MetroWest

Portishead Branch Line (MetroWest Phase 1)

TR040011

Applicant: North Somerset District Council
8.2 Legal Opinion from Stephen Tromans QC regarding the Report to Inform the Habitats Regulations Assessment
Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, regulation 5(2)(q)
Planning Act 2008

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Date: November 2019

Purpose of Document

This is the legal opinion of Stephen Tromans QC, who was instructed by the Applicant to consider whether the HRA Report correctly applies the law, and whether the approach to compensatory measures proposed by the Applicant is legally acceptable.

In the matter of

MetroWest Phase 1 Project

The Avon Gorge Woodlands SAC

Directive 92/43/EEC
The Conservation of Habitats and Species Regulations 2017

OPINION

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1. I am instructed to provide this advice by North Somerset District Council (NSDC) in the context of an application for a DCO, with the intention that the Opinion will accompany the DCO application.

Facts

2. MetroWest is a programme of major rail improvements for the West of England Region, which is being delivered by councils in the region, including NSDC, working with Network Rail (NR) and Great Western Railway (GWR). It is being delivered in two phases. Phase 1 includes reopening a section of disused Victorian railway line between Pill and Portishead and upgrading the existing and used freight line between Bristol and Portishead to allow for passenger services. In order to reopen the line from Portishead to Pill, NSDC needs to obtain a DCO.

3. Part of the existing operational railway runs through the Avon Gorge Woodlands SAC and the Avon Gorge SSSI. The main habitats in question are *Tilio-Acerion* woodland[1] and

[1] Mixed woodland on base-rich soils associated with rocky slopes: Annex 1 Habitat 9180.

Festuca-Brometalia grassland.[2] The *Tilio-Acerion* woodland is a priority habitat and some of it is diverse ancient woodland with uncommon species in the ground flora. In addition the site supports many rare plants, which include endemic whitebeam trees found nowhere else in the world.

4. Likely significant effects as a result of the project could not be excluded and hence an appropriate assessment (HRA) was required. The Stage 2 HRA concludes that the possibility of an adverse effect on integrity could not be ruled out because there would be clearance during the construction work in the SAC of: (1) 0.06ha of *Festuca-Brometalia* grassland (a loss of 0.84% of the SAC total); (2) 0.73ha of *Tilio-Acerion* woodland priority habitat (0.69% of the SAC total); and (c) up to 27 whitebeam trees.

5. The extent of the work is affected by the more rigorous safety requirements which apply as a result of converting the freight line to a passenger line.

6. Within the SAC the application site is subject to an existing Site Management Statement (SMS) and a Vegetation Management Plan (VMP), both produced by NR, which have been approved by Natural England (NE) and are irrespective of the DCO Scheme.

7. The current NR SMS (*Avon Gorge SSSI and SAC POD Branch Line*) is valid for 5 years from 1 July 2018 until 30 June 2023. It replaces the previous SMS which expired in 2008. It is produced under s. 28H of the Wildlife and Countryside Act 1981 (as amended) in respect of routine maintenance operations. These operations are agreed with NE and are granted assent under s. 28H. The SMS also states that it is intended to help both NR and NE to fulfil their duty as public bodies under s. 78G to conserve and enhance the special interest features of the SSSI when performing their duties. As I read the SMS its primary focus is on operations necessary to maintain the railway, by for example keeping the line clear of vegetation, maintaining drainage and controlling burrowing animals such as rabbits. However, it does include removal of introduced or invasive species as a "secondary but important priority" with a programme and techniques to be agreed with NE following an

[2] Semi-natural dry grassland and scrubland on calcareous substrates: Annex 1 Habitat 6210.

ecology survey. It also (para. 3.2) contains a list of "enhancement operations" recommended by NE to ensure that the SSSI/SAC are in good condition (as a minimum in unfavourable recovering and ideally moving towards favourable). Appended to the SMS (Appendix 6) is the Avon Gorge SSSI and SAC Vegetation Management Plan, which describes itself as an extension of the SMS and to the scope of NR maintenance works as described within the SMS. It indicated planned work over five years to restore the area's designated features. The first year is intended to be used in planning the work, followed by activity in years 2-4 which include removal of invasive non-native species. Invasive non-native species are to be felled and treated to prevent re-growth where there are safety critical issues but non safety critical species "will be added to a workbook for removal where possible" (para. 3.3, heading VMG 4).

