[REP3-043]** submitted into the examination, confirms that the principles and components of the PAS 2080 'Carbon Management in Infrastructure' certification have been and will continue to be followed for the Project, aligning with the Applicant's PAS 2080 verified carbon management processes. In doing so, the Applicant commits to adopting a whole life carbon basis for decision-making on the management of carbon for the Project. For instance, section 3 of the Outline Carbon Strategy outlines a requirement on the Project's contractors to integrate carbon management and reduction into decision-making, aligning with PAS 2080. Examples of carbon mitigation on the Project also include:

- maximising potential re-use or refurbish of existing assets and infrastructure;
- identifying low and no carbon consumption solutions for construction; and
- identify and integrate on or off-site sequestration measures as appropriate.

It is also to be noted that the Courts have recently ruled on an application for judicial review that included a ground relating to the CCC Report. In Mair Bain v Secretary of State for Transport, an application to challenge the A38 Development Consent Order, the Claimant sought permission to judicially review the A38 Project partly on a ground that claimed the Secretary of State had failed to take into account a material consideration, namely, the Carbon Budget Delivery Plan (CBDP) and the CCC Report. This was notwithstanding that the CBDP and CCC Report had been referred to in the Secretary of State's Decision Letter for the project. The Claimant stated that although the CBDP and CCC Report were referred to in that decision letter, the Secretary of State failed to expressly address particular aspects of those documents, and therefore failed to have regard to material considerations.

The Court refused the Claimant permission to apply for Judicial Review. In its decision dated 9 November 2023, it held that the Secretary of State set out a detailed analysis of the effects of the project on fulfilment of the requirements to reduce carbon emissions, was clearly aware the point was a matter of contention and gave a detailed explanation

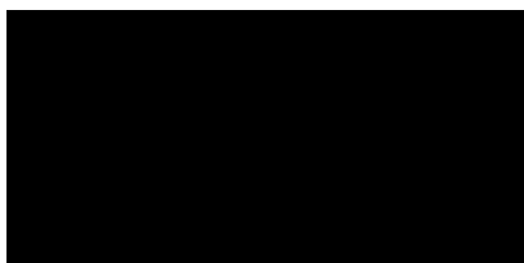
of his reasoning. The Secretary of State's failure to refer to particular aspects of the documents did not in that context indicate a failure to have regard to material considerations. Therefore, there was no realistic prospect of this ground succeeding. The Claimant has applied for a re-hearing of their application for permission.

Paragraph 8 Conclusion

The Applicant has considered the Government's Response to the CCC Report and any implications that it may have for the Project. Following this consideration, the Applicant has concluded that neither the CCC Report or the Response give cause to amend the Applicant's DCO application for the Project or its assessment of the likely significant effects arising from the Project on the environment as presented by the Applicant in its Environmental Statement, during examination and in the determination period.

If you have any further queries or comments, I can be contacted by email at A66NTP@nationalhighways.co.uk.

Yours sincerely



Monica Corso Griffiths
Head of Design and DCO
A66 Northern Trans-Pennine Project

ANNEX 1

UPDATED BOOK OF REFERENCE FOR SCHEME 07

ANNEX 2

WITHDRAWN CROWN LAND PLAN FOR SCHEME 07

ANNEX 3

COMPARISON BETWEEN DRAFTING OF ARTICLES 53 AND 54 OF THE DRAFT DCO AS PROPOSED BY THE APPLICANT BY THE END OF THE EXAMINATION AND THE DRAFTING NOW PROPOSED BY THE SECRETARY OF STATE

Environmental Management Plans

~~**53.**—53.~~53.—(1) The undertaker must not commence any part of the authorised development until a second iteration EMP for that part has been submitted to and approved in writing by the Secretary of State.

(2) The Secretary of State must consult the Environment Agency, Historic England and Natural England (on matters related to their statutory functions), local authorities and highway authorities on the submitted second iteration EMP, allowing each party a period not exceeding 30 days to respond unless otherwise agreed to in writing by the Secretary of State.

