

M60/M62/M66 Simister Island Interchange

TR010064

7.28 APPLICANT'S RESPONSE TO EXAMINING AUTHORITY'S WRITTEN QUESTIONS ON RECENT LEGAL JUDGEMENTS

APFP Regulation 5(2)(q)

Planning Act 2008

Infrastructure Planning (Applications: Prescribed
Forms and Procedure) Regulations 2009

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(Applications: Prescribed Forms and
Procedure) Regulations 2009**

M60/M62/M66 Simister Island Interchange
Development Consent Order 202[]

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QUESTIONS ON RECENT LEGAL JUDGEMENTS**

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1. Purpose of the Report

1.1.1 This report has been prepared by National Highways (the 'Applicant') in response to question CC.1.5 in the Examining Authority's first round of written questions, ExQ1 [PD-011] and question CC.2.3 in the Examining Authority's second round of written questions, ExQ2 [PD-013] which asked:

ExQ1: CC.1.5 Implications of Recent Legal Judgements

Does the judgement of the UK Supreme Court in Finch R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents) [2024] UKSC 20 and the judgement of the High Court in Friends of the Earth and Ors v SSDESNZ [2024] EWHC 995 (Admin) have any implications on the assessments and findings for the Proposed Development given that they were handed down after the application was accepted?

ExQ2: CC.2.3 Legal Judgements

The ExA requests that as part of its response (to ExQ1 CC.1.5), the applicant categorises the different emissions accounted for in any updates to its assessment which differ from those used in the current assessment, particularly in relation to downstream GhG emissions and how any updated assessment would meet the findings in the Finch Judgement.

In addition to the legal judgements referred to in ExQ1 CC.1.5, what, if any, implications does the finding in the high court ruling of Friends of the Earth Ltd & South Lakeland Action on Climate Change vs SSLUHC, West Cumbria Mining Ltd & Cumbria CC [2024] EWHC 2349 (Admin) have in the decision on this application?

2. Response to ExQ1: CC.1.5 Implications of Recent Legal Judgements

2.1 R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents) [2024] ("Finch")

Environmental Impact Assessment Background

- 2.1.1 Regulation 14(2)(b) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (EIA Regulations) provides that an Environmental Statement must include “a description of the likely significant effects of the proposed development on the environment”. Schedule 4 para 5 of the EIA Regulations provides that the description of the likely significant effects of a project should cover “the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development”.
- 2.1.2 In accordance with the EIA Regulations and the Design Manual for Roads and Bridges (DMRB) LA 103 (Scoping projects for environmental assessment) all potential effects, including indirect effects, should be identified during the scoping stage of EIA and, in accordance with DMRB 104 (Environmental assessment and monitoring) , all likely significant effects, including indirect effects, should be carried forward to the detailed assessment stage, the results of which should be presented within the Environmental Statement.
- 2.1.3 The Environmental Impact Assessment (EIA) for the M60/M62/M66 Simister Island Interchange (the ‘Scheme’) has been undertaken in line with the requirements of the EIA Regulations) as well as DMRB LA 103, DMRB LA 104 and also the Planning Inspectorate’s Advice Note Seven: Environmental Impact Assessment: process, preliminary environmental information and environmental statements, for all environmental factors (topics) set out in the EIA Regulations and guidance documents. Indirect effects have been identified and assessed as appropriate, and the findings presented in the Environmental Statement as required by the EIA Regulations.
- 2.1.4 The Scheme EIA was undertaken by competent experts from each technical discipline. Evidence of the competent expert for each discipline is presented in the relevant chapter of the Environmental Statement.
- 2.1.5 However, the judgement in Finch was handed down after the application was accepted so in response to the question raised by the Examining Authority, a review of the EIA has been undertaken to determine if the judgement would have any implications for the Scheme’s identification of potential indirect effects to provide confidence that all likely indirect effects have been considered and all likely significant indirect effects have been assessed and reported in the Environmental Statement.
- 2.1.6 It is important to note that the Supreme Court in Finch emphasised the need for an Environmental Statement to consider all impacts where there can be considered to be an 'inevitable causation' between a project and an effect. Such

effects must not be mere 'speculation or conjecture' i.e. the relevant information needs to be available or an appropriate methodology able to be applied. Furthermore, the Supreme Court emphasised that an assessment should only be required if a reasoned conclusion is able to be reached - there must be sufficient evidence to draw the link between the project and the effect.