8. NR has produced a document (31 May 2019) showing planned work for the first year programme under the SMS. However, this does not at present include positive commitments to address invasive species. The focus is mainly to be on works of vegetation maintenance for safety reasons.

9. The Avon Gorge VMP (AGVMP, Appendix 9.11 to Volume 4 of the DCO Scheme Environmental Statement) sets out management actions to compensate for the losses arising from the DCO Scheme. Planting of whitebeam saplings (grown from seed taken from the site and propagated and grown at Paignton Zoological Gardens) is proposed in three areas on NR land at the end of the construction phase, followed by management and monitoring for 10 years. It also contains positive management measures to be implemented during the 20-month construction phase, which are intended to result in improved management of the relevant habitats. The condition of the SSSI and SAC has declined over the years, due in part to lack of appropriate management of invasive non-native species, which is identified as one of the priority threats and pressures for the site in NE's Site Improvement Plan 2015 (SIP). The management is intended to be in areas which would benefit whitebeam trees and to clear scrub and non-native species in areas of *Festuca-Brometalia* grassland, about twice the size of the area lost. It also includes the possibility of compensation for woodland loss by positive management on Forestry

Commission (FC) land outside of the SAC/SSSI but adjoining it, as an alternative in whole or in part to sites identified on NR land.

10. Given the possibility of an adverse effect on integrity of the SAC, the competent authority may only agree to the project on the basis of imperative reasons of overriding public interest (IROPI) and if there are compensatory measures to ensure overall protection of the coherence of the Natura 2000 network. A central issue is the distinction between such compensatory measures and the "normal" management measures which NR would be required to undertake in any event. This was flagged up as an issue by NE in its discretionary (charged) advice dated 7 June 2019 and has been the subject of further and ongoing discussion between NE and the promotors of the scheme.

11. The AGVMP proposes (para. 8.1.5) the provision of a larger number of sites and area of land than is required as compensation by positive management. The compensation proposals are based on 1.6ha of positive management in total. However, providing a larger number of potential sites, including on FC land, will allow an "adaptive approach" to compensation, enabling NE to evaluate the compensation site options in combination with compensation measures to be provided by NR through the SMS and VMP, and to agree those that achieve the optimum outcome for the SAC in the light of prevailing circumstances.

Case law

12. The starting point in this matter is that by Article 6(4) of Directive 92/43/EC as amended (the Habitats Directive) because of the conclusions reached in the HRA, the competent authority may only agree to the project, in the absence of alternative solutions, if it must be carried out for imperative reasons of overriding public interest, which because the site hosts a priority habitat may only be considerations relating to human health or public safety or beneficial consequences of primary importance for the environment (absent a positive opinion from, at present, the Commission). In addition the UK as a member state must "take all compensatory measures necessary to ensure that the overall coherence of

Natura 2000 is protected." The requirements of the Directive are transposed in Part 4 of the Habitats and Protected Species Regulations 2017 and apply to DCOs, subject to the pending amendments made by the Conservation of Habitats (Amendment) (EU Exit) Regulations 2019 to reflect departure from the EU.

13. Art. 6(1) of the Directive requires member states to establish the necessary conservation measures for SACs, involving if need be appropriate management plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the Annex I natural habitat types and Annex II species present on the site.

14. Art. 6(2) requires member states to take appropriate steps to avoid, in SACs, the deterioration of natural habitats.

15. There has been something of a flurry of decisions from the Court of Justice of the EU (CJEU) on these provisions over the last year or so. These are summarised, in my view accurately and comprehensively, in the HRA.

