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Nathan Dyer
Transport Infrastructure Planning Unit

20 December 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 seventh Request for Information dated 7 December 2023 (the RfI)

I am writing in response to the RfI dated 7 December 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:

- Submission from Michael Hargreaves on behalf of the Brough Hill Fair (**BHF**) Community Association dated 6 November 2023 (**the BHF Submission**);
- Proposed amendments from the Secretary of State to article 36(1) of the draft DCO;
- Submissions from Interested Parties (**IPs**) relating to induced HGV traffic; and
- Impact of section 245 of the Levelling-up and Regeneration Act 2023 (**LURA**) on the Project.

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 IPs in their submissions made in response to the Secretary of State's previous RfIs of 18 October 2023 and 7 November 2023, the Applicant notes that it has 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.

The only exception to this approach is that the Applicant notes that various IPs have made submissions relating to the proposed new drafting of articles 53 and 54 of the draft DCO. In order to assist the Secretary of State, the Applicant has produced, at **Annex 1** to this response, a tabular analysis of each IP's submissions on these articles, alongside comments by the Applicant on (and a suggested approach to) each of the concerns raised.

Paragraph 1 – comments on the submission from the BHF Community Association dated 6 November 2023

The Applicant has considered the various documents comprising the BHF Submission and considers that the only new aspects of this that would be helpful to the Secretary of State for the Applicant to respond to are the letters from Friends, Families and Travellers dated 15 September 2023 (page 2 of the BHF Submission) and Abbie North dated 6 November 2023 (pages 50-61 of the BHF Submission).

The other documents consist of news articles, book chapters, a full court judgment (which, the Applicant notes, is not referred to throughout the rest of the BHF Submission), an email from the Applicant's team to Abbie North (which, the Applicant notes, provides a helpful summary of the Applicant's responses to the BHF Community Association on consultation under article 36 of the DCO and concerns relating to intangible cultural heritage) and the BHF Community Association's risk assessment (which the Applicant has already responded to in section 8 of the Summary Statement on Brough Hill Fair Relocation **[REP7-156]** (**BHF Statement**)). The Applicant has carefully reviewed these documents and does not consider that there are any new, or different, points raised that have not already been addressed by the Applicant throughout the Examination of the DCO Application.

Letter from Friends, Families and Travellers dated 15 September 2023

This letter raises concerns over the Applicant's treatment of the cultural importance and historical significance of the BHF, in the context of the Applicant's Equalities Impact Assessment (**EqIA**) **[APP-243]**. The Applicant considers that in addition to the EqIA referenced, and extensive direct engagement, these concerns were responded to in detail throughout the Examination of the DCO Application, most notably in sections 3.2 and 4 of the BHF Statement and in paragraphs 4.6.7-4.6.8 of the Applicant's Closing Submissions **[REP8-074]** (**Closing Submissions**).

Letter from Abbie North dated 6 November 2023

The Applicant has carefully considered, identified and addressed the concerns raised in this letter in the sub-headings below and responds to these in turn. The Applicant considers that the concerns raised in this letter by the BHF Community Association have all already been discussed in detail throughout the Examination of the DCO Application; therefore, the Applicant's responses are largely comprised of cross-references to its previous submissions on these matters.

*Request for the BHF site to be included in the Cultural Heritage chapter of the Environmental Management Plan (**EMP**)*

The Applicant notes that the BHF Submission reiterates the BHF Community Association's request for the BHF site to be included in the Cultural Heritage chapter of the EMP, which would lead the Applicant to need to have considered reasonable alternatives (including the 'Billy Welch Straight Line Route'), and raises criticism of Historic England providing suitable expertise for the consideration of intangible cultural heritage in the context of the BHF.

As shown in section 4 of the BHF Statement, the Applicant has considered, in great detail, the cultural heritage of the BHF. In particular, paragraphs 4.3.4 to 4.3.8 of the BHF Statement detail how article 36 of the DCO will operate to ensure that activities (i.e. the intangible cultural heritage) carried out at the existing BHF site will be enabled to continue, should development consent be granted.

As for the consideration of reasonable alternatives, including the 'Billy Welch Straight Line Route', the Applicant refers to paragraph 3.5.1 of the BHF Statement, along with paragraph 4.6.4-4.6.6 of the Closing Submissions, to remind the BHF Community Association and the Secretary of State that detailed consideration was given to this alternative route and the Applicant set out, in detail, its reasoning for this alternative route being not consentable.

In relation to the criticism of Historic England's role in this context, the Applicant refers to paragraph 4.2.6 of the BHF Statement, which demonstrates that the local planning authorities shared the view of Historic England on this matter.

Appropriate consideration of reasonable alternatives

As referenced above, the Applicant has considered reasonable alternatives to the proposed replacement BHF site in great detail before and during the Examination of the DCO Application, as evidenced by section 3 of the BHF Statement and section 4.6 of the Closing Submissions. The Applicant maintains but does not propose to repeat its submissions on this matter.

*Request for the BHF site to be included in the Book of Reference (**BoR**) as Special Category Land*

The Applicant notes that the BHF Submission states the BHF Community Association's request for the current BHF site to be included in the BoR as Special Category Land, with criticism of the Applicant's assessments of 'public rights', 'recreation' and 'regular usage'. The Applicant does not agree with the BHF Community Association's submissions on this matter and refers the Secretary of State to the Applicant's Post Hearing Submissions for Issue Specific Hearing 2 **[REP1-009]**, specifically pages 56 and 57, for its position on these matters (which has not changed).

In relation to the comment in the BHF Submission that the Applicant has "*denied the Gypsy Community the benefit of effective procedural oversight, [and] meaningful participation*", the Applicant strongly refutes this claim. Engagement with the BHF Community Association has been ongoing before and throughout the Examination of the DCO Application, and will continue in the context of article 36 of the DCO in the event that development consent is granted, given that the Applicant will be obliged to consult with the BHF Community Association on the Scheme under the provisions of that article (**the Scheme**). The Applicant also refers to section 2 of its Statement of Common Ground with the BHF Community Association **[REP9-010]** which fully details the extensive engagement held before and throughout the Examination of the DCO Application.

As for the BHF Community Association's criticism in the context of 'regular usage' of the BHF site, the Applicant refers to paragraphs 4.3.5 to 4.3.7 of the BHF Statement, which show that article 36 of the DCO will operate to ensure the continuity of the aspects of intangible cultural heritage at the existing BHF site. Preference has been given to the continuity of these aspects of the BHF, rather than to the physical site itself, given that the BHF has only been at its current location since 1947, when considered in the long-term context of the BHF's existence (as pointed out by the BHF Community Association), which is traced back to 1330. Indeed, the Applicant notes that the BHF has been reported as being held in at least two different locations in its history. The Applicant again notes that, to the extent that the location of the existing BHF is a characteristic of its intangible cultural heritage (which, as set out above, the Applicant argues is a limited consideration in the long term context of the BHF), the proposed replacement BHF site is adjacent to the existing BHF site and incorporates as much of the existing site as will remain and is practicable following the Project's implementation.

Concerns under the 'Ancient Public Right' sub-heading

The Applicant notes that in the BHF submission, under the 'Ancient Public Right' sub-heading, concerns are raised relating to the consideration of alternative sites, cultural heritage, EqIA and safety. In relation to the consideration of alternative sites and cultural heritage, the Applicant considers that it has responded to these matters above.

