

A66 Project Team
National Highways
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Att.: Damian Greenfield, Stakeholder Manager
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By email only: A66NTP@nationalhighways.co.uk

Our ref: TRA3/1/LJH/MRM

Email: 

7 April 2022

Dear Sirs

Inadequate consultation on the A66 Northern Trans Pennine Nationally Significant Infrastructure Project ("NSIP")

1. We are instructed by Transport Action Network ("**TAN**") in relation to the above NSIP ("**the Scheme**"), which is currently at the pre-application stage of the Development Consent Order ("**DCO**") process. Our client has previously sent emails of 3 and 10 February 2022 regarding concerns over the lawfulness and transparency of the consultations for the Scheme and included concerns about the adequacy of the statutory consultation in their response of 6 November 2021.
2. The Scheme effectively is the combination of eight different NSIP schemes along a fifty-mile stretch of the A66, crossing nationally and internationally protected landscapes and habitats. Our client is extremely concerned that because the Scheme is part of "Project Speed", National Highways is rushing the scheme development, resulting in inadequate and potentially unlawful consultations.
3. In summary, our client's concerns are:
 - (i) The adequacy of the statutory consultation, including its complexity and period it was open for comments
 - (ii) Four consultations described as 'targeted non-statutory consultations' were effectively closed to the public due to them not being publicised, or locatable on the National Highways consultation website despite including what are described as 'considerable changes to the design' presented in the statutory consultation. No information was provided regarding the environmental impacts of the proposed changes, despite them being described as 'considerable changes to the design'.

- (iii) A further consultation on significant changes to the proposed scheme, including large scale earthworks, new cycling and walking routes and the addition of a large number of extensive compounds. Again, no information provided regarding the environmental impacts of the proposed changes, despite the area being known nationally for its tourist and leisure industry and the earthworks and compounds being within and in such proximity to highly protected landscapes and habitats.
- (iv) A further consultation on the relocation of Brough Hill Fair, which is culturally important to the Gypsy community, may not comply with the requirements of the Public Sector Equality Duty.
- (v) The lack of environmental information available in respect of the proposals for the Scheme as it now stands, to the extent that it is not possible for the consultation bodies to develop an informed view of the likely significant environmental effects of the development and associated development.
- (vi) The fact that concurrent and consecutive consultations have been held on a range of quite complex topics and which the public concerned have been expected to get to grips with and comment on.
- (vii) Overall that the statutory consultation and subsequent consultations have been inadequate to the extent that the Secretary of State cannot be satisfied that the statutory requirements and those set out in the pre-application guidance have been met.

Background

- 4. Route options for the Scheme were consulted on in summer 2019 and a preferred route announcement was made in May 2020. The statutory consultation was held between 24 September 2021 and 6 November 2021.
- 5. Since the statutory consultation closed there have been six further consultations (that our client is aware of), including (in summary):
 - (i) [A66 Trans-Pennine Supplementary Design Consultation: Appleby to Brough](#)

This consultation ran between 28 January 2022 and 27 February 2022 and sought views on what are described as “*considerable changes to the design*” that was presented during the statutory consultation. These changes include:

- Building the additional carriage to the north of the existing A66 rather than the south at Warcop central to reduce the impact on properties and land to the south and to the Roman Camp.
- Building the structure at Warcop central slightly higher to help mitigate environmental issues with the River Eden Special Area of Conservation (SAC).

The consultation was not advertised publicly on the National Highways scheme page nor on National Highways social media, it did not appear on the National Highways consultation hub and could not (and still cannot) be located by searching that page and is not accessible via a publicly locatable link. The changes described in the Consultation Brochure are considerable

and the subject matter includes impacts on nationally designated landscapes, habitats and species and are of more than immediate local concern.

(ii) A66 Trans-Pennine Supplementary Design Consultation: M6 Junction 40 to Kemplay Bank

This consultation ran between 28 January 2022 and 27 February 2022 and sought views on changes that would impact community connectivity, environmental and land impacts, including the loss of public open space.

