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Your Ref: TR020001

Dear Sir/Madam

London Luton Airport Expansion Project (Reference Number TR020001)

Further response to Secretary of State letter published on the 27 September 2024 – section 85 of the Countryside and Rights of Way Act 2000

1 Introduction

1.1 In paragraph 1 of the [Secretary of State's letter dated 27 September 2024](#) she set out:

Without prejudice to the final decision and subject to the above, Natural England, the Chilterns Conservation Board and the Applicant are invited to set out what, if any, further enhancement measures they agree could be brought forward, should it be decided further measures are necessary to assure compliance with the amended duty. If agreement cannot be reached, the Applicant, Natural England and the Chilterns Conservation Board are invited to set out their respective views on what is needed to resolve the concerns.

1.2 The [Applicant's response dated 11 October 2024](#) advised that, without prejudice to its position that no further measures are necessary to assure compliance with the amended duty under section 85 of the Countryside and Rights of Way Act 2000, the Applicant had commenced engagement with the Chilterns Conservation Board (CCB) regarding the Secretary of State's questions. In the [Applicant's letter dated 1 November 2024](#), it reported to the Secretary of State that despite constructive engagement with the CCB, the Applicant had concluded that it would not be able to agree on a measure that would enable CCB to be assured that the amended duty would be complied with in respect of the Applicant's proposals. The Applicant notes that the corresponding [CCB letter dated 1 November 2024](#) confirms the same.

1.3 The Applicant's letter of 1 November 2024 stated that:

Should the Secretary of State decide that (notwithstanding the Applicant's position) further measures are necessary and appropriate in the context of the enhanced duty,

then the Applicant observes that the Secretary of State is capable of introducing a new form of commitment, secured by the draft DCO, if a decision is made to grant consent.

To assist the Secretary of State in this regard, the Applicant proposes to send a further letter on Friday 8 November 2024, setting out specifically the form and content of such a commitment, and how it could be secured. As the Applicant's focus up until this point has been to explore a legal agreement, more time is required to develop a unilateral form of commitment.

1.4 Accordingly the purpose of this letter is to address these matters which were outstanding from the Applicant's 1 November 2024 letter.

2 **Form, content and securing mechanism for "without prejudice" commitment**

2.1 For the reasons set out in the [Applicant's letter dated 19 August 2024](#), its position is that there are no further mitigation or compensation measures capable of being brought forward by the Applicant to effectively reduce or offset the residual noise effects from aircraft overflights on amenity and tranquillity in part of the Chilterns National Landscape.

2.2 Accordingly the Applicant's position is that any additional commitment would feasibly need to take the form of a funding contribution from the Applicant, for allocation to projects which further the purposes of enhancement and conservation in the Chilterns National Landscape.

2.3 As part of any decision to grant development consent for the Applicant's proposals, the Secretary of State is capable of:

2.3.1 amending the DCO;

2.3.2 amending a "certified document" that is referred to, or secured by, the DCO (see article 50 of the draft DCO¹).

2.4 It follows that there are a variety of ways in which the Secretary of State's decision could secure, unilaterally, a new commitment in the DCO: a new article; a new requirement in Schedule 2; an amendment to a management plan secured by Schedule 2; or a new Part to the Schedule 8 protective provisions.

2.5 Having regard to section 120 of the Planning Act 2008, the Applicant considers that a financial contribution of this nature – to the extent deemed necessary and appropriate by the Secretary of State – would most appropriately be contained in the DCO, as a new article 54. The Applicant has set out below its view on how such an article could be drafted, including the quantum of any financial commitment:

Enhancement and conservation of the Chilterns National Landscape

54.—(1) Having regard to the duty under section 85 of the Countryside and Rights of Way Act 2000, upon service of the notice referred to in article 44(1)

¹ The [latest version of the draft DCO](#) was published by the Secretary of State on 21 August 2024.

the undertaker will make a funding contribution to the Chilterns Conservation Board in the sum of £250,000.

(2) The Chilterns Conservation Board must allocate the funding contribution referred to in paragraph (1) to one or more projects which:

(a) further the purposes of conserving or enhancing the Chilterns National Landscape; and

(b) are consistent with the Chilterns AONB Management Plan 2019 – 2024 (or and any superseding equivalent document).

(3) Upon any allocation of funding in accordance with paragraph (2), the Chilterns Conservation Board must notify the undertaker about the project which is in receipt of the funding and provide the undertaker with such information about the project as the undertaker may reasonably request.

(4) In this article the “Chilterns Conservation Board” includes any successor body which performs its functions and duties.

