Communities Against Gatwick Noise Emissions (CAGNE)

Gatwick Airport Northern Runway project DCO application

PINS Reference Number: TR020005

SUBMISSIONS ON BEHALF OF CAGNE

DEADLINE 7 (15 July 2024)

INTRODUCTION

1. These submissions are made by CAGNE at Deadline 7. They contain the following:
   a. CAGNE's responses to relevant questions contained in ExQ2; namely CC.2.1 and NV.2.4, NV.2.7 and NV.2.8.
   b. CAGNE's comments on submissions received by Deadline 6 in relation to noise and further submissions regarding the noise envelope.
   c. CAGNE's comments on submissions received by Deadline 6 in relation to surface transport.
   d. CAGNE's comments on the draft Development Consent Order.

RESPONSE TO EXQ2

*CC.2.1 The relevance or otherwise of the recent Supreme Court judgment (20 June 2024) handed down on 20 June 2024 in the case of R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents) ("**Finch**").*

2. The Supreme Court in *Finch* held that GHG emissions caused by the inevitable combustion of a fossil fuel are "effects" of a project where the extractive "project", required as a matter of law to be assessed under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations"): *Finch* §7, §§79-81, §85, §§102-103; §118, §§123-124, §135, §138.

3. Three key points can be distilled from the Court's reasoning. First, that the question of an 'effect' in environmental impact assessment ("EIA") terms is a question of law and causation. Second, there must be sufficient evidence on which to base a reasoned conclusion as to whether a potential effect is "likely" (noting that it is only the "likely significant effects" of a development that must be included in an environmental statement). Applying this reasoning to the case of commercial oil production was a straightforward exercise given the inevitability of combustion emissions and established methodology to estimate such emissions.

4. Third, the Court held that: "*The fact that an environmental impact will occur or have its immediate source at a location away from the project site is not a reason to exclude it from assessment. There is no principle that, if environmental harm is exported, it may be ignored*" (§93). Lord Leggatt expressly rejected at §125 the potential double-counting of emissions with other projects as a reason for excluding downstream emissions from assessment:

> "*[I]mportantly, there is no rule that the same effect on the environment cannot result from more than one activity or that, if particular effects have been or will be assessed in the context of one project, this dispenses with the need to assess them as part of an EIA required for another project. It is in any event an objective of the EIA Directive, recorded in recital (2), that effects on the environment should be taken into account at the earliest possible stage in decision-making. That entails that, whatever other assessments might be required in which some of those GHG emissions are included, an assessment of the GHG emissions from the combustion of oil should be made before permission is given to extract the oil from the ground and the oil begins the journey which will inevitably end with these emissions*."

5. These key findings were not limited to downstream emissions of projects for fossil fuel extraction only, as made clear by the wide examples considered by the Supreme Court to which the principle would apply: see eg §§121-122. They apply equally to the likely significant downstream (and upstream) GHG emissions which would be caused by an airport expansion project, such as the instant application.

6. Accordingly, the Applicant's ES appears to be deficient, as it failed to assess the GHG emissions arising from the additional inbound flights which will be generated by the expansion project. These additional flights are an inevitable consequence of the expansion, and the basis on which they have been excluded – potential double-counting

– is not a lawful justification, in light of the Supreme Court's decision. Accordingly, the Examining Authority should ask the Applicant to provide this additional information under regulation 25 of the 2017 Regulations.

NV.2.4 Offsite mitigation

7. CAGNE considers that relevant authorities would likely be able to assist in identifying some "special case" properties in respect of assisting where mitigation is provided to dwellings and noise-sensitive buildings. It is also clear the local authorities are best placed to identify and apply relevant policy in respect of protected areas, such as AONBs and areas of historic importance, and will be able to take this into consideration.

8. However, ultimately, given the fast timescales over which the Applicant (or "GAL") are expecting to roll out any mitigation, and given GAL are also capable in principle of identifying the "special case" properties, CAGNE does not consider that a local authorities-led approach will lead to any real meaningful benefit.