The consultation was not advertised publicly on the National Highways scheme page nor on National Highways social media, it did not appear on the National Highways consultation hub and could not (and still cannot) be located by searching that page and is not accessible via a publicly locatable link. The changes described in the Consultation Brochure include impacts on a country park and college playing fields and are of more than immediately local concern.

(iii) A66 Trans-Pennine Supplementary Design Consultation: Bowes Bypass Hullands Quarry

This consultation ran between 28 January 2022 and 27 February 2022 and sought views on changes in respect of access arrangements into and out of Hullands Quarry and provision of an access track to Bowes Cross Farm, both of which would impact road safety.

The consultation was not advertised publicly on the National Highways scheme page nor on National Highways social media, it did not appear on the National Highways consultation hub and could not (and still cannot) be located by searching that page and is not accessible via a publicly locatable link. No consultation brochure was published for this consultation and there is no detail provided in respect of the environmental impact of the proposals, but the changes described impact road safety and are of more than immediate local concern.

(iv) A66 Trans-Pennine Supplementary Design Consultation: Temple Sowerby to Appleby

This consultation ran between 28 January 2022 and 27 February 2022 and sought views on what are described as “considerable changes to the design” that was presented during the statutory consultation. These changes include:

- Relocation of the junction north of Kirkby Thore westwards from Main Street to Fell Lane to improve a potentially dangerous stretch of narrow road and redirect heavy goods vehicles to a better, more suitable route and to avoid the Roman Camp Scheduled Monument. Works will include the construction of landscaping bunds.
- Change at Long Marton from overbridge to full-movement junction to the east of the design presented at the statutory consultation to seek to avoid increased heavy goods vehicles on unsuitable roads.

- The addition of a junction at Long Marton to remove the Appleby Junction links to seek to avoid land take from Fair Hill at Appleby which would have impacted the Appleby Fair.

This part of the scheme is in one of the most environmentally sensitive parts of the route, as it crosses Trout Beck, which is part of the River Eden SAC. The lack of information provided makes it impossible to understand what the impacts on the SAC could be.

The consultation was not advertised publicly on the National Highways scheme page nor on National Highways social media, it did not appear on the National Highways consultation hub and could not (and still cannot) be located by searching that page and is not accessible via a publicly locatable link. The changes described in the Consultation Brochure are considerable and involve the construction of a new junction, construction of landscaping bunds and loss of hedgerows. The changes also relate to impacts on road safety and an annual event culturally significant to the gypsy, traveller and Roma communities. The considerable changes described are of more than immediate local concern.

(v) A66 Trans-Pennine Supplementary Design Consultation: walking, cycling and horse-riding provision, landform and compounds

This consultation opened on 16 February 2022 and closed on 20 March 2022 and sought views on very considerable changes to the following:

- Extensive changes to walking, cycling and horseriding provision along the length of the Scheme
- Considerable changes to the proposed landform along much of the route, with the construction of multiple large landscape bunds
- Multiple new large compounds along much of the route, of unknown purpose or use

Although this consultation was listed on the National Highways consultation hub, it was not present on the National Highways scheme page, nor advertised on National Highways social media accounts with a publicly available link. Despite the numerous major and complex changes described in the Consultation Brochure, no public events were organised to inform the public and give them the opportunity to view the maps and ask questions. This may be in breach of National Highways' Public Sector Equality Duty, as it deprived those without access to the internet (particularly the elderly) an opportunity to inform themselves of the changes and to respond.

Neither the consultation webpage nor the Consultation Brochure provide any information regarding the environmental impacts of any of these changes, which by their nature can be expected to be considerable due to the extent of the land impacted and the proximity to multiple protected landscapes and habitats.

The new, proposed compounds, while they might be considered temporary, will have a large detrimental impact on the area and should have had their impact assessed as part of the Preliminary Environmental Information Report (PEIR). Even if considered temporary, compounds can end up being permanent features or leave behind permanent impacts, sometimes

leading to further development. Due to these significant changes, the environmental impacts of which have not been explained or made public, the PEIR should be updated and consulted upon again. The principle of public participation, and the requirements of the Statutory Guidance, have not been complied with.