As for EqIA and safety considerations, the Applicant again notes that these are not new issues and have been discussed at length during the Examination of the DCO Application.

The Applicant therefore refers to paragraph 3.2 of the BHF Statement and paragraphs 4.6.7 to 4.6.8 of the Closing Submissions in relation to EqIA matters, and section 8 of the BHF Statement in relation to safety matters (including the Applicant's risk assessment).

Article 36 of the DCO

In relation to article 36 of the DCO, the BHF Submission raises concerns with the consideration of alternative sites and safety (including risk assessments), which the Applicant has responded to above.

The BHF Community Association also notes that article 36 of the DCO does not provide for direct consultation between the Secretary of State and the BHF Community Association on the Scheme. Generally, in relation to article 36 of the DCO, the Applicant refers the Secretary of State to paragraphs 4.6.9 to 4.6.14 of the Closing Submissions, and paragraphs 4.3.4 to 4.3.7 and 4.3.10 to 4.3.11 of the BHF Statement, for its full position in relation to article 36 of the DCO, which has not changed since the end of the Examination of the DCO Application. It is noted in this context that direct consultation between the Secretary of State and the BHF Community Association on the Scheme has not been the topic of any RfIs published by the Secretary of State nor previous submissions from the BHF Community Association (including during the Examination of the DCO Application) until now.

However, the Applicant also refers to paragraph 3.3.2 of the BHF Statement in relation to the BHF Community Association's concerns regarding consultation, and reiterates that the Applicant must, as required by article 36 of the DCO, consult with the BHF Community Association on the details of the Scheme and notes that the role of the Secretary of State under article 36 of the DCO is to decide whether to approve the Scheme that the Applicant (following consultation with, amongst others, the BHF Community Association) has produced, rather than to consult of its own accord on this matter. This, therefore, clearly refutes the BHF Community Association's claim that the Applicant has not provided them with "*the right to participate effectively in the process of preparing the relevant scheme*".

Question for the Secretary of State regarding non-approval of the Scheme

The BHF Submission asks the Secretary of State what will happen if he is unable to approve the Scheme. From the Applicant's perspective and understanding, the mechanism as drafted would be based on undertaking consultation with the BHF Community Association, leading to the preparation of the Scheme in a manner which the Secretary of State is content to approve. If this is not the case, the Applicant suggests that it would simply have to re-start the process of preparing the Scheme, in line with the provisions of article 36 of the DCO.

Paragraph 3 – comments on the Secretary of State's proposed amendments to article 36(1) of the draft DCO

The Applicant notes, as a general point, that it agrees with the submissions of Westmorland and Furness Council (**the Council**) in response to this RfI that it is not the appropriate body to either approve the Scheme for the provision of the replacement BHF site or for certifying satisfactory implementation of the Scheme, the site's suitability and availability for use.

The Applicant also notes that this issue was not a matter raised during the Examination of the DCO Application.

The Applicant wishes to draw particular attention to the fact that article 36 of the draft DCO is broader in scope than merely a planning matter, which makes it inappropriate for the Council to be solely responsible for the approval of the Scheme prepared in accordance with this article. Article 36 of the draft DCO provides a mechanism for not only the physical relocation of the BHF, but also the transfer of any existing BHF rights to the relocation site. For that reason, and because the transfer of any such rights is connected to the approval of the Scheme prepared in accordance with article 36 of the draft DCO, the approval of the Scheme is not simply a planning function which can be performed by the Council. This is a function better suited to and appropriately discharged by the Secretary of State.

Again, the Applicant emphasises that any input required from the Council as part of the Secretary of State's approval of the Scheme prepared in accordance with article 36 of the draft DCO, for example in relation to detailed matters regarding the physical replacement site itself, would be provided via the consultation between the Applicant and the Council required pursuant to article 36(2)(b)(iii) of the draft DCO.

Paragraph 4 – comments on submissions from IPs relating to induced HGV traffic

Paragraph 4 of the RfI referred to the submissions made by Dr Andrew Boswell, Transport Action Network and others regarding the Applicant's perceived failure to assess induced HGV traffic for the Project, and invited the Applicant to comment on those submissions.

The Applicant considers that it has addressed the implications of the Project for HGV traffic entirely appropriately and in accordance with the relevant sections of Transport Analysis Guidance (**TAG**).

In responding to paragraph 4 of the RfI, the Applicant considers it may be useful to the Secretary of State to confirm the Applicant's understanding of the phrase "induced traffic". The Applicant understands this phrase, as defined in paragraph B.2.4 of TAG Unit: Guidance for the Technical Project Manager, to refer to the additional traffic, beyond the level of traffic that would use the network without the intervention. An alternative way to look at this is to consider it as demand suppressed traffic that is released through a road scheme improvement.

The methodology applied follows that used within Regional Transport Models developed by the Applicant and accords with TAG guidance. TAG guidance provides as follows:

- Paragraph 4.3.13 of TAG Unit 1.1 Principles of Modelling and Forecasting states that 'variable demand models are most often used to model personal travel for highway and local transport schemes'. It then states in paragraph 4.3.14 that 'For some trip movements it is more difficult to use choice models. Freight movements, in particular, are often part of a complex logistic chain, which means that it is often not appropriate to assume that each trip can be modelled individually. Simple factoring methods are therefore often used for freight movements.'

- TAG Unit M2.1 Variable Demand Modelling paragraph 1.1.5 states that 'any response in the demand for transport of freight is not considered here, since it is often sufficient to assume that total freight traffic is fixed, but susceptible to re-routeing.'

- TAG Unit M4.1 Forecasting and Uncertainty provides advice on how to forecast growth in freight traffic. This states, in paragraph 7.3.18, that 'Most local models will not be able to forecast changes in freight traffic in detail. Usually, simpler methods, such as applying a single growth factor for the whole matrix will suffice. The annual regional traffic forecasts from the National Transport Model (**NTM**), published by the Department, may be useful for forecasting freight growth (OGVs and LGVs) at regional level between 2003 and 2035.'

- TAG Unit M4.1 Forecasting and Uncertainty also goes on to identify (paragraph 7.3.19) that simple factoring methods may not be appropriate where a major development such as a distribution centre or retail park is proposed since that will affect freight demand. However, this is not the case in relation to the Proposed Development.

With reference to the first bullet point above, it is worth considering the factors which influence freight movements, and why this makes freight demand particularly difficult to model.

The freight moved between any origin and destination is determined by the location of sources for raw materials and other inputs to a production process as well as the location of intermediate and final markets for their products. In terms of accurately modelling (variable) freight demand, a diverse range of factors would need to be considered including:

- The wide range of different commodities transported;

- The range of different vehicles used to transport the commodities;

- The size of the firms involved, their geographical dispersion, and distribution policies. This includes decisions on self-handling or outsourcing distribution, preferred transportation modes or any other logistical policy such as just in time delivery;

- The location and density of population in terms of the distribution of end products;

- Seasonal variations in demand and changes in consumers' tastes; and

- Commercial models of the different operators which are known to be flexible and subject to negotiations and bargaining power.