16. In ***Case C-521/12 T.C. Briels v. Minister van Infrastructuur en Milieu*** the CJEU made clear the distinction between mitigating measures to prevent adverse effects on the integrity of the site and what are in reality compensatory measures: para. 33. Knowledge of the implications for the site is a necessary precondition for determining the nature of compensatory measures: para. 36. It also made clear that compensatory measures, provided they protect the overall coherence of Natura 2000, may be implemented within the affected site or in another part of the Natura 2000 network: para. 38.

17. The distinction was emphasised in ***Joined Cases C-387/15 and C-388/15 Hilde Orleans and others v. Vlaams Gewest*** where it was held that the future creation of habitat, the completion of which would take place after the project was not to be taken into consideration in assessing the effect of the project on integrity. Such measures could be categorised as compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein were satisfied (para. 64).

18. In ***Case C-323/17 People Over Wind, Peter Sweetman v. Coillte Teoranta***, the CJEU distinguished between what it termed conservation measures under Art. 6(1), preventive measures under Art. 6(2) and compensatory measures under Art. 6(4): para. 25. It also emphasised (para. 24) that the provisions of Art. 6 must be construed as a coherent whole in the light of the conservation objectives pursued by the Directive and that indeed Article 6(2) and 6(3) are designed to ensure the same level of protection of habitats and species (para. 23). The case was the subject of PINS guidance in the Advice Note 5/2018 (29 May 2018), which is also referred to in the HRA.

19. In ***Case C-164/17 Edel Grace, Peter Sweetman v. An Bord Pleanála*** the distinction was restated (paras. 47, 50). It emphasised the problem of taking into account under Art. 6(3) measures to create new habitat, which are often difficult to forecast with certainty and may only be apparent in the future – such benefits are unlikely to be established with the requisite degree of certainty required under Art. 6(3) to rule out adverse effects on integrity (paras. 52-54).

20. In ***Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v. College van gedeputeerde staten von Limburg, College van gedeputeerde staten van Gelderland*** (the Dutch Nitrogen Cases) the CJEU considered authorisation procedures for agricultural activities which cause nitrogen deposition in SACs. A number of the questions addressed by the CJEU are not relevant to this case, dealing with what constitutes a "project" and with authorisation procedures. However, paras. 121-133 of the judgment are of relevance. The key point arising from the judgment for this purpose is at para. 124, which states that the positive effects of necessary measures under Arts. 6(1) (which it called "conservation measures") and 6(2) (which it called "preventive measures") cannot be invoked in order to justify under Art. 6(3) authorisation for a project which has an adverse effect on protected sites. The CJEU at para. 125 also reinforced the distinction drawn in ***Briels*** and ***Grace and Sweetman*** between protective measures forming part of the project and intended to ensure it does not affect adversely the integrity of the site under Art 6(3); and on the other hand, measures which in

accordance with Art. 6(4), are aimed at compensating for negative effects. The upshot is that the appropriate assessment may not rely on conservation measures under Art. 6(1), preventive measures under Art. 6(2), or compensation measures under Art. 6(4) to justify a conclusion of no adverse effect on integrity.

21. Art. 6(4) was also considered by the CJEU in ***Case C-441-17 European Commission v. Republic of Poland (the Bialowieża Forest case)***. The CJEU stated that as a derogation from Art. 6(3), Art. 6(4) must be interpreted strictly and can be applied only after the implications of a project have been analysed in accordance with Article 6(3). The damage caused to the site must be established in order both to conduct the assessment of IROPI and possibly less harmful alternatives under Art. 6(3) and to determine the nature of compensatory measures under Art. 6(4): see paras. 189 and 191. The CJEU also considered the nature of the obligation to establish conservation measures under Art. 6(1). The Court held that Art. 6(1) requires that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned "… not only be adopted, but also, and above all, be actually implemented" (para. 213).