(vi) A66 Trans-Pennine Supplementary Design Consultation: Brough Hill Fair

This consultation opened on 11 March 2022 and closed on 3 April 2022 and sought views on changes to the proposed re-siting of Brough Hill Fair to a smaller site than previously proposed and almost two miles away.

Statutory guidance

6. Under the Planning Act 2008 the Department for Communities and Local Government in March 2015 issued statutory guidance on the pre-application process (“**the Guidance**”). The statutory guidance is an important consideration in the Secretary of State’s decision whether to accept an application for examination.¹ The Guidance throughout makes abundantly clear the importance of proper consultation. In particular:

6. Part 5 of the Planning Act sets out statutory requirements for applicants to engage in pre-application consultation with local communities, local authorities, and those who would be directly affected by the project. The front-loaded emphasis of consultation in the major infrastructure planning regime is designed to ensure a more transparent and efficient examination process.

18. Early involvement of local communities, local authorities and statutory consultees can bring about significant benefits for all parties, by:

- *helping the applicant identify and resolve issues at the earliest stage, which can reduce the overall risk to the project further down the line as it becomes more difficult to make changes once an application has been submitted;*
- *enabling members of the public to influence proposed projects, feedback on potential options, and encouraging the community to help shape the proposal to maximise local benefits and minimise any downsides;*
- *helping local people understand the potential nature and local impact of the proposed project, with the potential to dispel misapprehensions at an early stage;*
- *enabling applicants to obtain important information about the economic, social and environmental impacts of a scheme from consultees, which can help rule out unsuitable options;*
- *enabling potential mitigating measures to be considered and, if appropriate, built into the project before an application is submitted; and*
- *identifying ways in which the project could, without significant costs to promoters, support wider strategic or local objectives.*

19. The pre-application consultation process is crucial to the effectiveness of the major infrastructure consenting regime. A thorough process can give the Secretary of State confidence that issues that will arise during the six months

¹ Statutory guidance, paragraph 5; Planning Act 2008, sections 55(5A)(b) and 55(4)(c)

examination period have been identified, considered, and – as far as possible – that applicants have sought to reach agreement on those issues. Without adequate consultation, the subsequent application will not be accepted when it is submitted. If the Secretary of State determines that the consultation is inadequate, he or she can recommend that the applicant carries out further consultation activity before the application can be accepted.

53. Local people have a vital role to play at the pre application stage. People should have as much influence as is realistic and possible over decisions which shape their lives and communities. It is therefore critical that they are engaged with project proposals at an early stage. Because they live, work and socialise in the affected area, local people are particularly well placed to comment on what the impact of proposals on their local community might be; or what mitigating measures might be appropriate; or what other opportunities might exist for meeting the project's objectives.

72. The timing and duration of consultation will be likely to vary from project to project, depending on size and complexity, and the range and scale of the impacts. The Planning Act requires a consultation period of a minimum of 28 days from the day after receipt of the consultation documents. It is expected that this may be sufficient for projects which are straightforward and uncontroversial in nature. But many projects, particularly larger or more controversial ones, may require longer consultation periods than this. Applicants should therefore set consultation deadlines that are realistic and proportionate to the proposed project...

73. Applicants are not expected to repeat consultation rounds set out in their Statement of Community Consultation unless the project proposals have changed very substantially. However, where proposals change to such a large degree that what is being taken forward is fundamentally different from what was consulted on, further consultation may well be needed. This may be necessary if, for example, new information arises which renders all previous options unworkable or invalid for some reason. When considering the need for additional consultation, applicants should use the degree of change, the effect on the local community and the level of public interest as guiding factors.

75. If the application only changes to a small degree, or if the change only affects part of the development, then it is not necessary for an applicant to undertake a full re-consultation. Where a proposed application is amended in light of consultation responses then, unless those amendments materially change the application or materially changes its impacts, the amendments themselves should not trigger a need for further consultation. Instead, the applicant should ensure that all affected statutory consultees and local communities are informed of the changes.