Such factors do not map directly across to the variable demand model structure used in passenger models. Passenger models derive future year volumes by factoring base year volumes by forecast changes in travel time and operating costs. These assumptions are not the basis for route choice for freight; rather a freight traffic model would need to also reflect the influence of the other relevant factors listed above, and how such factors interact when making decisions. The data needed to develop such a model is not readily available, given the commercial nature of the freight industry. Additionally, a freight traffic model producing forecasts of the future would need to understand, or make assumptions on, how these factors are likely to change in the future.

Given this complexity, the Great Britian Freight Model (**GBFM**) is the only notable freight model within the UK. GBFM covers national flows at a 24hr level and is used to inform the NTM and Road Traffic Forecasts 2018 (**RTF18**) developed by DfT which have been used within the appraisal of the Project.

The Applicant is unaware of any road scheme pursued in recent years which assessed 'induced' HGV demand via a freight traffic model for future years. That is because the data required to construct such a model is not reasonably available nor is it required by TAG guidance. Indeed, the Applicant is unaware that any of the modelling work it has produced for the Project has been criticised throughout DCO examination in relation to this point. Nor is it aware of such modelling work ever being found not to comply with TAG guidance in respect of this issue.

In terms of the appraisal of the Project, the Applicant can confirm that the methodology applied is in line with the TAG guidance stated above, and:

- Aligning with the advice in TAG unit 1.1 and M4.1, simple factoring methods have been used to forecast future HGV movements. Therefore, as described in paragraph 5.2.33 of the Combined Modelling and Appraisal Report (**CMAR**) **[APP-237]**, forecast HGV growth is based on that found in RTF18 published by DfT, which is based on results from the NTM. LGV and HGV growth from the RTF18 data used for forecasting are provided in Table 5-5 and Table 5-6 of the CMAR. As noted above RTF18 data comes from the GBFM and is the only available data. This data has been applied to

the assessment for the Project, and the results of this growth are shown in Tables 5-15 to 5-17 of the CMAR.

- Aligning with the advice in TAG Unit M2.1, the Applicant has accounted for re-routeing, which is the only form of induced traffic applicable in the case of HGVs. Paragraph 4.6.7 of the CMAR states that Heavy Goods Vehicles are User Class 5 within the highway assignment model. The results of the HGV traffic reassignment onto the A66 are discussed within paragraphs 7.2.8 to 7.2.12 of the Transport Assessment (**TA**) **[APP-236]**, with paragraph 7.2.12 stating that '*Within the DS (Do Something) scenario, the additional traffic attracted to the route is mostly car traffic however there is some additional HGV traffic attracted also'*.

The Applicant also notes paragraph 38 of Dr Boswell's 22 September submission, which itself is considering the text contained within bullet point 3 of paragraph 5.7.6 of the CMAR. The text states that there is '*A higher proportion of light vehicles in the DS compared to the DM due to assignment re-routing and HGV demand being fixed*'. This final bullet should only be regarded in the context of the whole of paragraph 5.7.6, which is comparing and contrasting the relative growth of car traffic and HGV traffic on the corridor as detailed in Table 5-35 to 5-37.

For context, the full paragraph 5.7.6 states:

> *The tables for light and heavy vehicles show the following:*
>
> *• A high proportion of Heavies along the A66 at Bowes Bypass and West of Scotch Corner (approx.20-25%).*
>
> *• A reduction in the proportion of Heavies in the future as RTF HGV growth is not forecast to be as significant as Car NTEM growth and RTF LGV growth.*
>
> *• A higher proportion of light vehicles in the DS compared to the DM due to assignment re-routing and HGV demand being fixed.*

The Applicant further notes that the number of forecast HGVs increases with the Project in place, as can be seen in Table 5-35, 5-36 and 5-37 of the CMAR. For instance, in the AM peak period of 2029, the flow of 421 within the DM (Do Minimum) scenario increases to 438 in the DS (Do Something) scenario, i.e. an increase of 17 vehicles with the project in place. This is due to HGVs re-routeing from other adjacent routes due to the improvements on the A66 (with reference to the second bullet in the above TAG guidance list of bullet points).

The Applicant also notes paragraph 39 of Dr Boswell's 22 September submission. In response, the Applicant notes that Highway Reference Forecast Demand tables at Tables 5-2 to 5-4 in the TA are consistent with the Highway Reference Forecast Demand tables at Tables 5-15 to 5-17 in the CMAR, both of which describe the impact of the traffic growth

factors (including those for HGVs) applied within the forecasts as discussed in paragraph 5.2.33 of **[APP-237]**. Such traffic increases are included in both the economic and environmental assessments of the Project (including noise, air quality and greenhouse gases). The Applicant notes that Dr Boswell's paragraph 39 refers to HGV growth being fixed at zero and refers to this as ignoring the reality on the ground. This statement is based on a misunderstanding by Dr Boswell of the Project's position. To confirm, HGV growth with the Project in place is not fixed at zero, as has been demonstrated by the references set out above.

Conclusion

In conclusion, the Applicant understands 'induced HGV traffic' to refer to the additional HGV traffic, beyond the level of traffic that would use the network without the intervention. There has been no failing in the Applicant's assessment, as TAG guidance has been followed; growth in freight has been modelled through the application of RFT18 growth factors thus incorporating outputs from the GBFM. In addition, the reassignment of freight traffic onto the A66, which is the only form of induced traffic applicable in the case of HGVs, has been allowed for within the assignment model.

It is therefore incorrect to say that induced HGV traffic has not been included in the model. This has been assessed, using the best available and most robust data. This assessment includes the re-routeing of traffic as a result of the Project. HGV traffic growth has not been fixed at zero and it is incorrect to suggest otherwise.

Paragraph 5 – comments on the impact of section 245 of LURA on the Project

The Applicant notes the submissions made by various parties including the Friends of the Lake District, Transport Action Network, Anne Robinson and others regarding the impact of section 245 of the Levelling-up and Regeneration Act 2023 which will come into force on 26 December 2023, and provides its comments in relation to this matter below.

Section 5(1) of the National Parks and Access to the Countryside Act 1949 (**the 1949 Act**) provides:

> *(1) The provisions of this Part of this Act shall have effect for the purpose:*
>
> *(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and*
>
> *(b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.*

Similarly, in relation to Areas of Outstanding Natural Beauty (**AONB**), section 85 of the Countryside and Rights of Way Act 2000 (**the 2000 Act**) requires statutory undertakers to have regard to the purpose of conserving and enhancing the natural beauty of the AONB.

With effect from 26th December 2023, section 11(1A)[1] of the 1949 Act is amended to provide:

> *"In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority… must seek to further the purposes specified in section 5(1) and if it appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park."*

Similarly, and again with effect from 26th December 2023, section 85 of the 2000 Act is amended to provide:

> *"In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."*

Section 11(2A) of the 1949 Act provides that:

> *"The Secretary of State may by regulations make provision about how a relevant authority is to comply with the duty under subsection (1A) (including provision about things that the authority may, must or must not do to comply with the duty)."*

A relevant authority is defined as including a Minister of the Crown in section 11(3) of the 1949 Act and section 85(2)(a) of the 2000 Act.

If the grant of a DCO would affect land (directly or indirectly) within a National Park or an AONB, then the duty in section 11(1A) of the 1949 Act or section 85 of the 2000 Act respectively will be engaged in relation to determination of the application for the DCO.