- 2.6 The Applicant considers that a one-off payment is most appropriate in this context, rather than staged payments. Under this measure CCB would administer the fund (as indeed it states that it would wish to do in its letter of 1 November 2024). This avoids the need for steering groups and the like. The CCB would have discretion as to which projects it allocates funding to, subject to those projects furthering the purposes of conserving or enhancing the Chilterns National Landscape. The contribution could therefore be folded into existing funding streams administered by the CCB, so there need be no net additional cost incurred in administering it. The only additional requirement would be to notify the Applicant as to which projects the funding had been allocated to.

3 Justification of the quantum of any commitment

- 3.1 It will be noted that the Applicant’s “without prejudice” draft article contains a financial commitment in the sum of £250,000. The Applicant has arrived at this figure for the following reasons.
- 3.2 As a starting point, the Applicant emphasises that there is no formula or methodology for determining the appropriate scale of any financial commitment deemed necessary in pursuance of the revised section 85 duty. It follows that any financial contribution is a matter of judgment, based on what is considered reasonable and proportionate in the context of the specific project in question.
- 3.3 It further follows that, because each case must be assessed on its own merits, any project comparators (such as those raised by the CCB in their letter dated 1 November 2024) should be treated with a degree of caution, rather than as something to “read across” from. Since they merely provide a useful general frame of reference, the Applicant disagrees with the CCB that some comparators are more “ideal” than others.

The Applicant makes the following comments on the potential comparators raised by CCB, and two other projects not mentioned by it:

- 3.3.1 The [HS2 Chilterns AONB Additional Projects Fund](#) totals £3 million. As the CCB notes, this is in the context of a project with a significant direct physical harm as a result of development taking place right across the Chilterns National Landscape, which distinguishes it from the Applicant's proposals.
- 3.3.2 The Lower Thames Crossing is cited by the CCB, but importantly the DCO application for this project is not yet decided. Akin to the position being taken by the Applicant on this project, National Highways' position on that project is that: (i) the revised section 85 duty is complied with absent any further commitment to conservation and enhancement; and (ii) if the Secretary of State disagrees, National Highways has presented (on a strictly without prejudice basis) a form of funding commitment for enhancement and conservation projects in the sum of £3 million². As with HS2, a part of the Lower Thames Crossing project is located within a National Landscape (in that case Kent Downs) and it would have a significant adverse direct physical impact on it. Again, this distinguishes it from the Applicant's proposals.
- 3.3.3 The CCB reference the [Mend the Gap](#) scheme, which (excluding mitigation, which is not relevant in this context) contributes £3 million for enhancement projects. The Applicant strongly rejects both CCB's suggestion that this is the "closest" comparator, and its suggestion that a comparison of affected areas should be used on a pro rata basis to identify a fund value, for the following reasons:
- (a) The Mend the Gap scheme relates to electrification works in the Chilterns and North Wessex Downs National Landscapes, which involve new development within those Landscapes, with a direct and immediate physical adverse visual impact.
 - (b) This is markedly different to the Applicant's impact on the Chilterns National Landscape, which does not involve any development in that Landscape. The impacts relate to tranquillity and are assessed as a moderate adverse impact occurring in Phase 2b (the late 2030s) as a result of increased flights above that landscape that is already overflown as a result of flights below 7,000ft from London Luton Airport and other airports around London.
 - (c) The Applicant's proposals therefore entail intensification of an existing use. The Applicant understands that the "Mend the Gap" fund does not relate to the intensification of use of the railway. In this way the impact of the Applicant's proposal, and consequently the level of any funding commitment in recognition of section 85, is simply incomparable.
- 3.3.4 CCB reference the National Grid Bramford to Twinstead project, which impacts on the Dedham Vale National Landscape. As noted in the Applicant's

² See National Highways' [letter](#) to the Secretary of State dated 7 August 2024.

[letter of 11 October 2024](#), the host authorities for that project, supporting the views of the Dedham Vale AONB and Stour Valley Partnership, suggested that additional compensation such as a land restoration fund might contribute to further the purposes of the Dedham Vale AONB, but the Secretary of State found that the section 85 duty had been met via existing mitigation / compensation, without the need for any additional financial contribution.

3.3.5 The CCB's letter does not make reference to the A66 Northern Trans-Pennine Development Consent Order 2024 and the M3 Junction 9 Improvement DCO 2024. On both of these projects, the Secretary of State found that, despite development impacting protected landscapes, the amended duty was complied with without the need for any additional financial contributions to conservation and enhancement projects.

3.4 The Applicant strongly rejects the CCB's suggestion that any enhancement measures should demonstrate a "net gain". This attempts to import into the revised section 85 duty a biodiversity net gain -style methodology, and convert it into an outcome-based obligation. This strays far beyond the plain meaning of the actual wording of section 85, which is to "**seek** to further" [our emphasis] but without any particular outcome being mandated. If Parliament had intended to achieve the outcome the CCB suggest, it could have adopted wording specifically and expressly to achieve that effect; it is clear from the wording of section 85 that it did not so intend.

