
*Response to*

# Secretary of State's consultation letter dated 8 November 2023 for the A66 Northern Trans-Pennine Development Consent Order (consultation 6)

# Introduction

Transport Action Network (TAN) would like to respond to the Secretary of State's (SoS) post-examination consultation letter dated 8 November 2023.

# North Pennine Moors Special Area of Conservation and IROPI

As previously set out in TAN's representation dated 22 September 2023, TAN maintains the view that the derogation process should be followed before the project could be consented as the Applicant has failed to demonstrate that adverse effects on the integrity of the North Pennine Moors Special Area of Conservation ("SAC"), including on the extensive area of blanket bog (a priority habitat), can be ruled out.

TAN has reviewed the information provided by the Applicant in Annex 6[1] to support the case for derogation in relation to the SAC, including the reasons for the Applicant's conclusion that, if the SoS is minded to agree with Natural England and find an adverse effect on the integrity of the SAC, the SoS can nonetheless be satisfied that there is a robust and sound basis for finding there are Imperative Reasons of Overriding Public Interest ("IROPI") for the A66 Project (the "IROPI conclusion").

TAN does not agree with the Applicant's IROPI conclusion and repeats the points made previously as to why the IROPI tests have not been satisfied: (i) insufficient information has been provided to justify any assertion that the IROPI tests have been met; and (ii) there has been no assessment of viable alternative solutions that do not entail adverse effect on integrity of the SAC; and (iii) there has been an incomplete assessment of what reasons would amount to IROPI and why.

In regards to the sufficiency of the information provided, TAN notes as described further below, the measures contained in the Outline Blanket Bog Compensation and Management Plan ("OBCMP") are uncertain because insufficient information has been provided to show that the measures will work.

In regards to alternatives, TAN notes the following issues with the alternatives assessment provided by the Applicant at section 3 Annex 6:

- In the Annex 6, the Applicant has simply demonstrated that they have never fully assessed any non-dualling alternatives to the proposed scheme, as we

[1] TR010062-002294-Annex 6 - HRA - Information submitted without prejudice to support a Derogation case.pdf (planninginspectorate.gov.uk)

have consistently maintained throughout the examination as have other Interested Parties such as Friends of the Lake District.

- The project has been characterised by the rushed nature of its delivery, perfectly described by the "Project Speed" epithet, prioritising speed of delivery over improving environmental outcomes.
- Lower cost and low-impact solutions have never been examined such as redesigned junctions, lower speed limits with speed enforcement cameras, crawler lanes and passing points, and underpasses or bridges for local traffic. The only options examined and assessed have been dualling options with varying routes.
- The 2014 Northern Trans-Pennine Routes Strategic Study (NTPRSS) only examined dualling options and failed to consider any other alternatives which would meet the scheme objectives, and failed to consider the impact of the dualling proposals on the environment, including the SAC, and on legally binding climate targets.
- The Applicant has failed to examine whether proposals to dual the A1 north of Newcasle could also meet the scheme objectives of providing a road freight route up to Scotland, eliminating the need for HGVs to criss-cross the country on the A66, crossing the most sensitive and protected landscapes in England.
- Proposals to dual the A1 as an alternative route for freight traffic travelling to Scotland include the A1 Morpeth to Ellingham (currently awaiting a decision on its Development Consent Order application), and the recommendation of Sir Peter Hendy's Union Connectivity Review[2] to conduct an "assessment of the East Coast rail and road corridor to determine appropriate investments for better connectivity between Scotland and England".
- Rail freight options to improve capacity in the region, which would lead to a decrease in road freight have not been explored.

Lastly, regarding the assessment of reasons that amount to IROPI, the Applicants have now presented reasons relating to human health, public safety and beneficial consequences of primary importance to the environment, and additional reasons, relating to the social and economic benefits of the A66 Project.

The habitat in question in this case is a priority habitat. The IROPI are therefore required to relate to human health, public safety or beneficial consequences of primary importance to the environment; or, any other reasons which the competent authority, having due regard to the opinion of the appropriate authority, considers to be imperative reasons of overriding public interest (Reg 64(1) Habitats Regulations 2017 ("HR 2007").

[2] Union Connectivity Review Final Report, Department for Transport, 2021

Explaining the provisions of Regulation 64 HR 2007, PINS' Advice Note Ten, sets out: "*If other reasons of overriding public interest are being considered, such as social or economic benefits, the Competent Authority must seek the opinion of the relevant national government in England (Defra SoS) or Wales (Welsh Ministers), as applicable. Although it is for the Competent Authority to seek such an opinion, as noted above, Applicants should provide evidence and justifications of their reasons for the IROPI case, including whether or not other reasons are being considered where priority habitats and species would be affected.*"

Where the competent authority, desires to obtain the opinion of the national government in England, the government must have regard to the national interest when giving its opinion as to whether the reasons are IROPI, and before giving its opinion, must consult the following and have regard to their opinion: (a) the Joint Nature Conservation Committee; (b) the devolved administrations; and (c) any other person the government considers appropriate (Regulation 64(4A) HR 2007).