That is a duty to "**seek to further**" those purposes. It is not a duty to further those purposes. The words "seek to" must be given some meaning. Those words mean that a Minister must try to further those purposes when determining an application for a DCO that would affect land (directly or indirectly) within a National Park or AONB.

Accordingly, a Minister is not required to exercise his functions so as to achieve those purposes in every case, but he is required to exercise them so as to try to achieve them.

The amendments to section 11(2A) of the 1949 Act and section 85 of the 2000 Act plainly envisage that regulations will be made to assist in the application of the duty. If any such regulations are made and published prior to determination of the DCO Application, the Applicant would be happy to make further representations as to their effect should the Secretary of State deem this to be necessary.

[1] As inserted by section 62 of the Environment Act 1995.

In the meantime, from the language of the words in section 11(1A) of the 1949 Act and section 85 of the 2000 Act it can be discerned that, where it is concluded that a scheme will not conserve or enhance the natural beauty, wildlife and cultural heritage of a National Park or AONB, the Secretary of State in determining the DCO Application will need to consider whether there is anything further that could be done to avoid or mitigate any harm identified. If there is not, then he will have fulfilled his duty to seek to further those purposes.

The National Networks National Policy Statement (**NPSNN**) in paragraph 5.151 provides (with the same wording appearing in paragraph 5.163 of the draft proposed replacement NPSNN):

> *"The Secretary of State should refuse development consent in these areas except in exceptional circumstances and where it can be demonstrated that it is in the public interest. Consideration of such applications should include an assessment of:*
> *• the need for the development, including in terms of any national considerations, and the impact of consenting, or not consenting it, upon the local economy;*
> *• the cost of, and scope for, developing elsewhere, outside the designated area, or meeting the need for it in some other way; and*
> *• any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."*

As can be seen, this reflects the approach in section 11(1A) of the 1949 Act and section 85 of the 2000 Act as it requires consideration of meeting the need for a scheme in a way which does not affect a National Park or AONB and requires mitigation of the impacts where it cannot. The existence of the duties in section 11(1A) of the 1949 Act and section 85 of the 2000 Act will be relevant when considering alternatives.

The approach taken in section 11(1A) and section 85 of the 2000 Act is also reflected in NPSNN paragraph 5.152 which provides:

> *"There is a strong presumption against any significant road widening or the building of new roads and strategic rail freight interchanges in a National Park, the Broads and Areas of Outstanding Natural Beauty, unless it can be shown there are compelling reasons for the new or enhanced capacity and with any benefits outweighing the costs very significantly. Planning of the Strategic Road Network should encourage routes that avoid National Parks, the Broads and Areas of Outstanding Natural Beauty."*

NPSNN paragraph 5.153 provides (with the same wording appearing in paragraph 5.165 of the draft proposed replacement NPSNN):

> *"Where consent is given in these areas, the Secretary of State should be satisfied that the applicant has ensured that the project will be carried out to high environmental standards and where possible includes measures to enhance other*

aspects of the environment. Where necessary, the Secretary of State should consider the imposition of appropriate requirements to ensure these standards are delivered."

This too reflects the approach to seeking to conserve or enhance the natural beauty, wildlife and cultural heritage of a National Park or AONB, which is achieved by considering whether any further measures could be required by way of mitigation for any harm caused.

In respect of schemes which lie outside of National Parks or AONBs but which may have effects within them, paragraph 5.154 of the NPSNN provides (with the same wording appearing in paragraph 5.166 of the draft proposed replacement NPSNN):

"The aim should be to avoid compromising the purposes of designation and such projects should be designed sensitively given the various siting, operational, and other relevant constraints."

This too is reflective of the duties in section 11(1A) of the 1949 Act and section 85 of the 2000 Act.

Paragraph 5.157 of NPSNN provides that:

"In taking decisions, the Secretary of State should consider whether the project has been designed carefully, taking account of environmental effects on the landscape and siting, operational and other relevant constraints, ***to avoid adverse effects on landscape or to minimise harm to the landscape, including by reasonable mitigation****."*

This too is consistent with the approach to avoiding or mitigating harm, which the duties in section 11(1A) and section 85 of the 2000 Act give rise to. The Applicant has demonstrated that the Project is justified and that its benefits cannot be delivered by any alternative route or means, per (amongst other documents) the Case for the Project **[APP-008]**.

The Project has been carefully appraised against paragraphs 5.151 to 5.154 and 5.157 of the NPSNN. There is no further mitigation that can be reasonably required to mitigate its effects on the relevant National Parks and AONBs.

Accordingly, the NPSNN effectively already obliges the Secretary of State to seek to further the relevant statutory purposes, soon to be required as a matter of law through the amendments made by section 245 of the Levelling-up and Regeneration Act 2023, and the Secretary of State can conclude that there is nothing more that the Applicant could reasonably do to avoid or mitigate for any harm identified. As a result, the Secretary of State can conclude that he can grant the application for the DCO on a basis which is entirely consistent with the duties in section 11(1A) of the 1949 Act and section 85 of the 2000 Act.

Submissions have also been made with regard to section 104 of the Planning Act 2008. Section 104(3) of the 2008 Act provides:

> *"The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."*

It has been suggested in some representations from IPs, including Anne Robinson, that section 104(5) of the 2008 Act applies since determining the application in accordance with the NPSNN will result in a breach of the duties set out in section 11(1A) of the 1949 Act and section 85 of the 2000 Act. Accordingly, it is argued that the decision should not be determined in accordance with the NPSNN.

Section 104(5) of the 2008 Act states:

> *"This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment."*

The representations made contending that this subsection applies misread the duties in section 11(1A) of the 1949 Act and section 85 of the 2000 Act. They proceed on the basis that the duty is to further those purposes. That is not correct; the duty is to "seek to further" those purposes.

As set out in the analysis above of the NPSNN and the draft proposed replacement NPSNN, the policy approach set out in NPSNN is entirely consistent with seeking to further those purposes, since NPSNN requires it to be established that impacts cannot be avoided or, if there are impacts, further mitigated. For these reasons, section 104(5) does not apply.

Analysis of submissions made regarding articles 53 and 54 of the draft DCO

As referenced above, the Applicant notes that various IPs have made submissions relating to the Secretary of State's proposed new drafting of articles 53 and 54 of the draft DCO. In order to assist the Secretary of State, the Applicant has produced at Annex 1 a tabular analysis of each IP's submissions on these articles, alongside comments by the Applicant on (and a suggested approach to) each of the concerns raised.

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

Yours sincerely

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ANNEX 1

ANALYSIS OF VARIOUS IP SUBMISSIONS ON ARTICLES 53 AND 54 OF THE DRAFT DCO

1. INTRODUCTION

1.1. In his letter of 8 November 2023 (**"RFI 6"**) the Secretary of State consulted the Applicant and other Interested Parties on, among other matters, proposed amendments to articles 53 (Environmental Management Plans) and 54 (detailed design) of the Applicant's draft development consent order. The Applicant responded in detail to that consultation in its letter of 29 November 2023 (**"RFI 6 Response"**) and the contents of that letter set out the Applicant's position and that position remains unaltered.