NV.2.7 Independent noise reviewer

9. In REP6-122 CAGNE stated that the local authorities are best placed to act as the independent noise reviewer based on recent experience at Luton Airport. CAGNE maintains this position.

10. In addition, CAGNE has serious concerns regarding the suitability of the Civil Aviation Authority ("CAA"), particularly in respect of their independence, understanding of the situation on the ground and the level of trust communities have in their views. Since the disbanding of Independent Commission on Civil Aviation Noise ("ICCAN"), the CAA has taken over this role from a position much more closely linked to the Department for Transport and industry. As the CAA is responsible for carrying out policy, it has a vested interest in growth and the success of the aviation industry. As a result, its findings and regulatory actions are often questioned by communities who feel like they are not represented by the CAA. CAGNE considers that the CAA does not have enough emphasis on the ramifications of aviation growth for local communities

and the planet. It is a concern that this may affect how its role as a reviewer is carried out.

NV.2.8 Noise limit reviews

11. In response to this question, please see paragraph 18-33 of the enclosed submissions at Appendix 1.

COMMENTS ON D6 SUBMISSIONS IN RELATION TO NOISE

12. **Stakeholder consultation**: As set out in CAGNE's deadline 6 submissions [REP6-120], it transpired at ISH8 that the Applicant had undertaken an undisclosed survey of part of the community which apparently showed that local noise groups were not well known by or to the local community. The Applicant has provided a copy of the survey [See Annex A to REP6-081] as part of the Deadline 6 submissions which CAGNE has now considered.

13. It is stated that the objective of the survey is to understand what the public thinks about noise from Gatwick and how the public's views should be taken into account. The survey also purportedly set out to measure levels of public concern about noise issues and identify most effective forms of public feedback to London Gatwick on noise management. CAGNE makes the following observations:
    a. It is noted that areas which are not in the current flightpath, such as Croydon, Merton, Brighton and Worthing were all interviewed as part of the survey. Plainly, given their location, these areas will not be concerned by aircraft noise and it is therefore surprising they were interviewed in a survey which purports to be seeking information on the level of public concern regarding noise. This approach, in view of the objectives set out above, risks inaccurately depicting the level of public concern which in respect of noise is necessarily going to be location specific.
    b. For the same reason, any location specific conclusions, such as the finding that respondents in Brighton were the least concerned about the noise impact of aeroplanes flying too low (see p.35 of Annex A) or the finding that one in four respondents want the opportunity to engage with London Gatwick about noise issues (see p.44 of Annex A), should be assessed with the understanding that

certain locations and interviewees therein are not overflown and so do not face this concern regularly.

c. It is not surprising that other issues related to London Gatwick come out as of greater concern to residents, such as air quality and carbon emissions. This is a reflection of the growing public interest in pollution and climate related issues, and again reflects a spread of interviewees across areas, many of which are located where noise will not be an issue.

d. CAGNE were the most commonly named community noise group in the survey. Contrary to what was suggested by GAL at ISH8 community noise groups are a significant presence in areas which are concerned with noise and have an impact without necessarily requiring supporters or members of the public to visit their site or know of them directly. For instance, CAGNE promotes the Noise Management Board and other webpages as a means of making complaints and reporting noise issues. They therefore do not expect concerned members of the public to come to them directly or visit their website. By promoting the Noise Management Board, GAL benefit from CAGNE's activities by ensuring that all issues of concern are properly communicated to GAL.

e. It is also true that making a complaint about noise to GAL directly is incredibly difficult. Although it is noted that emailing through GAL's website to voice concerns is the preferred option for respondents, it should be noted that GAL's website only allows one report to be made at a time, so if a resident reports multiple issues from the same account, these will only be treated as one complaint thus painting an inaccurate picture of the level of concern. GAL's phone lines have also only been reinstated after pressure from CAGNE.

f. In view of all the above, it is significant that 54% - i.e. over half of all interviewees, including interviewees outside of an area affected by noise – stated they were concerned by noise.

