



Department
for Transport



Ministry of Housing,
Communities &
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Our ref: APP/HS2/1
Your ref:
PPC/PPC/380900/32/UKM/88047037.1

04 March 2019

Dear Mr Claussen

**HIGH SPEED RAIL (LONDON TO WEST MIDLANDS) ACT 2017 – SCHEDULE 17
APPEAL MADE BY HIGH SPEED TWO LIMITED (HS2 LTD)
LAND AT COLNE VALLEY VIADUCT WETLANDS ECOLOGICAL MITIGATION SITE, TO
THE WEST OF HARVIL ROAD, HAREFIELD
APPLICATION REF: 73263/APP/2017/3838**

1. I am directed by the Secretary of State for Transport and the Secretary of State for Housing, Communities and Local Government (henceforth “the Secretaries of State”) to say that consideration has been given to the report of the Inspector, Alan Novitzky, BArch(Hons) MA(RCA) PhD RIBA, who held a public local hearing on 3 July 2018 into your client’s appeal against the decision of the London Borough of Hillingdon Council (“the Council”) to refuse the Schedule 17 application made by your client, HS2 Ltd, to approve plans and specifications for proposed works associated with the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation comprising earthworks (1 no. mitigation pond; 1 no. reptile basking bank; and 2 no. hibernacula); and fencing, in accordance with application ref: 73263/APP/2017/3838, dated 20 October 2017 (“the Schedule 17 application”).
2. The grounds given by the Council for refusing the application, in accordance with paragraph 3(6) of Schedule 17¹ to the High Speed Rail (London to West Midlands) Act

¹ <http://www.legislation.gov.uk/ukpga/2017/7/schedule/17>

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2017 (“the HS2 Act”), are:

(i). The design or external appearance of the works ought to, and could reasonably, be modified to preserve a site of archaeological or historic interest or nature conservation value.

(ii). The development does not form part of a scheduled work, within the meaning of Schedule 1 of the HS2 Act, and that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.

3. HS2 Ltd gave notice of their appeal against the refusal of this application on 30 April 2018. On 16 May 2018, the parties were notified that this appeal would be subject to the joint determination by the Secretaries of State, pursuant to paragraph 23(1) of Schedule 17 to the HS2 Act. The HS2 Act authorises the construction of the HS2 railway from London Euston to Birmingham, which is referred to as Phase One of the HS2 project.
4. The Inspector recommended that the appeal be dismissed with regard to matters of archaeological interest and approval refused, but that the appeal be allowed with regard to matters of ecological value and the plans and specification Schedule 17 application be approved.
5. For the reasons given in this letter, the Secretaries of State agree with the Inspector's recommendation of allowing the appeal in relation to matters of ecological value. They disagree with his recommendation and some of his reasoning in support of the recommendation in relation to matters of archaeological interest. They have decided to allow the appeal and grant approval for the application. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Policy and statutory considerations

6. This appeal is made under paragraph 22(1) of Schedule 17 to the HS2 Act. In considering this appeal, the Secretaries of State have been mindful of the bespoke consent and controls regime established by the HS2 Act and other commitments made during its passage through Parliament. This regime has been designed to manage the particular issues associated with the delivery of the HS2 railway as a transport infrastructure project of national importance. A description of this regime, the notable elements of which include the Schedule 17 approvals and a set of environmental controls known as the Environmental Minimum Requirements (EMRs), is set out in paragraphs 7 to 14 below.
7. Under paragraph 26(1) of Schedule 17 to the HS2 Act, the Secretary of State for Transport can issue statutory guidance to planning authorities about the exercise of their functions within that Schedule. Planning authorities are required to have regard to that statutory guidance when considering a request for approval made by HS2 Ltd under Schedule 17 (paragraph 26(2)). The Secretary of State published the current Schedule 17 statutory guidance (“the *Statutory Guidance*”²) in February 2017.

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592755/hs2-schedule-17-statutory-guidance.pdf

8. The purpose of Schedule 17, as stated in paragraph 1.2 of the *Statutory Guidance*, is “to ensure there is an appropriate level of local planning control over the HS2 Phase One construction works while not unduly delaying or adding cost to the project”.