1.2. The purpose of this document is to set out the Applicant's response to the comments of Interested Parties insofar as they relate to the drafting of articles 53 and 54. The first column of the table below identifies the Interested Party, the second column includes verbatim extracts of that Interested Party's submission that relates to articles 53 and 54 and the third column sets out the Applicant's response to those comments. Where the extract of an Interested Party's submission also includes comments that relate to other matters these matters are not responded to in this table. The Applicant considers that its position in relation to those other matters is adequately addressed in its earlier submissions.

1.3. In this response, each reference to the SoS's drafting is a reference to the proposed forms of articles 53 and 54 contained in the Secretary of State's RFI 6. Unless the context states otherwise, a reference to the Applicant's proposed drafting is a reference to the proposed forms of articles 53 and 54 contained in the final version of the draft DCO submitted by the Applicant during the examination **[REP9-013]**.

1.4. The Applicant's position remains that, if development consent is granted, it ought to be in the form of the Applicant's final draft DCO **[REP9-013]**. To assist the Secretary of State, however, if he is minded to depart from the Applicant's wording in the draft DCO, the Applicant has prepared extracts of articles 53 and 54 which the Applicant considers both incorporate the without prejudice drafting agreed with key statutory consultees during the examination and take into account the comments of Interested Parties to RFI 6. This can be found at section 3 of this Annex and is referred to in the table below as the **"the RFI 7 Drafting"**.

2. THE APPLICANT'S RESPONSE TO INTERESTED PARTIES SUBMISSIONS TO RFI 6 ON THE SECRETARY OF STATE'S PROPOSED ARTICLES 53 (ENVIRONMENTAL MANAGEMENT PLANS) AND 54 (DETAILED DESIGN)

Interested Party	Verbatim submissions on articles 53 and 54	Applicant's response to the drafting comments relating to articles 53 and 54
Dr Mary Clare Martin	According to Article 53/54 of the draft DCO, the SoS is to approve the second iteration of the EMP but not the third. This leaves members of the public in a very vulnerable position, in relation to changes in the conditions under which the dual carriageway is constructed. For anyone living near the road during construction, measures to protect the public such as designated hours of work are essential. The proposal that the Arboriculture Assessment will not be carried out until the second iteration of the EMP raises serious issues about its effectiveness.	**Approval of third iteration EMP (article 53(10) of the Applicant's draft DCO)** The third iteration EMP covers the operation and maintenance of the authorised development and has no bearing on the construction phase or construction working hours. For the reasons set out in the RFI 6 Response, the Applicant considers it to be appropriate that the third iteration EMP is not subject to a requirement for Secretary of State approval because, under the Applicant's proposed drafting, a third iteration EMP must be in substantial accordance with the second iteration EMP and that second iteration EMP will have already been approved by the Secretary of State. This approach is consistent with the vast majority of National Highways' other development consent orders and there is no reason to depart from that established approach here. Both the Applicant's preferred drafting and the Applicant's RFI 7 Drafting go further than many other provisions relating to the regulation of operation and maintenance by requiring determinations to be made in accordance with the "consultation and determination provisions" contained in paragraphs 1.4.9 to 1.4.52 of the first iteration EMP, thereby ensuring that the relevant statutory bodies and local authorities are consulted on a third iteration EMP before it is approved. **Arboricultural Impact Assessment (article 53(4) of the Applicant's draft DCO)** The Applicant has set out its views in its RFI 6 Response. In summary, there is no need for article 53 to expressly make reference to Arboricultural Impact Assessment as adequate provision is already contained in the first iteration EMP. The Applicant notes that both its preferred drafting and that proposed by the Secretary of State rightly defer the carrying out of an Arboricultural Impact Assessment to the second iteration EMP stage.

Interested Party	Verbatim submissions on articles 53 and 54	Applicant's response to the drafting comments relating to articles 53 and 54
Durham County Council	**Article 53** DCC welcomes and supports the proposed amendments to the drafting of Article 53 set out in the Annex to the letter dated 8 November 2023. DCC supports the removal of the "self-approval provisions" previously included in Article 53 of the draft Order relating to amendments to the second iteration Environmental Management Plan (EMP). DCC also supports the need for the third iteration EMP to be submitted to and approved by the Secretary of State rather than the undertaker as previously drafted. **Article 54** DCC considers that the revised drafting is disproportionate and would require the Council to deploy significant resources including engage external consultants to assess such amendments. As a result, DCC disagrees with the revised drafting and consider it should be for the Secretary of State to approve any amendments pursuant to Article 54(2).	**Article 53 (Environmental Management Plans)** The Applicant has set out its views in its RFI 6 Response. **Article 54 (detailed design) – relevant planning authority approval functions** The Applicant has set out its views in its RFI 6 Response and notes that Durham County Council agrees with the Applicant that it would not be appropriate for the relevant planning authority to have an approval function under article 54(2) as proposed in the SoS's drafting. The Applicant's RFI 7 Drafting restores the Secretary of State's approval functions under this article.
Emma Nicholson	**Timing of the Arboricultural Impact Assessment** Within my Deadline 1 Written Representation I highlighted my concern that the Arboricultural Impact Assessment (AIA) remained. The Examiners at the Issue Specific Hearings appeared to make it absolutely clear that the EMP must include the Arboricultural Impact Assessment. An AIA must be complete prior to the grant of a development consent order. To delay the AIA until after a decision is made means the AIA becomes nothing more than a token gesture. It would clearly be perceived as a tick box exercise by whatever body was commissioned to conduct it. What would the purpose of a post AIA be post decision. • It would not feed into decisions about the extent of land required to achieve the necessary level. Environmental mitigation required to compensation for the trees, hedgerows and habitat lost. • Time would be lost in commissioning the report when it could be completed pre- decision. • No value would be placed on tree loss when it came to the merit of approving the scheme. • The temptation to downplay the value of individual trees would increase as the decision was already made. The impact of the scheme on arboriculture should form part of the balancing exercise conducted by the SOS when deciding whether or not to grant the DCO. If an AIA is not conducted before determination of the DCO, there can be no confidence that proper efforts have been made to come to a reasonable conclusion of the impact of the scheme. The environmental, social and economic benefits of retaining good quality trees, and mitigating tree. loss, to help mitigate the negative impacts of construction on habitat and landscape are clear. This scheme takes goes directly through and close to protected landscapes. It will inevitably have a negative impact on the existing tree stock. 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 ensure 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. Already NH have failed to identify ancient trees, or they have failed to classify tree stock correctly. In Kirkby Thore it was the knowledge of local residents which drew attention to the fact the planned route ignored an ancient oak on Sleastonhow Lane. This is not an isolated case. This was only noted because the lane is used for recreational purposes and the tree is viable to the public. https://cwherald.com/news/fears-600-year-old-oak-at-risk-due-to-plans-for-a66-upgrade/ Where the route cuts across private land the public cannot be relied upon to bring the existence of such trees to attention of NH, and it is not their role to do so. That is the purpose of the AIA. **Article 54** The suggestion that the detailed design of major infrastructure projects should be devolved to the relevant planning authority ("RPA") is another sign of watering down standards. Westmorland and Furness Council is a recently constructed entity which is finding its feet. It is a combination of County Council and local councils merged into one unitary authority. Planning staff are spread across one	**Arboricultural Impact Assessment (article 53(4) of the Applicant's draft DCO)** The Applicant has set out its views in its RFI 6 Response. In summary, there is no need for article 53 to expressly make reference to Arboricultural Impact Assessment as adequate provision is already contained in the first iteration EMP. The Applicant notes that both its preferred drafting and the drafting proposed by the Secretary of State rightly defer the carrying out of an Arboricultural Impact Assessment to the second iteration EMP stage. **Article 54 (detailed design)** The Applicant has set out its views in its RFI 6 Response and notes that Ms Nicholson agrees with the Applicant that it would not be appropriate for the relevant planning authority to have an approval function under article 54 as proposed in the SoS's drafting. The Applicant's RFI 7 Drafting restores the Secretary of State's approval functions under this article.