(3) The consultation requirement outlined in paragraph (2) applies in relation to the Secretary of State's consideration of any amendments made to the second iteration EMP in paragraph (7).

~~(1)~~(4) Each part of the authorised development must be constructed in accordance with the relevant second iteration EMP applying to that part.

~~(2)~~(5) Each part of the authorised development must be operated and maintained in accordance with the relevant third iteration EMP applying to that part.

~~(3)~~(6) A second iteration EMP must—

(a) be substantially in accordance with the first iteration EMP insofar as it relates to the relevant part of the authorised development, unless the Secretary of State is satisfied that any part of the second iteration EMP that is not substantially in accordance with the first iteration EMP would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement;~~and~~

(b) include the Arboricultural Impact Assessment; and

(c) ~~(b)~~be prepared in accordance with the consultation and determination provisions.

~~Without prejudice to the power conferred on the undertaker to amend a second iteration EMP in accordance (4)with paragraph~~ (~~6), the undertaker may request the~~ 7) The Secretary of State's approval in writing ~~of~~ is required for amendments to all or any part of a second iteration EMP and ~~paragraph (4) applies to the approval of any such amendments.~~the undertaker must provide—

~~(5) Subject to paragraphs (7), (8) and (9) following the Secretary of State's approval of a second iteration EMP under paragraph (1), the undertaker may determine to amend that second iteration EMP, or any part of it.~~

~~(6) The undertaker may only determine to amend a second iteration EMP or any part of it under paragraph (6) if—~~

~~(a) the undertaker is satisfied that those amendments—~~

~~(i) are substantially in accordance with the relevant second iteration EMP that has been approved by the Secretary of State under paragraph (1) or paragraph (5), as the case may be; and~~

~~(ii) would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement; and~~

~~(b) the undertaker has completed the consultation and determination provisions contained in the first iteration EMP in relation to the proposed amendments.~~

~~(7) The undertaker must not determine to amend a second iteration EMP (or any part of it) under paragraph (6) unless—~~

~~(a) the undertaker has sent to the Secretary of State—~~

(a) ~~(i)~~a copy of the submission; and

(b) ~~(ii)~~a copy of the summary report~~; and~~,

and paragraphs (3) and (6) applies to the approval of any such amendment.

~~(iii) a statement of the determination the undertaker proposes to make; and~~

~~(b) either—~~

~~(i) a period of 14 days has elapsed beginning with the date the Secretary of State received the information referred to in sub-paragraph (a) without the Secretary of State notifying the undertaker in accordance with sub-paragraph (ii) below or giving the undertaker a direction in accordance with paragraph (9) below (in relation to which the Secretary of State may notify the undertaker in writing, before the period of 14 days has elapsed, that the Secretary of State requires longer than this period to notify the undertaker in accordance with sub-paragraph (ii) below or to give the undertaker a direction in accordance with paragraph (9) below, specifying the longer period required, in which case that longer period will apply for the purposes of this paragraph); or~~

~~(ii) the Secretary of State has notified the undertaker in writing that the Secretary of State is content for the undertaker to make the proposed determination.~~

~~(8) In relation to any determination proposed to be made by the undertaker to amend a second iteration EMP (or any part of it) under paragraph (6), the Secretary of State may direct that—~~

~~(a) the undertaker must not make the proposed determination; and~~

~~the proposed determination is instead to be made by the Secretary of State as though it were in response to a request for the Secretary of State's approval of amendments to all or any part of the second iteration EMP made by (b)the undertaker under paragraph (5).~~

~~(9)~~(8) On completion of the construction of each part of the authorised development the ~~undertaker must prepare, and determine whether to approve in accordance with the consultation and determination provisions, a~~ third iteration EMP for that part, which must substantially accord with the measures relevant to the operation and maintenance of the authorised development contained in the relevant second iteration EMP approved (either initially, or as subsequently amended) for that part~~-~~, must be submitted in accordance with the provisions of this article ~~and the undertaker may at any time subsequently determine to approve amendments to a previously approved third iteration EMP in accordance with the provisions of this paragraph.~~for the Secretary of State's approval in writing.