22. The view of NE in its advisory letter of 7 June 2019 is that it supports the principle of compensatory planting for the loss of rare trees, at optimal locations, either on NR land or on third party land. In so far as proposed "positive management" (primarily control of invasive species) is concerned, NE agrees that this is needed, but suggests that it is essential to demonstrate that the suggested positive management measures "are over and above the works which NR is required to do as part of its duties". It does not cite any case-law for this, but refers to the Commission guidance on Art. 6 (Commission Notice C(2018) 7621 Final, 21 November 2018) which says (para. 3.7.6):

> "Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EU law. For example, the implementation of conservation measures under Article 6(1), or the proposal/designation of a new area already inventoried as being of Community importance, constitute 'normal' measures for a Member State. Thus,

compensatory measures should go beyond the normal/standard measures required for the designation, protection and management of Natura 2000 sites."

23. This is repeated at para. 3.7.8 (second bullet) of the Commission Notice:

> "… the compensation must be additional to the contribution to the Natura 2000 network that the Member State should have made under the Directive"

24. I also note what is said at the first bullet of para. 3.7.8:

> "… as a general principle, a site should not be irreversibly affected by a project before the compensation is in place. However, there may be situations where it will not be possible to meet this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as the original habitat negatively affected by a project. Therefore, best efforts should be made to ensure that compensation is in place beforehand and, in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime"

Advice as requested

25. It is expected that one or more Statements of Common Ground between NSDC, NE and other parties will be submitted during the Examination process. NSDC would like to append to each such Statement of Common Ground this Opinion having obtained the agreement of all parties to support the approach taken in the HRA Report.

26. The HRA Report in my view takes an approach which is legally correct and which follows the correct sequence under Arts. 6(3) and 6(4). It plainly takes account of recent case law from the CJEU and UK, which it correctly identifies, describes and applies. It also in my view takes proper account of PINS Guidance in Advice Note 10 on HRA and Note 05/2018 on avoidance and reduction measures. For example, it is recognised that NR conservation measures do not form part of the DCO application, which is correct as a matter of law, in the light of the cases described above and in the HRA (see para. 1.1.27).

27. I am asked to address the following specific matters on the HRA Report:

(1) **Whether the approach taken the HRA Report in setting out the relevant process and in distinguishing between preventative and compensatory measures is correct**.

As indicated above, in my view the authors of the Report have correctly understood and applied the law as it stands on the distinction between conservation, preventative and compensatory measures, and the proper role played by compensatory measures in the context of possible derogation from the protection accorded by Art. 6(3). The summary in bullet point form at para. 1.3.22 on the distinction between various types of measures is accurate in my view.

(2) Whether a "conservation + compensation" approach can be taken to the delivery of measures within the NR SAC

28. The correct approach, in accordance with the case law of the CJEU described above, is to identify, through the process of appropriate assessment, what adverse impact on the integrity of the SAC will occur as a result of the project: this then determines the nature of the compensation measures necessary in order to ensure protection of the overall coherence of Natura 2000. The starting point is that the compensation package should relate to the harm caused by the project. However, the overall result required by Art. 6(4) is the protection of the overall coherence of Natura 2000. So for example if the success of the compensation measures (for example in creating new habitat or planting replacement trees) is uncertain, the extent of compensation (what the Commission Notice calls "compensation ratios" (para. 3.7.13) will need to be increased accordingly.

29. It is not the role of compensation measures in my view to ensure that conservation measures under Art. 6(1) or preventive measures under Art. 6(2) are taken – these are distinct obligations which apply irrespective of any impact of the project. Compensatory measures could of course comprise the same types of management measures as under Arts. 6(1) or 6(2) but the rationale is different. Compensation measures should in my view be designed on the basis that the necessary management measures will be undertaken in any event. The HRA Report (section 11.1) recognises this.

30. Therefore, in considering whether the end result of overall coherence of Natura 2000 will be achieved through the proposed compensation measures, account needs to be taken of the conservation measures established under Art. 6(1) (in this case through the SMS and related documents) and of any "appropriate steps" which will be taken under Art. 6(2) to avoid deterioration.