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	of the largest and most inaccessible counties in the country. What checks have been made as to the relevant expertise within the Westmorland and Furness. When the question of how approval of large infrastructure was addressed at the Issue Specific Hearings the Examiners were surprised by the submission of Watercolors despite their specific request for visual representation . The link is provided to the segment of the examination which dealt with the Troutbeck Viaduct which crosses the Eden SAC. https://infrastructure.planninginspectorate.gov.uk/wpcontent/ipc/uploads/projects/TR010062/TR010062-001496-ISH3%20Session%201.html Article 54(1), requires the development to be designed in detail and carried out in accordance with the design principles, works plans, engineering section drawings. To devolve this to Westmorland and Furness when the structures involved are sited within AONB/ Setting of AONB, impact on the Eden SAC does not ensure that proper expertise and technical consideration is available to ensure the protection of these valuable landscapes. The RPA would only have to consult the Environment Agency on Flood mitigation. It would not be required to consult other bodies to include the NP AONB on the visual impact, the Local Parish of vernacular design to ensure it was in keeping with the setting. Bizarrely in relation to the approvals under paragraph 7 and 8, the RPA only duty (save for the Environment Agency) would be 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, and to illustrate the pollution issues which arise a recent article in the Guardian is attached emphasizing the impact of these structures. https://www.theguardian.com/environment/2023/oct/05/potentially-toxic-road-runoff-outfallspolluting-england-rivers	
Environment Agency	**Article 53** It is proposed to amend Article 53 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 (EMP) submitted for approval. In their draft DCO submitted during the Examination, the applicant did not propose any further consultation by the Secretary of State with relevant parties and statutory bodies on the second iteration EMP submitted for approval. We have considered the proposed changes and we have no preference for either the approach proposed by the Secretary of State or the approach as originally proposed by the applicant. **Article 54** It is proposed to amend article 54(4) such that following consultation with the Environment Agency, the local planning authority would need to approve the compensatory flood storage scheme for Scheme 6 rather than the Secretary of State: *(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.* We have no preference as to whether the compensatory flood storage scheme is approved by the Secretary of State or by the local planning authority. Our key concern is that consultation with the Environment Agency is undertaken prior to any approval, regardless of who the approval body is. It is also proposed to amend Article 54(7) as follows: *(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.* The revised wording of the article states that "details of **the design** and external appearance" (my emphasis) of the viaducts needs to be agreed prior to the commencement of construction, however "design" did not originally feature in this article. Our understanding was that the article was intended to allow the Secretary of State control over how the viaducts will look, in the absence of sufficient detail presented during the Examination.	**Article 53 (Environmental Management Plans) – mandatory third stage of consultation** The Applicant has set out its position in its RFI 6 Response. The Applicant notes that the Environment Agency has no preference for either (i) the Applicant's proposed consultation and determination provisions or (ii) consultation at the Secretary of State approval stage. In either case the Environment Agency is not calling for both the Applicant's consultation and determination provisions and a third mandatory Secretary of State consultation stage. The Applicant's RFI 7 Drafting restores the position that consultation is carried out by the Applicant in accordance with the "consultation and determination provisions" contained in the first iteration EMP. The Applicant notes that should the Secretary of State consider it desirable to consult with a party, such as the Environment Agency, before approving a second iteration EMP, he is at liberty to do so and the DCO need not make any explicit provision to that effect. **Article 54 (detailed design) – relevant planning authority approval functions** The Applicant has set out its position in its RFI 6 Response. The Applicant notes that the Environment Agency is not calling for approval functions under this article to sit with the relevant planning authority. The without prejudice drafting agreed between the Applicant and the Environment Agency makes provision for consultation with the Environment Agency in relation to the detailed design of the flood plain compensation scheme for Scheme 06. The Applicant's RFI 7 Drafting restores the Secretary of State's approval functions under this article. **Article 54 (detailed design) – requirement for approval of the "design" of viaducts (article 54(7) of the SoS proposed drafting)** The Applicant notes that the Environment Agency's response indicates that it is generally content with the controls included in the Applicant's proposed DCO (including the Agency's protective provisions and the measures secured through the EMP) and that the SoS's proposed broadening of