~~(10)~~(9) If before the coming into force of this Order the undertaker or any other person has taken any steps that were intended to be steps towards compliance with the provisions of this article, those steps may be taken into account for the purposes of determining compliance with this article if they would have been valid steps for that purpose had they been taken after this Order came into force.

~~(11)~~(10) In this article—

“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;

“the consultation and determination provisions” means the provisions contained in paragraphs 1.4.9 to 1.4.52 of the first iteration EMP that set out the ~~matters~~ maters on which consultation is required and the procedures that apply to the conduct of that consultation and which require the undertaker to maintain functional separation when making determinations under this article;

“the first iteration EMP” means the document certified by the Secretary of State under article 49 (certification of plans, etc.) as being the first iteration EMP (Environmental Management Plan) for the purposes of this Order;

“the second iteration EMP” means, in relation to any part of the authorised development, the development of the first iteration EMP in its application to that part of the authorised development and includes the Arboricultural Impact Assessment, following the grant of development consent and in advance of its construction, as approved or subsequently amended in accordance with this article;

“submission” has the meaning given to it in paragraph 1.4.17 of the first iteration EMP;

“summary report” has the meaning given to it in paragraph 1.4.17 of the first iteration EMP; and

“the third iteration EMP” means, in relation to any part of the authorised development, the development of the second iteration EMP in its application to that part of the authorised development, to support its future management and operation following completion of its construction, as approved or subsequently amended in accordance with this article.

Detailed design

~~**54.**—54.~~54—(1) Subject to article 7 (limits of deviation) and the provisions of this article, the authorised development must be designed in detail and carried out so that it is substantially in accordance with—

(a) the design principles;

(b) the works plans;~~and~~

(c) the engineering section drawings: plan and profiles and the engineering section drawings: cross sections~~.~~; and

(d) the matters approved by the relevant planning authority under paragraphs (4), (7) and (8)

(2) ~~The Secretary of State~~ The relevant planning authority may approve a detailed design that departs from paragraph (1), following consultation with ~~the relevant planning authority,~~ the Environment Agency, Historic England and Natural England (on matters related to their statutory functions), provided that the ~~Secretary of State~~ relevant planning authority is satisfied that any amendments to the design principles, the works plans, the engineering section drawings: plan and profiles and the engineering section drawings: cross sections would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.

(3) Where amended details are approved by the ~~Secretary of State~~ relevant planning authority under paragraph (2), those details are deemed to be substituted for the corresponding design principles, works plans, engineering section drawings: plan and profiles and engineering section drawings: cross sections as the case may be and the undertaker must make those amended details available in electronic form for inspection by members of the public.

(4) No part of the authorised development comprised in scheme 06 is to commence until a detailed floodplain compensation scheme for that part has been submitted to and approved in writing by the relevant planning authority, following consultation with the Environment Agency.

(5) The floodplain compensation scheme prepared under paragraph (4) must provide suitable flood storage such that flood risk during construction and operation of scheme 06 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 15 May 2023) and arise from events with a magnitude up to and including the 1% annual exceedance probability, plus allowance for the 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 scheme 06 unless otherwise agreed with the Environment Agency.

(7) The undertaker must not commence construction of any of the viaducts comprised in Work Nos. 0405-1A(xii), 0405-2A(x), 06-1C(vi) and 06-1C(x) until details of the design and external appearance of the viaducts have been submitted to approved in writing by the relevant planning authority following consultation with the relevant planning authority.

(8) The undertaker must not commence the construction of Work No. 06-7 until detailed designs for these Works including the locations of any draining ponds and access roads and the associated ancillary works have been submitted to and approved in writing by the relevant planning authority following consultation with the relevant planning authority.

(9) In this article—

"commence" has the same meaning as in article 53(15).