31. This in my view is consistent with what I understand to be the "conservation + compensation" approach.

32. It seems to me that there is a logical distinction to be drawn between the general "necessary" conservation measures and the specific compensation measures. This is because the specific compensation measures are targeted at addressing the harm caused by the project. By way of example, measures to improve the condition of the *Tilio-Acerion* woodland where the whitebeam trees will be lost (section 11.2). The conservation measures as embodied in the SMS and associated documents are significantly more generalised and less targeted than the compensation measures proposed. It seems probable that the compensation measures are more likely to deliver benefits than the relatively weaker conservation measures.

(3) Assuming the necessary surveys will confirm the suitability of FC land for compensatory measures, whether compliance with the Habitats Regulations can be secured through a formula to enable NE to agree which of the DCO Scheme compensation sites spanning the NE and FC land shall be provided to deliver 1.6ha of compensation measures

33. The Directive does not prescribe whether compensation takes place on the affected site or elsewhere: the only criterion is whether it does adequately compensate for the adverse effect on integrity by ensuring the overall coherence of Natura 2000. Therefore compensation by management on FC land is permissible, provided of course it meets the criteria in the Commission Notice: sufficiently targeted to the harm (para. 3.7.10); feasible and effective (para. 3.7.11); technically feasible (para. 3.7.12); adequate in extent (para.

3.7.13); located in areas where they will be most effective (para. 3.7.14); and acceptable in timing (para. 3.7.15). Of course, if the object is to improve the condition of existing *Tilio-Acerion* woodland, self-evidently this can only take place where that woodland is present.

34. The first point is therefore to demonstrate that 1.6ha (1.45ha woodland and 0.15ha grassland), taking account of an appropriate ratio, represents an area for management which is adequate to compensate for the habitat lost or damaged. This is an area by definition additional to the areas required to be managed to provide conservation measures. Provided it is clear that the candidate areas are suitable, I see no reason why (provided there is a clear legal obligation imposed in the DCO) it could not be left to NE to determine which areas should be utilised to deliver the 1.6ha as compensation, considering this in conjunction with the measures which NR will have to deliver in any event and in the light of circumstances and knowledge at the time. Subject to the obligations being stated clearly and to there being the requisite degree of certainty as to effectiveness, in principle the approach described in para. 11.1.3 of the HRA Report seems to me legally acceptable.

(4) The adequacy of the proposed compensation measures, the information provided on the risk of their failure on technical grounds and the information provided on their contribution to the status of the SAC.

35. Establishing the adequacy of the compensation measures is a matter for the competent authority. However, the HRA does in my view demonstrate a correct understanding and application of the legal principles, in particular (para. 1.3.21) the principle of compensation being additional to measures to comply with other obligations under the Directive, and the implications of this for the treatment of measures under the NR SMS.

36. Land amounting to 4.15ha within the ownership of the Forestry Commission which is outside but abutting the boundary of the SSSI/SAC is included at the suggestion of NE as area within which there is the option for the siting of up to 1.45ha of woodland compensation measures, as a possible alternative in whole or in part to using NR land.

This seems to me to be in line with the adaptive approach to compensation, which I think is legally acceptable.

37. The HRA correctly recognises the importance of demonstrating the effectiveness of proposed compensation, and in that regard it is helpful that there is evidence of success in previous whitebeam propagation projects (Annex H of the AGVMP, Appendix 9.11 of the ES) and detail on a rolling programme for propagation so as to maximise the prospects of success.

IROPI

38. Obviously it is for the Secretary of State to decide whether an IROPI case is made out, as the HRA recognises. However, the HRA has certainly identified and in my view correctly applied the test, distinguishing between priority and non-priority habitats. The points made on IROPI in relation to public safety and human health in respect of the priority habitat are in my view reasonable and proper arguments, which should carry force, and the specific points made as to the unusual nature of the DCO scheme (para 1.8.1) are in my view also reasonable points for the Secretary of State to take into account.

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13 November 2019

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