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	If the article is amended to include "design" of the viaducts as well as appearance, then it would be necessary for the determining authority to consult with the Environment Agency prior to making their decision. This is because some aspects of the bridge design will be regulated by the Environment Agency through the Protective Provisions and the detailed design of all watercourse crossings is regulated through the EMP (DRDWE-05), upon which the Environment Agency will be a consultee. We request that any changes to Article 54(7) which include controls over design also include the Environment Agency as a consultee, i.e. *(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,* ***following consultation with the Environment Agency****.* We would have no preference as to who the determining authority is, provided that the Environment Agency is consulted before a decision is made. If the proposed wording of Article 54(7) is changed to remove "design" and the article was to relate solely to the visual appearance of the viaducts, we would not need to be a consultee as the visual impact of the structures is not within our remit to advise on.	the scope of this provision by requiring approval of the "design" requires, in the Environment Agency's view, further consequential amendments to remedy that change. The Applicant further notes that it would require in effect multiple approvals, under both the Environment Agency's protective provisions and under the SoS proposed amendments to this article. Duplication of regulation is generally to be avoided as it increases the risks of delays (or even deadlock where the approval bodies cannot reach agreement) to delivery and runs contrary to the 'Project Speed' ethos underlying the Applicant's approach. The Applicant further notes that the Environment Agency is content if "design" were to be removed from the SoS's proposed drafting. The Applicant's RFI 7 Drafting removes "design" from the scope of the matters to be approved by the Secretary of State in relation to the viaducts, restoring its scope to the approval of the "external appearance" as proposed in the Applicant's without prejudice drafting previously submitted during the course of the examination.
Historic England	At the conclusion of the examination of the Application, Historic England had two concerns which relate to the drafting of Article 53 of the DCO. These are set out in detail in our final statement to the examination **[REP9-042]**; Historic England also agreed a joint position statement with the Applicant on these issues **[REP9-042]**. In summary, our concerns were: 1. The absence of external oversight of the Applicant's proposed internal handling arrangements for the post-consent determinations it would make under the EMP; and 2. The standard to which archaeological investigations and mitigation works 'carved out' of the definition of "commencement" in Article 53 of the DCO would be carried out and supervised. In relation to Article 53, the proposed new drafting provides that the approval of amendments to the second iteration EMP, and of the third iteration EMP, will be the responsibility of the Secretary of State. The proposed new drafting also requires that any archaeological works 'carved out' from the definition of commencement are undertaken to recognised standards. As such, the revised wording of Article 53 addresses our concerns with the Applicant's proposal as it stood at the conclusion of the examination. We would, however, take this opportunity to raise an issue for clarification. It would be helpful if the drafting of Article 53(8) could specify in terms whether the provisions of Article 53(2) and (7), and the consultation and determination provisions in the EMP, also apply to the submission and approval of the third iteration EMP. In relation to Article 54, the drafting of this provision was not in issue between the Applicant and Historic England at the conclusion of the examination. We note the change to the drafting which will mean that various matters will be signed off by Local Planning Authorities rather than the Secretary of State. We also note that Article 54(9) refers to Article 53(15), which will need to be updated to Article 53(10) should the new drafting of Article 53 be used. The proposed new drafting of Article 54 does not raise any new issues of concern in relation to Historic England's areas of responsibility.	**Article 53 (Environmental Management Plans) – handling arrangements for the Applicant's own determinations** The Applicant notes that Historic England's response refers to the agreed joint position statement **[REP9-034]** and confirms that Historic England's concerns would have been addressed by adopting the drafting approaches agreed in that statement. The Applicant also noted in its RFI 6 Response that Historic England's concerns with National Highways' own determinations were overcome by the inclusion of the 'call-in' mechanism included in the Applicant's article 53(7) and (8) which the Secretary of State proposes to delete. As is set out in the joint position statement **[REP9-034]** the matter outstanding in relation to the Applicant's own determinations was the process for establish the handling arrangements within the Applicant's organisation to ensure a functional separation of the 'promoter' and the 'approval' functions. The Applicant's position is that handling arrangements cannot be immutably fixed in the first iteration EMP as it will require a degree of flexibility to respond to changes in its organisation over time. However, the requirement to ensure functional separation is in any event secured because it is set out in paragraphs 1.4.45 to 1.4.49 of the first iteration EMP, i.e. the "consultation and determination provisions" secured in the Applicant's article 53(12). The agreed without prejudice drafting contained in **[REP9-034]** seeks to address Historic England's concerns in relation to handling arrangements by requiring the Secretary of State's approval of the handling arrangements before any determination is made by the Applicant. The Applicant's RFI 7 Drafting restores the "call-in" mechanism and the approval by the Applicant of "insubstantial changes" to a second iteration EMP. It also includes at paragraphs (12) and (13) the without prejudice drafting agreed between the Applicant and Historic England in their joint position statement **[REP9-034]** to address the residual concern in relation to the Applicant's handling arrangements. The RFI 7 Drafting also restores to the Applicant the function of approving the third iteration EMP in accordance with the "consultation and determination provisions". **Article 54 (detailed design)** The Applicant notes that the drafting of article 54 was not an issue for Historic England.
Natural England	**Article 53 – EMPs** Natural England notes the amendments to the EMP. However, measures to secure the blanket bog compensation are not included in these changes. Natural England have included the last draft of its preferred wording with the applicant as an Annex to this letter. As seen in NE's letter dated 27th October: 'Natural England would like to document that it strongly prefers the second option ("Option 2"), attached for ease of reference to the bottom of this letter, which details that no part	**Article 53 (Environmental Management Plans)** The Applicant sets outs its views on a without prejudice mechanism for securing blanket bog compensation in its letter of 27 October 2023, responding to the Secretary of State's fifth request for information dated 18 October 2023. **Article 54 (detailed design)**

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	of the mainline A66 shall commence until a detailed blanket bog and maintenance plan is prepared in consultation with Natural England. This option ensures that NE have sufficient opportunity at a meaningful stage to ensure that the blanket bog compensation will be appropriate and well secured before works commence.' **Article 54 – detailed design** It is Natural England role to provide advice on any likely impacts to protected sites, in this case the River Eden SAC is a prominent and precious resource. Natural England have been involved in many discussions thus far regarding the design of viaducts over Trout Beck, Cringle Beck and Moor Beck. It is important that these designs are secured via the DCO. It is our statutory role to advise the competent authority, and proving that Natural England still have the ability to be consulted we are happy to advise either the SoS or Westmorland and Furness. The design for the structure crossing of Trout Beck must allow for full functionality of normal supporting river processes including flood flows and associated erosion/sediment regime, and the migration of the channel across its floodplain. This can be achieved using an open multi-span structure, across the entire floodplain of the watercourse. There are existing plans for river restoration along this section of the Beck and the bridge design must not compromise the delivery of the restoration and restoring the river to a favourable condition. The design needs to ensure that there is no adverse impact on the integrity of the River Eden SAC.	The Applicant's notes that Natural England's response does not appear to express a preference between the Applicant's proposed drafting and that proposed by the Secretary of State. For the reasons set out in the Applicant's RFI 6 Response, the Applicant considers that its drafting ought to be taken forward, should development consent be granted. The Applicant further notes that the provisions of the Project Design Principles **[REP8-061]** secure that the design of the viaducts achieves the aims that Natural England refers to in its response to RFI 6. Please see the following project wide and scheme specific principles: • Project wide: ○ LI04 – *"Where structures are in close proximity to watercourses, they must also be designed to have regard to accommodating geomorphological changes and the need to conserve and maintain the integrity of riverbanks to prevent erosion and maintain habitat connectivity and fluvial geomorphological processes, and be able to adapt to increased risks of bank erosion due to climate change and natural geomorphological processes."* • Scheme specific : ○ 0405.04 – *"The structure crossing the Trout Beck must allow for full functionality of normal supporting river processes including flood flows and associated erosion/sediment regime, and the migration of the channel across its floodplain (these are important functions of its role as part of the River Eden Special Area of Conservation or SAC). This is to be achieved using an open multi-span structure, across the entire floodplain of the watercourse and the span arrangements for the Trout Beck viaduct are to be designed such that the vertical clearance from the top of River Bank Level relative to meters Above Ordnance Datum is a minimum of 2.5m and at least 600mm above the 1 in 100 year plus climate change flood level as reported in the ES, unless otherwise agreed with National Highways (in respect of standards and maintenance requirements), the Environment Agency and Natural England."* ○ 0405.04 – *"With the Trout Beck viaduct, the orientation of the piers must be informed by detailed flood modelling so that they do not influence the migratory nature of the river. All piers are to be designed as in-channel structures (even if they are not currently in-channel in the DCO scheme design), to allow for the movement of the river and avoid the need to add scour protection in future."* ○ 0405.04 – *"The same Design Principles as for the Trout Beck crossing above must be applied to all watercourses which are functionally linked to the SAC – Moor Beck, Cringle Beck – and all crossings of such watercourses are to be open span structures."* ○ 0405.11 – *"Design of flood compensation at the Trout Beck will be blended into the landscape and designed to tie into existing topographic pattern where reasonably practicable. Flood compensation must be designed to reduce the footprint and visual impact of the proposals and is to be designed sensitively with regard to existing ground levels/profiles and local landscape characteristics. Viaduct piers will be designed and constructed to withstand river erosion in order that no additional bank protection would be required under a future scenario where the river channel has migrated (laterally) and interacts with the piers. Design should have due regard to The Trout Beck river restoration scheme at Sleastonhowe, proposed at the date of this document and managed by the Eden Rivers Trust."* The above design principles address the matters of concern to Natural England and compliance with the Design Principles is secured through the Applicant's article 54(1). Consequently, the Applicant remains of the view that it is unnecessary to require approval of the "design" of the viaducts.

