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12 February 2024

Nathan Dyer
Transport Infrastructure Planning Unit

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 tenth Request for Information dated 2 February 2024 (the RfI)

I am writing in response to the RfI dated 2 February 2024 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 invites all Interested Parties to provide comments in relation to the representations received in response to the Secretary of State's previous RfI dated 24 January 2024 (**the Ninth RfI**). The Ninth RfI elicited responses from: (1) the Applicant; (2) Campaign for National Parks (**CNP**); and (3) The Woodland Trust (**WT**). The Applicant is therefore providing comments on the matters raised in the submissions of CNP and WT, which are summarised as follows:

- CNP – concerns relating to the Levelling-up and Regeneration Act (**LURA**) 2023, including a legal opinion (**the CNP Legal Opinion**) from Alex Shattock of Landmark Chambers; and
- WT – concerns relating to the provision of an Arboricultural Impact Assessment (**AIA**) by the Applicant.

In this letter, the Applicant provides responses to these matters in turn, using sub-headings for each matter.

CNP – LURA

The Applicant notes CNP's response to the Ninth RfI, including the CNP Legal Opinion. In this letter, the Applicant addresses the CNP Legal Opinion, noting also that the Applicant has already provided detailed submissions in relation to LURA in pages 1-5 of the Applicant's response dated 31 January 2024 to the Ninth RfI (**the Ninth RfI Response**) and pages 10-14 of the Applicant's response dated 20 December 2023 to the Secretary of State's seventh RfI.

The CNP Legal Opinion expresses views as to the meaning of the amended duty in section 11A of the National Parks and Access to the Countryside Act 1949 (**the 1949 Act**) via examination of other statutory duties, none of which utilises the same language. The Applicant does not consider that any of these are *"comparable duties"*, as the CNP Legal Opinion suggests at paragraph 12, particularly since none of these includes the phrase *"seek to further"*, which is the phrase inserted by LURA into section 11A of the 1949 Act.

The case law referred to in the CNP Legal Opinion is entirely distinguishable, as the courts in those cases were not interpreting statutory language that has even similar wording to the duty under section 11A of the 1949 Act:

- the case of *re Lehman Bros Europe Ltd (in administration) (No 9) and another* [2018] Bus. L.R. 439 relates to the interpretation of Schedule B1 to the Insolvency Act 1986, which provides that the administrator or an insolvent company *"must perform his or her functions with the objectives of rescuing the company, achieving results for creditors or realising property"*. Therefore, this has no bearing on the duty to *"seek to further"* the purposes under section 5 of the 1949 Act; and
- the case of *R (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 relates to the interpretation of section 149 of the Equality Act 2010, which provides that a public authority, *"in the exercise of its functions"*, must have due regard to the need to *"advance"* equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. Therefore, this also has no bearing on the duty to *"seek to further"* the purposes under section 5 of the 1949 Act.

The Applicant considers the analysis contained in the CNP Legal Opinion to be flawed as a result of the above.

Ultimately the CNP Legal Opinion concludes that, where the duty under section 11A of the 1949 Act is engaged, the Applicant must provide positive evidence that it has taken *"all reasonable steps"* (paragraph 17(h) of the CNP Legal Opinion) or do *"all they reasonably can"* (paragraph 21 of the CNP Legal Opinion) to further the purposes under section 5 of the 1949 Act. The Applicant considers that this conclusion is flawed and places a gloss on the language of the statutory duty, given that this is not what the words of section 11A of the 1949 Act actually say.

Section 11A of the 1949 Act is clear in its language – the Secretary of State must *"seek to further"* the purposes under section 5 of the 1949 Act. This does not mean that the Secretary of State must achieve a furthering of those purposes in every case; nor does it mean that the Secretary of State must adopt all measures that are theoretically available to further those purposes.

Section 120 of the Planning Act 2008 identifies that an order granting development consent may impose requirements in connection with the development for which consent is granted. These requirements may include those which could have been imposed on *"the grant of any permission, consent or authorisation, or the giving of any notice, which (but for section 33(1)) would have been required for the development"*. Accordingly, the tests ordinarily applied to planning conditions also apply to what may be imposed by way of requirement. As the National Policy Statement for National Networks (**NPSNN**) identifies (at paragraph 4.9), the Secretary of State should only impose requirements in relation to a DCO that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise and reasonable in all other respects. Further, planning obligations can only be required where they are necessary to make the development acceptable in planning terms, directly related to the proposed development in question and fairly and reasonably related in scale and kind to that development.

The Applicant does not consider that the duty under section 11A of the 1949 Act gives rise to any overarching legal duty to adopt an alternative that best furthers the purposes under section 5 of the 1949 Act (as suggested in paragraph 21 of the CNP Legal Opinion) – a duty to *"seek to further"* objectives cannot reasonably be construed as a duty to best further those objectives. Again, the CNP Legal Opinion applies a gloss to the words of the duty under section 11A of the 1949 Act and, in doing so, adopts a test which is not warranted by the statutory language.