3.5 Noting the background and context set out above, the Applicant has made its assessment of the appropriate quantum of any financial commitment having regard to the following matters:

3.5.1 **The nature of the impact** – as noted at paragraph 3.3.3(b) above, the Applicant's proposals do not involve any physical development in the Chilterns National Landscape. The impacts in question relate to tranquillity and are assessed as a moderate adverse impact, occurring in Phase 2b (the late 2030s) as a result of increased flights within a landscape that is already overflowed as a result of flights below 7,000ft from London Luton Airport and other airports around London³. The impacts are also transient in nature so the area of land potentially impacted is not an appropriate comparator when considered against fixed source impacts.

3.5.2 **Existing commitments which already mitigate impacts** –

(a) As noted in the Applicant's [letter dated 19 August 2024](#), it has adopted all feasible mitigation measures of relevance to the Chilterns National Landscape including the Noise Envelope within the ground-breaking Green Controlled Growth (GCG) Framework [TR020001/APP/7.08], and the noise controls in the Air Noise Management Plan [REP9-048]. The Noise Envelope contains a mechanism for the GCG Limit to be reduced in future years (beyond

³ Overflights are calculated using the methodology in "CAP 1498 Definition of Overflight, Civil Aviation Authority (2017)". This shows that at 7,000ft an aircraft could be laterally offset from an observer by up to 2.4km and still be within an overflight contour. This results in overflight contours that are substantially larger than the tracks overflowed by aircraft over the ground.

the 2030s) if 'next generation' aircraft are quieter than existing 'new generation' types, or an airspace change is implemented (see below) that would enable lower noise levels to be achieved than that forecast in the reasonable worst-case assessment reported in the Applicant's Environmental Statement.

- (b) The Applicant has also capped the DCO at 32 mppa, which is below the capacity of the runway. The decision to do so followed public consultation in 2018, on proposals to expand the airport potentially up to 38 mppa, and a clear message from feedback to reduce noise and other environmental impacts. Reducing the capacity of the airport was therefore a significant mitigating measure inbuilt in the proposals now before the Secretary of State.
- (c) No further mitigation or compensation measures are capable of being brought forward to effectively reduce or offset the residual noise effects from aircraft overflights on amenity and tranquillity in part of the Chilterns National Landscape.

3.5.3 **The management of airspace** – aircraft noise and overflight of the National Landscape is also a function of airspace management and future airspace change, which is not within the Applicant's control. In line with paragraph 188 of the National Planning Policy Framework and paragraph 4.54 of the Airports National Policy Statement, the DCO process should assume that the Civil Aviation Authority's airspace change process will operate effectively. As noted in the Applicant's examination document "Relationship between the Development Consent Order Process and the Airspace Change Process" [REP1-028], a programme of airspace modernisation is underway, one of the aims of which is to reduce environmental impacts. The Applicant's [letter dated 1 November 2024](#) to the Secretary of State highlighted that Government has recently launched a consultation on a proposed new UK Airspace Design Service. This is further evidence of measures taking place at a national level to seek to modernise and improve the efficiency of UK airspace and reduce its impact. This has the potential to reduce the Applicant's reported adverse impacts on tranquillity in the Chilterns National Landscape before the impact arises in the late 2030s. The Applicant notes that the Civil Aviation Authority would be subject to the enhanced duty in section 85 when it is assessing and approving changes to airspace.

3.5.4 **Other relevant funding streams already committed to** – as noted in the Applicant's [letter dated 1 November 2024](#), the Applicant's Community First commitment [REP11-025], secured by section 106 dated 9 February 2024 [REP11-108] provides a significant financial contribution to local communities affected by airport expansion, up to £13 million each year at a throughput of 32 mppa. The Community First zone (figure 9.1) includes significant areas of the Chilterns National Landscape, and projects capable of receiving funding are those which tackle deprivation and support the achievement of carbon neutrality by 2040. It follows that conservation and enhancement projects within the Chilterns National Landscape area, whether promoted by CCB or any other eligible body which meets the Community First aims are already

capable of receiving funding. It is noted that such funding is available to a broader range of projects than those promoted by the CCB, thereby offering access to a substantial fund significantly greater than those highlighted by CCB, for a wider range of projects already being made available within the affected area without an enhancement fund.

3.5.5 **Typical funding contributions made by the CCB for conservation and enhancement projects** – the [CCB's website](#) contains examples of the projects it has supported, and gives an indication of the typical scale of those contributions. By way of example, the Applicant notes:

- (a) In 2023/24 the CCB made a contribution of £22,490 to the [Chilterns Chalk Streams Project](#)⁴;
- (b) CCB has published a list of approved projects⁵ under the [Farming in Protected Landscapes](#) (FiPL) programme, which give an indication of the widely varying scale of FiPL grants and project costs.