Methodology

- 2.1.7 The review of indirect effects has been undertaken by the same competent experts that completed the Environmental Statement for the Scheme and identifies any additional effects that have not already been included and scoped out or included within the Environmental Statement. The review has followed a four-step approach:
1. Identify any additional potential indirect effects of the Scheme not already covered.
 2. For any additional potential effects identified, determine if they are "likely" to occur as a result of the grant of consent for the Scheme.
 3. Assess any additional likely indirect effects which have been identified to determine whether they are significant; and
 4. Report any additional likely indirect effects which are considered to be significant in the Environmental Statement.
- 2.1.8 Table 2.1 below reports the findings of this review, including the rationale for the consideration or otherwise of additional potential indirect effects.
- 2.1.9 As part of this exercise, it was noted that further information is now available on the dependent development works at Pike Fold Golf Course i.e. alterations to the course to maintain its function in light of the land take arising from the Scheme. This indirect effect of the Scheme was addressed in paragraph 12.18.3 of Chapter 12: Population and Human Health, of the Environmental Statement [APP-051] but details of the proposed alterations were not available at that the time that the DCO application was submitted. Since then, two applications for Lawful Development Certificates for these works have been submitted to, and granted by, Bury Metropolitan Borough Council. Therefore, although applications for lawful development certificates would not normally trigger the need for inclusion in the cumulative effects assessment, because of the 'inevitable causation' and immediate proximity between the Scheme and the works, the Applicant has included them within the Cumulative Effects Assessment update also being submitted at Deadline 5 of the Examination in accordance with ISH2 Action 3 [EV10-002].

Conclusion

- 2.1.10 The review concludes that there are no likely indirect effects which are considered to be significant that have not already been captured by the existing EIA for the Scheme.
- 2.1.11 In light of this conclusion, no updates have been required to the EIA for the Scheme. In relation to the first part of ExQ2: question CC.2.3, no different emissions have needed to be accounted for other than those reported in the current assessment.

Table 2.1 Additional Indirect Effects Review

Potential Indirect Effect	Construction/ Operation	Is the effect likely to occur?	Does the effect have the potential to be significant?	Does assessment of this effect need to be added to the Scheme Environmental Statement?	Commentary
Air Quality					
Likely indirect effects are captured within Chapter 5 of the Environmental Statement [APP-044] and no additional indirect effects were identified in this review.					
Cultural Heritage					
Likely indirect effects are captured within Chapter 6 of the Environmental Statement [REP4-008] and no additional indirect effects were identified in this review.					
Landscape and Visual Amenity					
Likely indirect effects are captured within Chapter 7 of the Environmental Statement [REP4-010] and no additional indirect effects were identified in this review.					
Biodiversity					
Likely indirect effects are captured within Chapter 8 of the Environmental Statement [REP1-025] and no additional indirect effects were identified in this review.					
Geology and Soils					
Likely indirect effects are captured within Chapter 9 of the Environmental Statement [APP-048] and no additional indirect effects were identified in this review.					
Material Assets & Waste					
Off-site extraction and production of raw materials and products	Construction	Y	N	N	Due to the complexity and intricacy of the supply chains for material extraction and production, and waste management and disposal, there was considered insufficient evidence of an identifiable "causal link" between any indirect environmental effects and the Scheme. Notwithstanding this, all facilities involved in extracting and producing materials and products, as well as those managing and disposing of waste for the Scheme, would already be operating under existing planning and permitting conditions, regardless of the
Off-site management and disposal of surplus materials and waste	Construction	Y	N	N	

Potential Indirect Effect	Construction/ Operation	Is the effect likely to occur?	Does the effect have the potential to be significant?	Does assessment of this effect need to be added to the Scheme Environmental Statement?	Commentary
					<p>Scheme.</p> <p>Any likely significant environmental effects from operating these facilities would therefore have already been assessed and mitigated as far as practicable under existing regulations, and no new indirect effects are "likely" to occur as a result of constructing the Scheme.</p> <p>Irrespective of there being no causal link, the Scheme includes mitigation measures designed to inherently reduce any residual indirect environmental effects of materials procurement and waste management. These are the only measures the Scheme can control, as it cannot impose additional controls on existing regulated facilities.</p>
Manufacture of construction machinery	Construction	N	N	N	The Scheme will not result in the manufacturing of construction machinery which would not otherwise be produced for other highways construction schemes in the United Kingdom. The Scheme is not anticipating to require any bespoke items of construction machinery to be utilised. It has been considered that the size of the Scheme is negligible compared to the market forces which drive the production of construction plant and equipment on a national level.
End of lifecycle for construction machinery used in the Scheme.	Construction	N	N	N	The construction period of the Scheme is such that construction plant used on the Scheme would still be in a serviceable condition for future use and would not be disposed of in a landfill.
Increase in the production of vehicles	Operation	N	N	N	The Scheme is likely to result in the production of a negligible amount of additional vehicles.

Potential Indirect Effect	Construction/ Operation	Is the effect likely to occur?	Does the effect have the potential to be significant?	Does assessment of this effect need to be added to the Scheme Environmental Statement?	Commentary
Production and use of fuel (fossil, electric and hydrogen)	Operation	N	N	N	<p>The Climate assessment, contained within Chapter 14 of the Environmental Statement [APP-053], included the emissions associated with road users. This assessment captures the emissions of the Scheme compared to the without Scheme scenario, including the emissions associated with the use of fossil fuels and electricity within the vehicles. This is based on the traffic assessment which indicates an increase in vehicle kilometres is anticipated, and as such increased fuel usage.</p> <p>However, the increase in fuel use as a result of Scheme itself is considered to be negligible in the context of overall fuel demand in the United Kingdom and would not result in the need for additional fossil fuel extraction sites.</p>
Greater wear and tear on vehicles due to vehicles travelling greater distances	Operation	N	N	N	The Scheme will not result in greater wear and tear on vehicles as it will have a negligible impact on the length of the overall route.
Noise & Vibration					
Likely indirect effects are captured within Chapter 11 of the Environmental Statement [APP-050] and no additional indirect effects were identified in this review.					
Population and Human Health					
Effects of relocation/extinguishing existing occupiers	Construction/ Operation	N	N	N	The Scheme will not result in the permanent relocation or extinguishment of any existing occupiers.
Changes in modes of travel	Construction/ Operation	N	N	N	The Scheme is not likely to result in a significant alteration in the modes of travel used in the area.