9. As stated in paragraph 3.1-3.3 of the *Statutory Guidance*:

“Section 20 of the Act grants deemed planning permission under Part 3 of the Town and Country Planning Act 1990 for HS2 Phase One and associated works (“the Works”) between London and the West Midlands, but some of the detailed design and construction are subject to further approval. Schedule 17 to the Act puts in place a process for the approval of certain matters relating to the design and construction of the railway which requires that [HS2 Ltd] must seek approval of these matters from the relevant planning authority. As deemed planning permission has been granted by the Act requests for approval under Schedule 17 are not planning applications.

As some of the elements of the detailed design of the railway and associated works require further approval, comparisons can be made between the deemed planning permission granted for the [HS2] works and that granted for an outline planning permission under the Town and Country Planning Act 1990. The main distinction between the two is that under the Act the grounds on which the planning authority can approve further details and apply conditions are more constrained.

The roles that a planning authority has in the determination of different requests for approval and the grounds on which they can determine them are set out in the Schedule 17.”

10. As the nominated undertaker appointed by the Secretary of State under the HS2 Act, HS2 Ltd is required under the HS2 Development Agreement to adhere to the arrangements provided for in the EMRs in designing and constructing the works for Phase One of the HS2 project.

11. The EMRs set out the environmental controls with which HS2 Ltd and its contractors are required to comply. The EMRs comprise a suite of documents, including the *Heritage Memorandum*³, the *Environmental Memorandum*⁴ and the *Planning Memorandum*⁵.

12. The *Heritage Memorandum* sets out how the historic environment will be addressed during the design and construction of Phase One of HS2. Section 4.6 of the *Heritage Memorandum* sets out the EMRs for investigation and recording of heritage assets. A route-wide generic written scheme of investigation, known as Historic Environment Research and Delivery Strategy (GWSI:HERDS) sets out the research framework and general principles for design, evaluation, investigation, recording, analysis, reporting and archive deposition to be adopted for the design development and construction of the Phase One scheme.

13. The *Environmental Memorandum* relates to the environmental aspects of the design and construction of Phase One of HS2. It sets out at paragraph 4.8.3 that the nominated undertaker will prepare Ecology Site Management Plans at detailed design stage and prior to any works commencing on site. These will specify the ecological objectives of

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593595/Heritage_Memorandum.pdf

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593596/Environmental_Memorandum.pdf

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593594/Planning_Memorandum.pdf

each ecological habitat creation area, the measures to be taken to establish and maintain these habitats, the detailed planting requirements and the monitoring regime for each, in order to measure success.

14. The EMRs apply to all HS2 works, whereas Schedule 17 applies to a specific subsection. The two processes therefore operate independently of each other and the Schedule 17 approval process is not intended as an enforcement mechanism for the EMRs. A bespoke process is in place for dealing with concerns relating to compliance with the EMRs (described in paragraph 2.8 of *HS2 Information Paper E1: Control of Environmental Impacts*⁶).

Schedule 17 Grounds for refusal

15. Paragraph 7.1 of the *Statutory Guidance* states that for all approvals under Schedule 17, the Schedule specifies the grounds that are relevant. When determining a request for approval a planning authority must only consider the grounds relevant to that approval. Therefore requests may only be refused, conditions be imposed, and modifications to submissions or additional information requested, where they relate to the grounds specified for determining the request for approval.
16. The present appeal relates to the refusal of an application made under paragraph 3 of Schedule 17 for the approval of plans and specifications of earthworks and fencing. The second column of the table in paragraph 3(6) of Schedule 17 sets out the specific grounds on which an application for approval can be refused, which are, in relation to earthworks (entry 2 in the table):

“That the design or external appearance of the works ought to, and could reasonably, be modified—

- (a) to preserve the local environment or local amenity,*
- (b) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or*
- (c) to preserve a site of archaeological or historic interest or nature conservation value.*

If the development does not form part of a scheduled work that, the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.”;

and in relation to fencing (entry 5 in the table):

“That the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.”

17. The grounds given by the Council for refusing this application are as set out in paragraph 2 of this letter.

⁶ <https://www.gov.uk/government/publications/hs2-information-papers-environment>

18. Paragraph 4.4 of the *Statutory Guidance* states that planning authorities should not through the exercise of their powers under Schedule 17 seek to modify or replicate controls already in place under the EMRs. Paragraph 10.3 of the *Statutory Guidance* states that when determining any request for approval under Schedule 17, planning authorities should not impose conditions which conflict with controls and commitments contained in the EMRs, because those controls will have been considered necessary or sufficient by Parliament when it approved deemed planning permission for the railway under the HS2 Act. The *Statutory Guidance* also makes clear that the approvals regime under Schedule 17 has been carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding cost to the HS2 Phase One project.
19. When making a Schedule 17 application, HS2 Ltd has a statutory requirement to provide plans and specifications of the works and a context report⁷ (see paragraph 16(1) of Schedule 17). In addition, through the *Planning Memorandum* and the *Planning Forum Notes*⁸ (which have been developed through the HS2 Phase One Planning Forum in consultation with local authorities) it has been agreed that HS2 Ltd will provide, where relevant, certain other supporting information. *Planning Forum Notes* 1, 2 and 3 set out the form of the items submitted for a plans and specification approval such as in this case.