As a result of the Applicant's conclusion on adverse effects and derogation, no opinion has yet been sought, despite NE's conclusion of an adverse effect on integrity of the SAC and despite the habitat in question being a priority habitat. There is therefore an exceptional and significant gap in the information before the SoS. A significant amount of further consultation is therefore required in order to rely on any conclusions made by the Applicant as regards IROPI. The Secretary of State should urgently seek the opinion and carry out the statutory consultations required in order to reach a conclusion on IROPI.

In addition to the above, the conclusions reached by the Applicant regarding public safety, human health and primary importance to the environment fail to explain why such benefits cannot be achieved by an alternative solution and artificially seeks to suggest that these reasons are the main driver for the scheme, as opposed to economic reasons.

As set out in Road Investment Strategy 2: 2020-2025[3], the purpose of dualling the A66 is to "support growth" (p.22) and "underpin a wider economic transformation" (p.74). Similarly, the Applicant's own Environmental Statement ("ES") explains "If the existing A66 route is not improved, it will constrain national and regional connectivity and may threaten the transformational growth envisaged by the Northern Powerhouse initiative (Transport for the North, 2019) and the achievement of the Government levelling up agenda." The ES also sets out the scheme objectives, starting with economic objectives. Economic reasons alone cannot be IROPI reasons without compliance with Regulation 64(4). Public safety and human health are marginal benefits of the scheme, the main purpose of which is economic. These marginal benefits to public safety and human health cannot be said to be "imperative" and, furthermore, the assessment of alternatives carried out by the applicant fails to

[3] Road Investment Strategy 2: 2020-2025 (publishing.service.gov.uk)

demonstrate that the purported public safety and human health benefits cannot be achieved by alternative schemes.

TAN also notes that, in addition to the extensive economic reasons given in Annex 6, the Applicant's justification given in support of IROPI related to the primary importance of the environment are in truth socio-economic in nature. For example, improvements to the tourism sector (4.3.42), improvements in travel conditions (4.3.43) and cultural heritage (4.3.39-4.3.30). Similarly, in relation to public safety, at concluding paragraph 4.4.2 of Annex 6 the Applicant states: "The urgent need to reduce fatalities and other accidents and improve public safety for all is in the public interest. The Applicant is a government owned company, delivering and contributing to the government's long-term plan for the strategic road network. The Project is a long-term infrastructure project in the public interest for the benefit of road users, non-motorised users and people living and working in the local area and across the wider region." The latter two sentences of this paragraph are not relevant to any assessment of the public safety benefits of the scheme and instead lend themselves to supporting the economic benefits of the scheme.

## Outline Blanket Bog Compensation and Management Plan

TAN notes that the Applicant has also published the Outline Blanket Bog Compensation and Management Plan ("OBCMP")[4], now with respect to delivering compensation in line with test 3 of the derogation process. No explanation has been given as to the Applicant's views on whether the OBCMP, which was initially proposed as a form of mitigation of adverse effects, can now be treated as a compensatory measure.

The Applicant explains that once a compensation site has been identified the detail in this OBCMP will be developed into a Detailed Blanket Bog Compensation and Management Plan (DBCMP) which will be subject to a further approval process by the SoS under the provisions of article 53 of the DCO. TAN notes that the Applicant's preferred approach to securing the compensation measures within the DCO is to insert article 53(11) which provides that the mainline A66 must not be completed and opened for public use until a DBCMP has been approved by the SoS, following consultation with NE; and the approved DBCMP has been implemented to the SoS' satisfaction following consultation with NE. NE consider that the DBCMP ought to be approved prior to the "commencement" of the "mainline A66" and are concerned that by the Applicant's proposed approach the road's construction may be very advanced before full detail of the compensation plan is approved and implemented.

[4] TR010062-002295-Derogation Case Annex 1 HRA Stage 3 Blanket Bog Compensation and Management Plan.pdf (planninginspectorate.gov.uk)

TAN agrees with NE for the reasons NE states and for the reasons given previously, i.e. that a significant amount of information will be required in order to demonstrate that 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 before a scheme can be approved. See for example Grace, Sweetman C-164/17 [51-53]. Given the DBCMP is necessary in order to assess the effects of the project on the SAC, the measures proposed in the DBCMP are "further information" which should be consulted on as part of a revised environmental statement.