Natural England's submission dated 19 January 2024 explains that where the duty under section 11A of the 1949 Act is engaged, a decision-maker should explore and secure the measures that are appropriate and proportionate to the type and scale of the development and its implications for the relevant area. If this process of active consideration is undertaken, then it will be established that the decision-maker has sought to further the purposes under section 5 of the 1949 Act and thus has met the duty under section 11A of the 1949 Act. This advice from Natural England aligns with the Applicant's position, as stated on page 2 of the Ninth RfI Response. The Applicant also considers that this same approach applies in respect of the duty in section 85 of the Countryside and Rights of Way Act 2000 (the **2000 Act**).

CNP's submission asserts that, in light of the CNP Legal Opinion:

> *"National Highways must now provide the evidence to demonstrate why it has ruled out alternatives to dualling which would do more to further the purposes, such as introducing demand management measures to reduce traffic on the A66, investing in public transport or addressing road safety concerns by reducing speed limits"*.

The Applicant has demonstrated why demand management measures, public transport and the reduction of speed limits are not a reasonable alternative to the Project – they will not meet the need for the Project, nor will they deliver the Project's benefits. The Applicant has comprehensively demonstrated, with particular reference to the following documents, that there is no reasonable alternative to the Project:

- on pages 3.9-43 and 3.9-44 of the Legislation and Policy Compliance Statement: Update to Appendix A **[REP9-006]**, the Applicant has demonstrated compliance with paragraphs 4.27 and 4.28 of the NPSNN;
- sections 6.5.132 to 6.5.136 of the Case for the Project **[APP-008]** consider paragraph 5.151 of the NPSNN in regard to *"addressing the need for the Project in some other way"*;
- the Project Development Overview Report **[APP-244]** provides a detailed summary of the alternatives considered during the development of the Project from feasibility stage through to design for DCO;
- Chapter 3 of the Environmental Statement **[APP-056]** includes an assessment of alternative routes; and
- in Annex 6 of the Applicant's response dated 27 October 2023 to the Secretary of State's fifth RfI, the Applicant considers the alternative modes, public transport and a reduction of speed limits as part of its without prejudice derogation case.

The Applicant also draws the Secretary of State's attention to the Ninth RfI Response, which stated that:

- Chapter 13 of the Environmental Statement **[APP-056]** at paragraph 13.10.67 identifies a permanent moderate beneficial residual effect in terms of access to and from the Lake District National Park and no adverse impacts upon the Yorkshire Dales National Park;
- Chapter 10 of the Environmental Statement **[APP-053]** does not identify any adverse impacts of the Project in landscape or visual terms upon the natural beauty, wildlife and cultural heritage of any National Park;
- in relation to the duty under section 11A of the 1949 Act and the National Parks, there are no further measures that could be required in accordance with paragraphs 4.9 or 4.10 of the NPSNN;
- in relation to potential impacts upon the relevant Areas of Outstanding Natural Beauty (**AONB**) (i.e. the North Pennines AONB) and section 85 of the 2000 Act, the Applicant has adopted all measures that could be required in accordance with paragraphs 4.9 or 4.10 of the NPSNN. The Ninth RfI Response sets out examples of how the Project has been designed and mitigated paying careful regard to the special qualities of the AONB (for instance, as identified in the AONB Management Plan) and has taken a landscape-led approach to the design of the Project citing, for instance, the Case for the Project **[APP-008]** at paragraph 6.5.143: *"Furthermore, National Highways has taken a landscape-led approach to the Project design which has sought to minimise or avoid adverse effects on the North*

Pennines AONB landscape and its special qualities and where possible, sought to identify opportunities for enhancement…";

- the AONB would benefit from the Project, including that: (1) the boundary of the North Pennines AONB that runs along the northern edge of the road at Warcop would, as a result of the Project, benefit from the establishment of woodland belts and effective screen planting; and (2) the buildings, signage and other Ministry of Defence paraphernalia would be rationalised to create a neater and more contiguous boundary to the North Pennines AONB (Chapter 10 of the Environmental Statement **[APP-053]** at paragraphs 10.8.55 and 10.8.63); and
- Project Design Principles **[REP8-061]** and Environmental Management Plan **[REP8-005]** measures seek to have positive benefits for the AONB (see pages 3-5 of the Ninth RfI Response for details).

As a result, the Applicant considers that the Secretary of State can conclude that by granting the DCO as currently proposed, the duties created by section 245 of LURA would be complied with.

WT – AIA

The Applicant considers that the points made by WT in its submission, relating to AIA, have been the subject of detailed submissions by the Applicant throughout the Examination of the DCO Application and in subsequent correspondence. The Applicant does not consider that it would assist the Secretary of State to repeat its previous submissions in this letter, which mirrors the approach taken by the Applicant in its responses to previous RfIs and does not mean that the points raised by WT are taken as accepted by the Applicant. Instead, the Applicant refers WT and the Secretary of State to the following previous submissions and correspondence in particular:

- pages 41-44 of the Applicant's Post Hearing Submissions for Issue Specific Hearing 2 **[REP1-009]** – the need for an AIA;
- page 71 of the Applicant's Response to Written Representations made by Affected Persons at Deadline 1 **[REP2-015]** – the securing of an AIA;
- page 2.7-54 of the Applicant's Environmental Management Plan **[REP8-005]** – the commitment for an AIA; and
- page 9 of the Ninth RfI Response – the bullet point on AIA which contains cross-references to previous submissions by the Applicant on this matter.

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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A66 Northern Trans-Pennine Project