Summary of Inspector's recommendation

20. The Inspector recommended that the appeal be dismissed with regard to matters of archaeological interest and approval refused (IR81), but that the appeal be allowed with regard to matters of ecological value and the plans and specification Schedule 17 application be approved (IR82).
21. In his reasoning for dismissing the appeal with regard to matters of archaeological interest, the Inspector stated his view that the information available to the Council was not adequate and that the design of the works ought to, and could reasonably, be modified to preserve a site of archaeological interest, if found necessary once adequate information became available (IR78). Moreover, if found necessary once adequate information became available, the Inspector considered that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits. The Inspector found it unreasonable to expect the Council to approve an application, or to show how the works ought to be, and could reasonably, be modified or carried out elsewhere, on the basis of inadequate information (IR79).
22. In his reasoning for allowing the appeal with regard to matters of ecology, the Inspector found that, while there were shortcomings in the assembly of the *Environmental Statement*, there was adequate information available to the Council to make a pragmatic but responsible judgment on the effect of the proposals on the ecological value of the site (IR80).

Summary of the Secretaries of State's decision

23. For the reasons given in this letter, the Secretaries of State agree with the Inspector's recommendation of allowing the appeal in relation to matters of ecological value. They

⁷ A context report is a document explaining how the matters to which the application for approval relates fit into the overall scheme of the works authorised by the HS2 Act.

⁸ <https://www.gov.uk/government/publications/hs2-phase-one-planning-forum-notes-for-local-authorities>

disagree with his recommendation and some of his reasoning in support of the recommendation in relation to matters of archaeological interest.

24. In relation to both matters, the Secretaries of State consider that there are two main issues: (1) whether the planning authority has justified its refusal of approval on either of the stated grounds under paragraph 3(6) of Schedule 17; and (2) whether the planning authority's approach, that it was open to them to refuse approval of the submitted plans and specifications on the ground that HS2 Ltd had failed to provide sufficient information on the impact of the proposed works to enable them to determine the application, was open to them under Schedule 17.
25. For the reasons explained in this letter, they have decided to allow the appeal on the matters of archaeological interest and the matters of ecological value and to grant approval for the Schedule 17 application.

Main issues

Justification for refusal under 3(6)

26. This appeal relates to the refusal of an application made under paragraph 3 of Schedule 17 for the approval of plans and specifications of earthworks and fencing. The specific grounds on which an application for approval can be refused are set out in paragraph 16 of this letter. The grounds given by the Council for refusing this application are as set out in paragraph 2 of this letter.
27. The Secretaries of State agree, for the reasons set out by the Inspector at IR65, that the site has archaeological interest. They further agree, for the reasons given at IR66, that the site may have nature conservation value.
28. However, the Secretaries of State consider that the Council has submitted no evidence to substantiate the grounds set out in paragraphs 16-17 to justify refusing approval of the application. The Council has not proposed that the works ought to and could reasonably be constructed in some other way so as to preserve a site of archaeological interest or nature conservation value or that the development ought to and could reasonably be carried out elsewhere.
29. The Secretaries of State note that the Inspector's overall conclusion at IR79 (that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits) is qualified by the statement "if found necessary once adequate information becomes available". However, the Secretaries of State are clear that paragraph 3(6) of Schedule 17 provides that a planning authority may only refuse to approve plans and specifications on a ground specified in relation to the work in question in the table and further does not provide any ground to support the qualification suggested by the Inspector.
30. Under paragraph 3(6) of Schedule 17 it is for the Council to demonstrate that the design or external appearance of the earthworks and boundary fence ought to and could reasonably be modified to preserve the site of archaeological interest or nature conservation value; or that the earthworks ought to and could reasonably be carried out elsewhere within the development's permitted limits. The point is explicitly made in paragraph 7.7.2 of the *Planning Memorandum* which states that in these circumstances, "the authority shall include an explanation of why and how it considers the modifications should be made and where".