# Amendments to the Draft Order

## Article 53

TAN notes the amendments made to the wording of Article 53 of the draft DCO and is content that the Secretary of State ("SoS") will now be required to consult relevant parties and statutory bodies on the second iteration of the Environmental Management Plan ("EMP") submitted for his approval (art 53(2)) and that this consultation requirement also applies in relation to the SoS' consideration of any amendments made to the second iteration EMP (art 53(3)).

TAN also endorses the proposed requirement for the third iteration EMP to be submitted in accordance with the provisions of Article 53 for the Secretary of State's approval in writing.

## Requirement to consult on third iteration EMP

TAN notes that the requirement to consult relevant parties and statutory bodies on the second iteration EMP and/or any amendments to the second iteration, does not appear to extend to the approval process of the third iteration EMP. As currently drafted, article 53(8) requires the third iteration EMP to be submitted in accordance with the provisions of this article for the SoS' approval in writing. However, the meaning of "the provisions of this article" is not clear as the consultation duties in the rest of the article are specifically phrased as applicable only to the second iteration EMP and do not appear to be applicable to other approval stages. TAN notes that the Secretary of State's request for information letter dated 8 November 2023 reaffirms this interpretation as it states: "Article 53 has been drafted to allow the Secretary of State to directly consult relevant parties and statutory bodies on any changes to the second iteration of the Environmental Management Plan submitted for his approval". There is no mention of a similar approval process being required for the third iteration EMP.

The third iteration EMP will support the future management and operation following construction of the scheme. The question of admissibility of the third iteration EMP is therefore clearly as important and requires an equal amount of scrutiny as that of the second iteration EMP. As with the second iteration EMP, a consultation requirement should be applicable both to the third iteration EMP as submitted and in relation to the SoS' consideration of any amendments made to the third iteration EMP after initial approval.

## Timing of the Arboricultural Impact Assessment

TAN notes that per article 53(6)(b) the second iteration EMP must include the Arboricultural Impact Assessment ("AIA"). As set out in article 53(10), 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" (emphasis added).

An AIA should be required prior to the grant of development consent. It would risk rendering the AIA a futile exercise, for an AIA to be a requirement only after development consent for the scheme has already been granted. The impact of the scheme on arboriculture should be properly scrutinised as part of the planning balance exercise when deciding whether or not to grant the DCO. Without conducting an AIA before determination of the DCO, there is no way for the Examining Authority to come to a reasonable conclusion of the impact of the scheme. Therefore, the AIA cannot be a subsequent requirement.

The environmental, social and economic benefits to retaining good quality trees, and mitigating tree loss, in order to reduce the potential negative impacts of construction, are clear. Regrettably, a project of this scale in protected landscapes will inevitably have a negative impact on the existing tree stock and the species that depend upon them. An AIA is required to understand the existing tree stock, the site-specific effects of the planned development and what mitigation measures might be required. An AIA is also necessary to determine that the proposed work remains within the law for example in relation to any Tree Preservation Orders that exist, and in terms of harm to statutory protected sites. TAN notes that for other road-related DCOs, an AIA has been carried out by the Applicant as part of its Environmental Statement (for example A303 Amesbury to Berwick Down). There is no reason for a different approach to be taken for this DCO and the Applicant's approach unfortunately reinforces TAN's concerns about the rushed nature of this Examination to date.

## Article 54

TAN notes that, per article 54(2) the relevant planning authority ("RPA") will be able to approve a detailed design that departs from the requirements of article 54(1), namely for the development to be designed in detail and carried out in accordance with: the design principles, works plans, engineering section drawings and matters approved by the RPA under paragraphs 4, 7 and 8. Paragraph 4 relates to the floodplain compensation scheme, Paragraph 7 relates to the design and external appearance of viaducts and Paragraph 8 relates to design of draining ponds, access roads and associated ancillary works.

TAN believes that allowing the RPA to approve the items in paragraphs 4, 7 and 8, plus approve any deviation from article 54(1), does not ensure that proper expertise and technical consideration is addressed to these decisions. Aside from the flood compensation scheme, for which the RPA is required to consult the Environment Agency, article 54 does not require the RPA to consult any technical or expert bodies in determining these approvals. Nonsensically, in relation to the approvals under paragraph 7 and 8, the RPA is only required to consult with the RPA itself.

The design of viaducts, draining ponds, access roads and ancillary works are technical decisions that require a proper understanding of the technical implications of the decisions. By way of example, the scheme currently includes the construction of large viaducts that will be built across three areas within Special Areas of Conservation ("SAC"). The design and external appearance of the viaducts should be determined with proper scrutiny and expert advice from relevant bodies and stakeholders. The decision maker should also consider the views of the public. The same is applicable to the approval of deviation from any of the principles or plans set out in article 54(1).