Potential Indirect Effect	Construction/ Operation	Is the effect likely to occur?	Does the effect have the potential to be significant?	Does assessment of this effect need to be added to the Scheme Environmental Statement?	Commentary
Road Drainage and the Water Environment					
Increased use of water resources as a result of construction workforce.	Construction	N	N	N	<p>The approximate maximum size of the construction workforce is set out in section 2.6.36 of Chapter 2: The Scheme, of the Environmental Statement [APP-041]. At peak, it is estimated that there would be approximately 230 personnel working on the Scheme. It is anticipated that the construction workforce will result in a negligible increase in use of water resources.</p> <p>Additionally, local workforces will be utilised where possible, further minimising the potential of this effect.</p>
Increased production of domestic wastewater as a result of construction workforce	Construction	N	N	N	<p>The approximate maximum size of the construction workforce is set out in section 2.6.36 of Chapter 2: The Scheme, of the Environmental Statement [APP-041]. At peak, it is estimated that there would be approximately 230 personnel working on the Scheme.</p> <p>It is anticipated that the construction workforce will result in a negligible increase in waste and wastewater production.</p> <p>Additionally, local workforces will be utilised where possible, further minimising the potential of this effect.</p>
Climate					
Decommissioning of assets associated with the	Operation	N	N	N	The carbon assessment within Chapter 14 Climate of the Environmental Statement [APP-053] considers the whole life carbon emissions through construction and

Potential Indirect Effect	Construction/ Operation	Is the effect likely to occur?	Does the effect have the potential to be significant?	Does assessment of this effect need to be added to the Scheme Environmental Statement?	Commentary
Scheme					operation of the Scheme. Construction includes emissions from materials, construction plant and transport to/from site. Operation includes emissions from road users, energy requirements, renewal and maintenance, and land use change (changes to habitat in line with Biodiversity Net Gain and landscape design). As per DMRB LA 114 decommissioning is excluded from the assessment due to the length of the asset operational phase.
Unplanned repair and maintenance activities	Operation	N	N	N	Due to the unplanned nature of these activities, prediction of the likelihood of this effect was deemed impossible to predict and therefore not considered to be likely.

2.2 Friends of the Earth and Ors v SDESNZ [2024]

- 2.2.1 The Applicant has reviewed the judgement of Sheldon J sitting in the High Court in *Friends of the Earth and Ors v SDESNZ [2024] EWHC 995 (Admin)* ("FoE"). Notwithstanding that the FoE judgement was handed down after the application was accepted, the Applicant is satisfied that FoE has no implications on the assessments within the Environmental Statement, specifically Chapter 14 Climate of the Environmental Statement [APP-053].
- 2.2.2 The FoE judgement does not alter the carbon budgets set by the UK Government. The Applicant has assessed the impact of the Scheme (the Proposed Development) against the ratified carbon budgets and that approach remains unaltered by the FoE judgement. FoE was concerned with the Carbon Budget Delivery Plan, in which the Government set out a package of proposals and policies designed to achieve the carbon budgets. The judgement held that the Government's dependence on proposals which relied upon technological advances and policies being delivered in full was not adequately robust and the Government is expected to produce a revised Carbon Budget Delivery Plan to meet its statutory duty. However, a Carbon Budget Delivery Plan provides a 'route map' to achieving the carbon budgets and will not alter the ratified carbon budgets.

3. Response to ExQ2: CC.2.3 Legal Judgements

3.1 Friends of the Earth Ltd & South Lakeland Action on Climate Change vs SSLUHC, West Cumbria Mining Ltd & Cumbria CC [2024]

- 3.1.1 The Applicant has considered the judgement of Holgate J sitting in the High Court in *Friends of the Earth Ltd & South Lakeland Action on Climate Change vs SSLUHC, West Cumbria Mining Ltd & Cumbria CC [2024] EWHC 2349 (Admin)* ("Cumbria") which was handed down after and applied the Supreme Court decision in *Finch*. Insofar as Cumbria related to the grant of planning permission for a new coal mine in Whitehaven and ultimately applied *Finch*, the Applicant has dealt with both cases together in the response at 2.1 above.
- 3.1.2 The only additional matter considered by High Court in Cumbria, was the UK's leadership role in promoting international action to address climate change. Specifically, the High Court agreed that the proposed mine would not be 'net zero' and, in any event, the precedent of permitting a similar project reliant on offsetting arrangements would be undesirable due to such offsetting measures being finite. The Scheme is not a similar project to Cumbria or *Finch* and does not rely on offsetting measures such that the Applicant considers this point is not applicable.