Sufficiency of information

31. As set out in paragraph 19 of this letter, when making a Schedule 17 application, HS2 Ltd has a statutory requirement to provide plans and specifications of the works and a context report. In addition, through the *Planning Memorandum* and the *Planning Forum Notes* it has been agreed that HS2 Ltd will provide certain other supporting information where relevant.
32. The Secretaries of State agree with the Inspector at IR67 that the application satisfies *Planning Forum Notes* 1, 2 and 3 with regard to the form of the items submitted for a plans and specification approval such as this matter.
33. The Secretaries of State note the Inspector's further observation in IR67 that the depth of information to be carried by each item is not made explicit in the *Planning Forum Notes*, but that within the supporting material, in this case the written statement, scope exists for the supply of information reasonably necessary to allow an informed decision to be made. The Secretaries of State note the assessment made by the Inspector at IR68 that the written statement largely describes actions which are expected to be taken in the future to assemble this information, rather than conveying the substantive information itself.
34. The Secretaries of State consider that the information required to be submitted as part of a Schedule 17 application is that prescribed by the statutory requirement set out in paragraph 16 of Schedule 17 and further such information that has been agreed and is set out in the *Planning Forum Notes* 1, 2 and 3. They note the statement in paragraph 4 of *Planning Forum Note* 3 that the scope of the content of the Written Statement will reflect the scope of the matters for approval. They further consider that the scope of the matters for approval must be viewed in the context of the bespoke HS2 consent and controls regime described in paragraphs 7-14 of this letter, which includes the processes contained in the EMRs as a means to ensure archaeological and ecological protections are in place. In particular, the Secretaries of State note paragraph 9.1.1 of the *Planning Memorandum* which forms part of the EMRs. This paragraph requires a qualifying authority (of which the Council is such an authority), in determining requests for approval, to take into account the assessments in the *Environmental Statement*, the arrangements in the *Code of Construction Practice*, the *Heritage Memorandum* and the *Environmental Memorandum*.
35. Given this context, the Secretaries of State conclude that it was in accordance with the controls established by the EMRs for HS2 Ltd to base the Written Statement upon the programme of site investigation to be carried out at the site, as summarised in IR14-17. Further the Secretaries of State consider that the concerns raised by the Inspector at IR68 (about the lack of necessary archaeological evidence concerning the location of the proposed pond) is not a matter of concern because the EMRs will ensure that the necessary investigations will be carried out prior to the earthworks being undertaken.
36. The Inspector confirmed at IR67 that the Schedule 17 application satisfied *Planning Forum Notes* 1, 2 and 3 with regard to the form of the items submitted for a plans and specification approval such as this. Accordingly, the Secretaries of State agree with the position set out by HS2 Ltd that the Schedule 17 application was supported with the appropriate level of information.

The Council's approach to Schedule 17

37. As described in paragraph 4.4 of the *Statutory Guidance*, Schedule 17 provides a means for local authorities to have an appropriate level of local planning control over the works while not unduly delaying or adding cost to the project.
38. The *Statutory Guidance* also states that the Schedule 17 procedure should not be used to modify or replicate controls set out in the EMRs.
39. In this case, trial pit investigation of the site, including that part which is of most concern to the Council (the mitigation pond) will be undertaken in accordance with the EMRs (the *Heritage Memorandum* and GWSI:HERDS) as explained in the Written Statement. In the event that the results of this investigation show the plans and other documents for the proposed works require modification, HS2 Ltd will be required to do so and, if necessary, make a further submission under Schedule 17. The Secretaries of State note, that in such circumstances, the Council's concerns at IR24 and IR32 (that the control provided by the Act would be frustrated) would be unfounded. It is not the purpose of the Schedule 17 procedure to replicate or police the process of investigation set out in the EMRs, but rather to complement it.
40. The Secretaries of State conclude that the correct approach here, therefore, was for the Council to determine the application on the basis of the controls already in place under the EMRs. The Secretaries of State consider that the Council, by refusing the application, and the Inspector in accepting the Council's arguments on this point (IR71 and 79), have incorrectly sought to replicate those controls through the Schedule 17 process.

Further considerations pertinent to the conclusions

41. In IR26 and IR72, the Inspector refers to the concern that there could be a duplication of resources and delay should a redesign of the works and a further Schedule 17 application prove necessary following surveys. HS2 Ltd has a sizeable programme of Schedule 17 applications to make over the coming months and years, and it is best placed to oversee the programme of these applications in the most effective and efficient way. It is, furthermore, required to reimburse local authorities for their time in processing such applications. As such, the Secretaries of State find that this is not material to their consideration.