Taking account of the above, the Applicant's conclusion is that a contribution of £250,000 would have a materially positive impact on the typical projects undertaken to further the purposes of conserving and enhancing the Chilterns National Landscape, especially when also considering the ongoing opportunity for CCB or other bodies to seek funding from the Community First fund.

3.5.6 **The timing of the commitment** – the funding contribution would take place when the Applicant activates DCO growth above the current permitted cap, which would be many years ahead of the likely significant adverse impact on tranquillity reported in the Applicant's environmental statement. This would allow the benefits of funding enhancement and conservation projects to be realised and become well established in advance of the impact to which they relate.

3.6 For all of the above reasons, the Applicant considers that a fund of £250,000 would represent a reasonable and proportionate contribution in circumstances where the Secretary of State considers that further measures are required.

3.7 If the Secretary of State considers that a financial contribution is necessary, the Applicant considers that the Secretary of State will need to determine the quantum of any commitment at the point of deciding the DCO application – to explain why:

3.7.1 the Applicant's view is that there is no merit in inviting the parties to try and reach consensus before the DCO decision, given the evident differences of opinion – and there is no desire (on both sides) to incur further delay to the DCO decision;

3.7.2 if a financial commitment is considered necessary, there is likewise no merit in requiring the parties to agree quantum in the post-decision stage – such

⁴ See the project's annual report, final page, [here](#).

⁵ See [this document](#) available on CCB's website.

an obligation would unfairly disadvantage the Applicant, it would likely delay the delivery of a nationally significant infrastructure project, and it would require some form independent resolution (e.g. by the Secretary of State) to resolve it in any event;

- 3.7.3 in order to discharge the section 85 duty effectively, if the Secretary of State considers that a financial contribution is necessary then the quantum of that contribution should be determined at the point of decision.

4 Compliance with amended duty

- 4.1 It is noted that the CCB took the opportunity, in its letter of 1 November 2024, to restate its case in relation to the DCO application. The Applicant rejects the arguments mounted by the CCB, and reiterates its case that the Secretary of State may properly grant the application for development consent consistent with the enhanced duty in section 85 of the 2000 Act, absent any further enhancement and conservation commitments.

- 4.2 The Applicant has set out in full the reasons why it complies with the revised duty in its letter dated 19 August 2024 (at paragraphs 4.1 to 4.20), supplemented by its letters dated 11 October 2024 (at paragraphs 2.2-2.3) and 1 November 2024 (at paragraph 1.10). The Applicant does not repeat those arguments here, but takes the opportunity to respond to the following points in the CCB's latest letter.

- 4.2.1 Through its DCO application, examination submissions and post-examination correspondence with the Secretary of State, the Applicant has demonstrated that the project complies with relevant government policy in relation to aviation and planning. It also complies with all relevant legislation including the amended section 85, absent any further commitments. The amendment to the NPPF referred to by the CCB does not change this conclusion.

- 4.2.2 The CCB appears to suggest that compliance with the section 85 duty, as amended during the examination of the DCO, requires the DCO application to be refused. It simply cannot have been Parliament's intent, in revising the duty, that it should in some way "trump" the raft of existing aviation policy which supports expansion, and planning policy which permits such development notwithstanding impacts on a protected landscape. To find in favour of CCB's interpretation of the duty would have grave implications for the Government's stated intent to unlock and simplify the delivery of nationally significant infrastructure, to realise the economic benefits it brings.

- 4.2.3 The CCB (and other parties) are seeking to import into the revised duty wording which Parliament could have chosen to adopt, but plainly did not. See, for example, the suggestion that the revised duty requires taking "*all reasonable steps to explore how the statutory purposes ... can be furthered*". Whilst the enhanced duty goes beyond consideration of mere rectification of harm to a National Landscape, this does not mean that the Secretary of State must adopt all measures that are theoretically available to further the purpose. The duty is subject always to other considerations, including what

is reasonable and proportionate in the context of the project in question and its specific objectives and constraints.

- 4.2.4 The Applicant is aware of the legal opinion produced by a barrister at Landmark Chambers on instruction of the Campaign of National Parks, and submitted in response to DCO applications for the A66 and M3 Junction 9 and Lower Thames Crossing projects. It is noted that National Highways has submitted rebuttals to that opinion, to which the Secretary of State is directed. Additionally, it is noted that the Secretary of State's decision on the A66 scheme "*recognise[d] the force*" of National Highways' submissions on the meaning of the enhanced duty, which aligns with that of the Applicant.

Yours sincerely,



Antony Aldridge
Head of DCO Programme