76. In circumstances where a particular issue has arisen during the preapplication consultation, or where it is localised in nature, it may be appropriate to hold a non-statutory, targeted consultation. A developer's Statement of Community Consultation should be drafted so that it does not preclude this approach. A more bespoke approach can be adopted, which may allow developers to respond with more agility to the issue at hand. If adopting this approach, the emphasis should be on ensuring that relevant individuals and organisations are included.

77. Consultation should also be fair and reasonable for applicants as well as communities. To ensure that consultation is fair to all parties, applicants should be able to demonstrate that the consultation process is proportionate to the impacts of the project in the area that it affects, takes account of the anticipated level of local interest, and takes account of the views of the relevant local authorities.

88. It is important to stress that pre-application consultation is a statutory duty for applicants, and it should, as this guidance makes clear, be carried out to a certain standard. Issues about the adequacy of consultation should be considered prior to the Inspectorate (on behalf of the Secretary of State) accepting an application for examination. Where any interested party feels that consultation was inadequately carried out, they should approach the applicant in the first instance. If consultees remain unsatisfied, they can complain to the relevant local authority (who can consider this complaint as part of their representation to the Secretary of State on the adequacy of consultation), or the Secretary of State (through the Inspectorate). Any concerns should be raised promptly during or immediately following the consultation, to enable the applicant to address the issues if appropriate. In all cases, the final decision as to whether pre-application consultation was adequately carried out rests with the Secretary of State.

93. For the pre-application consultation process, applicants are advised to include sufficient preliminary environmental information to enable consultees to develop an informed view of the project. The information required may be different for different types and sizes of projects. It may also vary depending on the audience of a particular consultation. The preliminary environmental information is not expected to replicate or be a draft of the environmental statement. However, if the applicant considers this to be appropriate (and more cost-effective), it can be presented in this way. The key issue is that the information presented must provide clarity to all consultees. Applicants should be careful not to assume that non-specialist consultees would not be interested in any technical environmental information. It is therefore advisable to ensure access to such information is provided during all consultations. The applicant's Statement of Community Consultation must include a statement about how the applicant intends to consult on preliminary environmental information.

Statutory consultation

7. Our client's response to the statutory consultation outlined multiple concerns with its adequacy, including that there were fifteen options consulted on, making this a uniquely complex project and consultation, and that it was unclear which options were the preferred options. This could be in breach of paragraph 93 of the Guidance that "information presented must provide clarity to all consultees". Our client also raised concerns about the inadequacy of the 89-page Non-Technical Summary (NTS). The NTS was extremely long and technical, copying over lengthy and technical information from the PEIR, included information on fifteen different options, and could not be described as a layperson's guide to the environmental impacts of the eight schemes. Another area of concern was that the 6-week consultation period was far too short for a scheme of this complexity.

Preliminary Environmental Information

8. The Applicant is under a duty to consult the consultation bodies and local community and must prepare a Statement of Community Consultation ("**Consultation Statement**").² Consultation must be carried out in accordance with the proposals in the Consultation Statement.³
9. The Consultation Statement⁴ must set out how the Applicant intends to publicise and consult on the PEIR,⁴ which must contain the information reasonably required

² Planning Act 2008, section 47(1)

³ Planning Act 2008, section 47(7)

⁴ The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, regulation 12(1)(b)

for the consultation bodies to develop an informed view of the likely significant environmental effects of the development and of any associated development.⁵

10. Where the PEIR, which is a public document on which the public should be properly consulted,⁶ does not contain information reasonably required for the consultation bodies to develop an informed view of the likely significant environmental effects of the development and of any associated development, it must be updated and be consulted upon again if there are additional or substantively different likely significant effects.