Other archaeology-specific matters

42. The Secretaries of State note the concerns raised by the Greater London Archaeological Advisory Council (GLASS), part of Historic England, and set out at IR41 that their experience of the GWSI:HERDS processes has not so far been encouraging. GLASS would have expected a representative sample of open trenches to be offered for viewing, but state that this has not been the case so far.
43. The Secretaries of State consider that these are matters for GLASS to raise directly with HS2 Ltd under the arrangements for engagement put in place through the *Heritage Memorandum*. Should GLASS have any concerns about the way the EMRs process is working, there is a process for ensuring compliance referenced in paragraph 14 of this letter.
44. The Secretaries of State consider that the points made by GLASS at IR42 (regarding the adequacy of information and the possibility of further Schedule 17 applications) have already been addressed elsewhere in this letter.

Other ecology-specific matters

45. Notwithstanding the Secretaries of State's conclusion that Schedule 17 does not provide for the insufficiency of supporting information as a ground for refusal (see paragraph 29), they nevertheless agree with the Inspector at IR80, that adequate information was available to allow the Council to make a pragmatic but responsible judgment on the effect of the proposals on the ecological value of the site.
46. For the reasons given at IR73-74, the Secretaries of State agree that it is unlikely that there would have been a material difference in the outcome of the environmental assessment had the true boundary of the Site of Importance for Nature Conservation been recognised. They further agree, for the reasons given at IR75-76 that the proposed works would give rise to valuable wetland which would help towards the mitigation of the loss of recent growth on the site and that the site is likely to be more species diverse than exists at present.
47. The Secretaries of State note that while the Inspector has commented that there was a section of the Site of Metropolitan Interest (SMI) overlooked in the *Environmental Statement*, he has expressed the view that it is not critical in maintaining the integrity of the SMI because it is such a tiny portion of the overall area and because of its character of established agricultural use (IR74). The Inspector considered that the AECOM Memorandum goes some way in establishing a baseline for the current ecology of the site and the Inspector saw no reason to believe that critical aspects have been overlooked (IR75). The Secretaries of State have no reason to disagree with the Inspector's assessment and therefore take the view that this provides support that there was sufficient information available to the Council on the matters of ecological value.

The cases for other interested persons

48. The Secretaries of State have had regard to the points made by interested parties. They agree with the Inspector (IR77) that many relate to matters beyond the scope of this appeal, and further agree that the responses provided to the other points by HS2 Ltd are satisfactory.

Overall conclusion

49. Having regard to the factors described above, the Secretaries of State disagree with the Inspector that the information available to the Council was not adequate (IR78). They therefore disagree with the Inspector at IR79 that it was unreasonable to expect the Council to approve an application. The Secretaries of State agree with HS2 Ltd that no grounds within the framework of Schedule 17 to the HS2 Act have been substantiated for refusing approval of the application and the Council is required by both the HS2 Act and the *Planning Memorandum* to provide justification for their reasons for refusal (IR22); that the required information had been supplied with the Schedule 17 application (IR8); that the information requested by the Council is required to be provided through the EMRs which HS2 Ltd is contractually bound to comply with in delivering the HS2 project (IR9).
50. The Secretaries of State consider that the Schedule 17 regime should not duplicate the controls in the EMRs and are satisfied in this case that the EMR processes, which were approved by Parliament alongside the HS2 Act, will ensure that the appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings, including a further Schedule 17 application should that be required (IR17).

51. The Secretaries of State therefore find that there was no legitimate basis for refusing to approve the Schedule 17 application.
52. They hereby allow your client's appeal and approve the Schedule 17 application for the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation comprising earthworks (1 no. mitigation pond; 1 no. reptile basking bank; and 2 no. hibernacula); and fencing, in accordance with application ref: 73263/APP/2017/3838, dated 20 October 2017.
53. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than Schedule 17 of the HS2 Act.
54. A copy of this letter has been sent to the Council and other parties who made representations in relation to this appeal and notification has been sent to others who asked to be informed of the decision.

Yours faithfully

Phil Barber

Patrick Bateson

Phil Barber

Authorised by the Secretary of State
for Housing, Communities and Local
Government to sign in that behalf

Patrick Bateson

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