No reasons have been given as to why the RPA is the most appropriate body to consider such matters. In the first instance, given the highly sensitive locations of the large structure, TAN does not consider that these decisions should be taken by the RPA and should instead be taken by the SoS in consultation with the relevant statutory environmental bodies (SEBs). At the very least, the RPA must be required to consult relevant technical bodies before any approval decision given the technical nature of the decisions and the sensitivity of the locations.

# The Secretary of State's Previous Consultations

We were concerned to learn that there have been serious communication failures with Interested Parties during the post-examination consultation phase, with some IPs not

receiving notification of the five previous consultation letters from the Secretary of State and being given the opportunity to respond. TAN would like the SoS to order the Planning Inspectorate to conduct an audit of how many IPs received notifications of each consultation and to publish the result. We would also like to be reassured that all IPs have received this 8 November 2023 consultation letter, and so will be aware that they may have missed out on all the other consultations.

We are also concerned how IPs who have not received notification of the previous five consultations will be able to read the 72 relevant documents and respond to them within the 21 day window given for this consultation. We consider most IPs will simply give up and disengage, and we would like the SoS to consider this in his decision making.

# Government Response to the Climate Change Committee Progress Report

The carbon emissions from this scheme are considerable as we and other IPs have raised throughout the examination. In particular the construction emissions are extremely large and fall within the fourth and fifth carbon budgets. There is considerable risk that the UK will not meet its national and international climate obligations as evidenced by the Climate Change Committee (CCC), and this scheme increases this risk. A full cumulative assessment of the scheme's emissions has not been carried out, contrary to the The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**EIA Regs**"). We fully support the position of Dr Andrew Boswell of CEPP.

It is completely inadequate that the Applicant dismisses and fails to engage with the advice of the Climate Change Committee (CCC) 2023 Progress Report which recommended a "systemic review" of current road schemes (R2023-148), and the Transport Select Committee's Strategic Road Investment report which recommended "cancelling complex, costly enhancement projects", such as the A66 which is in the Government Majors Projects Portfolio and is estimated to cost at least £1.5 billion): "***The Applicant remains of the view that the commentary on government policy of this nature is not specific to the DCO Application***"

In its response to the CCC Progress Report the Government similarly fails to engage with the recommendation of the CCC to conduct a systematic review of current road schemes such as the A66, due to the serious and evidenced shortfall on reducing road transport carbon emissions and the risk to meeting our legal climate obligations. Instead of addressing the serious issues raised by the CCC head-on, the Government merely side-steps them, saying its current business-as-usual approach addresses these issues without providing the necessary evidence to back up these assertions. There is a depressing failure to engage with evidence

and policy recommendations from an expert body, replaced instead with complacent handwaving that the status quo can be maintained despite all evidence to the contrary.

We remain concerned that the Applicant has also failed to assess induced HGV traffic. This is especially unacceptable as the Applicant has justified the scheme (in the Case for the Scheme and in the Strategic Case) as a strategic freight route. The Applicant has therefore only included and considered the 'benefits' of increasing HGV traffic along the route, but has not assessed, quantified or costed the harms of encouraging and increasing HGV traffic along the route.

# Representation from the Friends of the Lake District

We fully support the representations made by Friends of the Lake District, including their 29 November 2023 representation, regarding the failure of the Applicant to address the harm of increasing traffic in the Lake District World Heritage Site. We also share their concerns about the lack of a Heritage Impact Assessment.

# New and further evidence

Section 245 of the Levelling Up and Regeneration Act 2023 has strengthened the duty on the SoS to "seek to further the purpose of conserving and enhancing the natural beauty of the National Park or Area of Outstanding Natural Beauty." The SoS must have regard to this new strengthened duty in his decision making when deciding whether to grant the DCO. We fully support the evidence submitted on this by the Friends of the Lake District and Anne Robinson.

We remain concerned that the Secretary of State has not required the Applicant to update the economic case for the project as we recommended in our responses of 8 September 2023.

Given the extremely poor economic case for the scheme (with a negative BCR, very limited safety benefits, huge carbon impact, and very large adverse environmental impacts), and the very real possibility that the economic case has declined further, it is critical the Secretary of State requires the Applicant to update the economic case before he makes his decision on the grant of planning consent. There are numerous tests (on biodiversity, habitats, impacts to AONBs, the state's right to compulsorily purchase private property etc) that require the project to demonstrate exceptional circumstances of overriding public interest. These high thresholds have never been met by this poorly performing scheme, and the DCO should not be granted.

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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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