14. It is also noted that GAL have now published the results of the insulation offering survey conducted.

15. **General**: Further comments on noise following Deadline 6 submissions, and specifically in relation to the noise envelope, are appended to this submission at

Appendix 1. CAGNE intends to respond in more detail to the Deadline 6 submissions at Deadline 8.

COMMENTS ON D6 SUBMISISONS IN RELATION TO SURFACE TRANSPORT

16. Please see Appendix 2 enclosed.

DRAFT DCO

17. CAGNE has reviewed the draft DCO and makes the following points:

Missing items

18. CAGNE is concerned that, by failing to include air quality standards as a requirement in the DCO, air quality has not been given the same legal status as issues such as the noise envelope. It is not sufficient for air quality to be dealt with solely in the section 106 agreement. CAGNE has raised this issue previously in submissions at Deadline 4. The DCO must include safeguards that require GAL to take action in the event that their assessments of significance of effects do not align with real world impacts and should include a binding commitment to ensure air quality impacts are kept below significant levels, with consequences including fines if these are breached. The failure to include air quality provisions in the DCO also fails to ensure that air quality standards are enforceable and legally binding on GAL.

Requirement 31 (Construction Sequencing)

19. The updated Requirement 31 appears to be part of how GAL has now incorporated the new wastewater treatment works into the Draft DCO. At present, Requirement 31(3) reads as follows (emphasis added):

> *(3) The commencement of dual runway operations must not take place until—*
> *(a) Work No. 44 (wastewater treatment works) has been completed; and*
> *(b) an application has been submitted for an environmental permit under regulation 12(1)(b) (requirement for an environmental permit) of the Environmental Permitting (England and Wales) Regulations 2016 for the operation of Work No. 44 (wastewater treatment works),*
> ***unless otherwise agreed in writing by Thames Water Utilities Limited***.

20. CAGNE considers that the possibility of avoiding the requirement to build out the onsite wastewater treatment works by way of an agreement from Thames Water Utilities Limited constitutes an unlawful tailpiece. It is well established in the Town and Country Planning Act context that tailpiece conditions, that include a phrase such as *'unless otherwise agreed by the local planning authority in writing'* should be considered with care and avoided where possible, as they can create a risk that developers will seek to make significant changes to the development and/or to circumvent the statutory routes to vary conditions, depriving third parties of the opportunity to comment.

21. It was held in *Midcounties Co-operative Ltd v Wyre Forest DC* [2009] EWHC 964 that a tailpiece added to a condition to limit floor space allocations '*makes it hopelessly uncertain what is permitted. It enables development not applied for, assessed or permitted to occur. It side steps the whole of the statutory process for the grant of permission and the variation of conditions*…'

22. In *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin), permission had been granted for the construction of a wind turbine and it was held that a condition stating that the turbine should be of certain dimensions *'unless given the written approval of the local planning authority'* could lead to the approval of a turbine of a greater scale and environmental impact than had been permitted; the clause had to be removed.

23. The Government's Planning Guidance on drafting of DCOs makes a similar point with respect to DCO requirements:

> *Section 120 of the Planning Act provides that a DCO may impose requirements in connection with the development for which consent is granted. Such requirements may correspond with conditions which could have been imposed on the grant of planning permission under the Town and Country Planning Act 1990. In this regard, the relevant paragraphs of the National Planning Policy Framework and associated Planning Practice Guidance concerning conditions will generally apply. Requirements should therefore be precise, enforceable,*

necessary, relevant to the development, relevant to planning and reasonable in all other respects.

….

Requirements can impose an obligation on the applicant to seek approval of final details of the proposed development prior to construction. <u>These should typically be drafted such that they are not tailpiece requirements which simply provide for their own variation</u>, but at the same time should not prevent the discharging authority from approving details which would lead to environmentally better outcomes where appropriate.