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North Yorkshire Council	The North Yorkshire Council supports the response made by Westmorland and Furness Council on this topic in their letter dated 29 November 2023.	Please see the Applicant's response to Westmorland and Furness Council below.
Transport Action Network	**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**	The Applicant considers that the matters raised by Transport Action Network are adequately addressed in the Applicant's RFI 6 Response. The Applicant further notes that the Transport Action Network shares the Applicant's concerns with respect to the proposal for the relevant planning authority to have an approval function under article 54 (detailed design).

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	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.	
United Utilities Water Limited	With regards to draft Article 53, which relates to a requirement for the submission of a second iteration of Environmental Management Plans, we request that the applicant undertakes early consultation with UUW on the content of the EMP in accordance with the provisions of the side agreement. This reflects the fact that the EMP will cover matters such as construction management plans and controls associated with vibration. The content of such documents could affect UUW assets. In relation to draft Article 54, which relates to detailed design, we similarly request that the applicant undertakes early consultation with UUW on any detailed design changes in accordance with the provisions of the side agreement.	The Applicant notes that United Utilities Water Limited has the benefit of the provisions of the side agreement between the parties and as such no amendments are required to articles 53 and 54 to reflect those matters.
Westmorland and Furness Council	**Article 53** The Council welcomes and supports the proposed amendments to the drafting of Article 53 set out in the Annex to letter of 8 November 2023. Throughout the Examination, the Council made representations on the need for full and meaningful consultation on the content of the second iteration of the Environmental Management Plan (**EMP**). The Council welcomes the direct consultation from the Secretary of State on the second iteration EMP initially submitted by the undertaker as well as any amendments made to that second iteration EMP. The Council additionally supports the removal of the "self-approval provisions" previously included in Article 53 of the draft Order relating to amendments to the second iteration EMP. Approval by the Secretary of State is a more independent and transparent process. The Council also supports the need for the third iteration EMP to be submitted to and approved by the Secretary of State rather than the undertaker as previously drafted. The Council has made some suggestions/ comments on the drafting of revised Article 53 in the Appendix to this letter. **Article 54** The Council has some concerns on the proposed amendments to the drafting of Article 54 set out in the Annex to the letter of 8 November 2023.	**Article 53 (Environmental Management Plans)** The Applicant has set out its position in its RFI 6 Response. **Article 54 (detailed design)** The Applicant notes that Westmorland and Furness Council, whose submission is endorsed by North Yorkshire Council, shares the Applicant's concerns that it is not appropriate for the relevant planning authority to have approval functions under article 54 (detailed design) and that the proposed change gives rise to other consequential issues that alter a previously settled position between the parties, notwithstanding other areas of disagreement. The only exception to the above is that the Applicant notes that Westmorland and Furness Council is content with the additional wording contained in article 54(8), whereas the Applicant still considers (for the reasons set out in its RFI 6 Response) that relevant planning authority approval should not be required for the entirety of this article, particularly given that article 54(8) already includes a requirement for the Applicant to consult with the relevant planning authority in this regard, before approval by the Secretary of State. The Applicant's RFI 7 Drafting restores the Secretary of State's approval functions under this article.

Interested Party	Verbatim submissions on articles 53 and 54	Applicant's response to the drafting comments relating to articles 53 and 54
	In your letter dated 8 November 2023, you suggest that the amendments to Article 54 relate to the approval by the relevant planning authority being Westmorland and Furness Council to the detailed design for Trout Beck, Cringle Beck and Moor Beck Viaducts. However, the revised drafting goes further than this and purports under Article 54(2) to require the relevant planning authority rather than the Secretary of State to approve amendments to the documents referred to in Article 54(1)(a) to (c) provided that those amendments do not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement. The previous draft authorised the Secretary of State to approve such amendments with the relevant planning authority being consulted on such changes. The Council considers that the revised drafting is disproportionate and would require the Council to deploy significant resources including engage external consultants to assess such amendments for the project as a whole. The Council's position is to reject the revised drafting and for the Secretary of State to approve any amendments pursuant to Article 54(2). Please see the Appendix to this letter for suggested drafting. ***Floodplain Compensation Scheme*** The Council is satisfied with the additional drafting relating to the submission of a detailed flood compensation scheme for scheme 06 under Article 54(4) to 54(6). ***Viaducts – Design and Appearance*** The Council welcomes the inclusion of Article 54(7) into the dDCO. However, it considers that the Secretary of State should be the authority determining approval of the design and external appearance rather than the Council. The Council considers that it is proportionate for the Council to be expressly consulted on the design and external appearance for a period of no less than 30 working days to allow it to consider and comment on its position, however, it is not appropriate for the Council to determine whether or not the submitted design and appearance of the viaducts are acceptable. The Council is aware that the Applicant has previously sought comments from the Design Council in relation to the design principles document relating to this project. The Council would welcome meaningful engagement with the Design Council to assess the Applicant's proposed design and appearance of the viaducts. ***Langrigg*** The Council is satisfied with the additional wording contained in Article 54(8) relating to the drainage ponds, access roads and ancillary works at Langrigg.	

3. THE APPLICANT'S WITHOUT PREJUDICE PROPOSED RFI 7 DRAFTING FOR ARTICLES 53 (ENVIRONMENTAL MANAGEMENT PLANS) AND 54 (DETAILED DESIGN)

3.1. On the following pages the Applicant has prepared proposed drafting that responds to the submissions of interested parties to the RFI 6 consultation relating to the Secretary of State's proposed amendments to articles 53 and 54. It is prepared without prejudice to the Applicant's position that if the development consent order is to be made it ought to be made in the form of the Applicant's last submitted draft DCO contained in document **[REP9-013]**.

3.2. The Applicant's RFI 7 Drafting largely adopts the without prejudice drafting agreed with the relevant stakeholders in the joint position statements annexed to **[REP9-034]** and other without prejudice drafting submitted during the course of the examination that covers the same issues as those referenced in the Secretary of State's RFI 6 drafting.

3.3. The changes shown are tracked from the baseline of the Applicant's final draft DCO **[REP9-013]**.

Environmental Management Plans

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

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

(4) 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) be prepared in accordance with the consultation and determination provisions.

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

(6) 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.

(7) 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.

(8) 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—

(i) a copy of the submission;

(ii) a copy of the summary report; and

(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.

(9) 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

(b) 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 the undertaker under paragraph (5).

(10) 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 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.

(11) 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.

(12) The undertaker must not make a determination under—

(a) a second iteration EMP approved under paragraph (1);

(b) paragraph (6); or

(c) paragraph (10),

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

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

(14) ~~(11)~~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 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, 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.—(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.

(2) The Secretary of State 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 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 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 S06 is to commence until a detailed floodplain compensation scheme for that part has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority and the Environment Agency.

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

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

(7) The undertaker must not commence the 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 external appearance of the viaducts have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority.

(8) The undertaker must not commence the construction of Work No. 06-7 until detailed designs for that work including the locations of any drainage ponds, access roads and the associated ancillary

works have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority.

(9) In this article "commence" has the same meaning as in article 53(14).