



The Rt Hon Mark Harper MP
Secretary of State for Transport
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By email to: TransportSecretary@dft.gsi.gov.uk

27 February 2024

Dear Secretary of State

TR010062: A66 Northern Trans-Pennine Project

Registration identification number – 20031994

I am writing to you regarding National Highways' response dated 12 February 2024 to the legal opinion procured by Campaign for National Parks, which was itself submitted in response to your letter of 24 January 2024 requesting further information from National Highways on the impact of section 245 of the Levelling-Up and Regeneration Act 2023.

Campaign for National Parks is gravely concerned that the conclusions in the legal opinion we have obtained have been misrepresented by National Highways in their letter, and we wish to make the following brief points by way of response.

National Highways states in its letter of 12 February 2024:

“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.”

We consider that this statement does not fairly reflect the advice in the legal opinion we have obtained. In particular, paragraph 7(h) of the legal opinion is clear in setting out the difference that is made by the requirement to “seek to further” rather than simply to “further.” It is not suggested in the legal opinion that “seek to further” means achieving a net positive furthering of the purpose in every case. It is rather a duty to take “all reasonable steps” to further the purpose.

Furthermore, the legal opinion does not suggest that “the Secretary of State must adopt all measures that are theoretically available to further those purposes.” Instead, again, it is a duty to take “all reasonable steps” to further the purpose (paragraph 7(h)).

National Highways also criticises this conclusion:



“...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.”

However, the interpretation set out in the legal opinion is entirely in accordance with Natural England’s advice dated 19 January 2024 (emphasis in original):

“the duty to ‘seek to further’ is an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape... can be furthered.

...

The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development...”

National Highways also states that “This advice from Natural England aligns with the Applicant’s position.”

If that is National Highways’ position, it is hard to understand why National Highways disagrees with the independent legal advice we have obtained, given that it aligns with the advice of Natural England.

Finally, National Highways says in its letter:

“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).”

Again, this misconstrues what is said in the legal opinion. The legal opinion does not suggest that there is an “overarching legal duty to adopt an alternative that best furthers the purposes.” What it says at paragraph 21 is as follows (emphasis added):

“Moreover, if there is an obvious alternative approach that better furthers the statutory purposes and the relevant authority cannot evidence (1) why it cannot reasonably adopt that approach or (2) that its chosen approach also seeks to further the statutory purposes, the decision will be open to legal challenge.”

In our view this is clearly correct. Any decision that engages the new duties must be supported by sufficient evidence as to why alternatives that better further the purposes were rejected.

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In conclusion, we urge you to reject the submissions of National Highways in their letter dated 12 February 2024, which misconstrue the legal opinion we have obtained (which itself entirely aligns with the views of Natural England).

We request that you take this letter into account before reaching your decision, particularly given the fact that there appears to be a legal dispute over the scope of an important new statutory duty.

Yours sincerely

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