Paragraph 017 Reference ID 04-017-20240430

24. It appears that by seeking this tailpiece GAL is seeking to leave open the option of regiling later from the Waste Treatment Water Works if they make progress with Thames Water. CAGNE resists this addition.

<u>Article 9 – Planning permission</u>

25. CAGNE considers that the current drafting of Article 9 is an attempt to disapply the law as set out in *Hillside Parks Ltd v Snowdonia National Park Authority 2022 UKSC [30*.

26. As currently drafted, Article 9 states:

> ***9.**—(1) Development consent granted by this Order is to be treated as specific planning permission for the purposes of section 264(3) (cases in which land is to be treated as not being operational land) of the 1990 Act.*
> *(2) The authorised development may be carried out or continue to be carried out, and the airport may be operated or continue to be operated, pursuant to this Order notwithstanding the initiation of development pursuant to any planning permission which may be physically incompatible with the authorised development or inconsistent with any provision of this Order.*
> *(3) Any planning permission which has been initiated prior to the commencement of the authorised development pursuant to this Order may continue to be lawfully implemented thereafter notwithstanding any physical incompatibility with the authorised development or inconsistency with any provision of this Order.*
> *(4) Any conditions of any planning permission granted prior to the date of this Order that are incompatible with the requirements of this Order or the authorised development shall cease to have effect from the date the authorised development is commenced and for the purpose of this article planning permissions deemed to be granted pursuant to the 2015 Regulations shall be deemed to be granted prior to the date of this Order.*

27. The Applicant's Explanatory Memorandum (REP6-007) provides the following explanation:

> *4.33 With the exception of paragraph (1), the drafting of this Article is bespoke to the Order. It addresses any potential uncertainty that may result from the Supreme Court's recent decision in Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30. That judgment relates to planning permissions granted under the 1990 Act. It holds that, unless there is an express provision otherwise, where development has taken place under one permission, whether another planning permission may lawfully be implemented (or continue to be implemented) depends upon whether it remains physically possible to carry out the development authorised by the second permission in light of what has already been done under the first permission.*
>
> …
>
> *4.37 The Applicant has not identified extensive precedent drafting in made DCOs that addresses Hillside uncertainty, though it does note that Article 8(2) of the Slough Multifuel Extension Order 2023 provides that "Anything done by the undertaker in accordance with this Order does not constitute a breach of any planning permission issued pursuant to the 1990 Act", though this appears targeted at potential breaches of an existing permission rather than incompatibility and resulting inability to continue building out a permission.*
>
> *4.38 However, emerging drafting in the draft orders for the Lower Thames Crossing (Article 56) and London Luton Airport Expansion (Article 45) projects seeks to tackle Hillside uncertainty and has informed the drafting of this Article 9.*
>
> *4.39 The bespoke drafting in Article 9, which pursues generally the same aims as that in the Lower Thames Crossing and London Luton Airport Expansion draft orders, is important to remove uncertainty and risk regarding the interaction between the Order and other planning permissions (either existing or in the future).*

28. At the very least this is a novel approach. In *Hillside* the Supreme Court found at (§§41-45) that a planning permission does not authorise further development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted.

29. As currently drafted, the DCO appears to allow for mutually incompatible developments to be built out. GAL has not justified the disapplication of the Supreme Court's decision. There is no obvious reason why GAL, unlike other developers, should be allowed to avoid the constraints of the judgment.

References to "runway"

30. CAGNE notes that at several points in the draft DCO the runway is referred to as the "northern runway" as opposed to accurately reflecting that this is a new runway being built without policy support. CAGNE continues to rely on its previous detailed submissions in this regard. [1]

15 July 2024

[1] For reference, CAGNE's detailed submissions on policy can be found at REP1-137, REP3-133 and REP6-120