Concerns

11. Although our client asked for confirmation of the consultations' details (such as dates, deadlines, links to any information online etc) on 3 February and chased this up on 10 February, National Highways declined to provide details of the six subsequent consultations or assist our client to respond.
12. As outlined in the emails of 3 and 10 February our client is extremely concerned at the way that National Highways is conducting its consultations. It appears that public participation is being minimised and large, 'considerable' changes appear to be presented as small and not materially impacting on the scheme that was consulted on in the Autumn of 2021. Our client believes that this is wrong and that there appears to be a number of aspects of the changes which materially impact on the scheme. However, because the environmental impacts of those changes have not been set out, it is not possible fully to understand their significance.
13. Without a properly open and public consultation with sufficient information the public will not know if the new changes are substantially different, or will materially impact on the scheme. Despite the changes being described as 'considerable' and, in our client's view, obviously of wider than merely local impact, unless a member of the public received a leaflet through their letter box, they would not be alerted to these consultations. There would be nothing online to tell them what is happening and those who may have commented on those issues in the Statutory Consultation who are not local or did not receive a leaflet would not have had the opportunity to participate in and comment on the change proposed in the consultation.
14. Our client would argue that any changes within or close to an Area of Outstanding Natural Beauty (AONB) are capable of being significant and of national importance. The same principle applies to internationally important habitats and species protected under the Habitats Directive, such as Special Conservation Areas (SACs) and Special Protection Areas (SPAs). The public, including, local, regional and national environmental organisations, should be given the opportunity properly to respond to these changes if the consultation is to be considered adequate. Without their input it is difficult to see how the most appropriate proposals will be advanced, that will have the least impact on this protected area. People and organisations who have already responded to the statutory consultation and expressed an interest in the scheme, such as our client, (with a national interest in transport and the environment), and national, regional and local environmental groups with an interest in the area, should be considered to be "relevant organisations" for the purposes of further consultations, and notified of further

⁵ The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, regulation 12(2)(b)

⁶ Consultation Statement, paragraph 3.11

consultations. Our client asked on 10 February to be notified of all consultations, yet was not notified of the six new consultations.

15. This is a huge scheme spanning eight sections over 50 miles and costing over £1 billion. Each one of these sections has the potential to be an NSIP in its own right, so any changes should be consulted upon in an open and transparent way. Consulting on changes in the different areas separately and in a way that prevents people commenting on other areas also undermines any ability to assess the **cumulative** impacts of the changes and whether these combined impacts materially impact on other areas or the entire scheme. The supplementary consultations into the proposed changes should not happen in isolation, but should be considered in combination.

Conclusion

16. Regulation 12 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 requires that the preliminary environmental information should be adequate for consultees to “develop an informed view of the likely significant environmental effects of the development (and of any associated development)”. The Consultation Statement and the Statutory Guidance set out the importance that the public be consulted on the PEIR. The environmental information and the likely significant effects resulting from proposed changes to the scheme which have been consulted on after the Statutory Consultation need to be explained and included in an updated PEIR that fully informs all consultees, including statutory consultees, on the environmental impacts of these substantial changes, and to revisit the issue of cumulative impacts. Any defects in the way that this consultation has been run could render it unlawful. It is in everyone's interests that these consultations are run properly, otherwise they may be legally defective.
17. If the relevant consultation bodies, including local authorities, consider that they have not been provided with sufficient environmental information on the consultation proposals to develop an informed view of the likely significant effect, they would be within their right to make clear in their representations to the Secretary of State that the consultation carried out by the applicant is deficient and that therefore the application ought not be accepted for examination.⁷
18. Our client believes the solution is for National Highways to issue a new Statement of Community Consultation and to re-run the statutory consultation with an updated PEIR, taking on board all previous feedback. The statutory consultation should allow enough time for adequate responses (six weeks was not enough last time for such a huge scheme), be open to all, with information clearly available online and offline, and a clear and simple Non-Technical Summary (NTS).
19. We would like a substantive reply to the points raised in this letter as soon as possible and in any event no later than 14 days from the date of this letter.

Yours faithfully



Richard Buxton Solicitors
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⁷ See in particular paragraphs 88 and 93 of the Statutory Guidance (above at para.6) and Regulation 12 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

Cc.:

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- David Haughian, Head of Planning, Cumbria County Council
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- Fergus McMorrow, Assistant Director of Development, Eden District Council
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