

**National Highways: A303 Amesbury to Berwick
Down Project, Development Consent Order
Application**

Scheme Reference: TR010025

**Covering Note
and Legal Submission
concerning**

**Responses to Secretary of State's call for further
representations on his Statement of Matters**

for

**The Stonehenge Alliance
(Reference No. 2001870)**

4 April 2022

1. This covering note and legal submission has been prepared on behalf of the Stonehenge Alliance by Dr Kate Fielden with assistance from Victoria Hutton of counsel.
2. Further submissions on behalf of the Alliance and accompanying this paper cover the following subject matter:
 - a) Alternatives (SOM Bullet Point 1)
 - b) Transport, Carbon and Economic Issues (SoM Bullet Points 2–4)
 - c) Environmental Information Review, including Cultural Heritage, Landscape and Biodiversity (SoM Bullet Point 4)
 - d) Geology, Ground Investigation and Groundwater Monitoring (SoM Bullet Point 4)
 - e) Any Other Matters (SoM Bullet Point 5)
3. In short, the Stonehenge Alliance considers that the DCO application for the Stonehenge New Road should be refused. This is due to breaches of the NPSNN (s104(3) Planning Act 2008) but also, because the adverse impact of the proposal would outweigh its benefits (s104(7) Planning Act 2008). We address this (at paragraphs 21ff.) below.
4. The Stonehenge Alliance is also of the view that the Secretary of State’s proposal to re-determine the scheme under Rule 20(2) of the Infrastructure Planning (Examination Procedure) Rules 2010/103 is unlawful. We set out our position in relation to this below.

Procedure

5. The Planning Act 2008 (PA 2008) makes no provision for the re-determination of an application once a decision of the Secretary of State has been quashed by a Court.
6. The Infrastructure Planning (Examination Procedure) Rules 2010/103 were made under the PA 2008. The pre-amble to those Rules states that they are made under rules 88(6), 90(3) and 97, paragraphs 3 and 4 of schedule 3 to PA 2008. None of those rules or paragraphs empower the Secretary of State to make provision as to the redetermination of applications following the quashing of a decision by a Court.
7. The Secretary of State’s statement of matters is purportedly issued under regulation 20(2) which states:

‘(2) Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State—

- (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
- (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters.'

8. It can be seen that Regulation 20(2) does not require the Secretary of State to re-determine the application nor does it, in fact, prescribe any mode of re-determination. Further, if it were to be read as purporting to dictate any procedure following the quashing of a decision such provision is *ultra vires* as such is not provided for in the PA 2008. In any event, the Regulation does not preclude the re-opening or re-start of an Examination under the PA 2008.
9. In the present case, the nature of the new evidence is such that it cannot be fairly examined other than through a fresh examination or by way of an inquiry. Given the nature of the scheme and the severe impacts it will have (not least on the WHS as already found by the Secretary of State) it is imperative that all of the evidence is robustly tested by appropriately qualified experts. The ordinary examination procedure under the PA 2008 provides for this.
10. The PA 2008 sets out a strict timetable for the submission, examination and determination of applications for DCOs.
11. By s103(1) the Secretary of State has the function of deciding an application for an order granting development consent. Section 107 sets out a timetable for the Secretary of State's decision. The timetable relates to the receipt of the ExAR.
12. Under the statutory scheme, the SoS decision is predicated upon receipt and consideration of a report by the examining authority following the examination of the application.
13. The statutory examination process involves an inquisitorial procedure through which the evidence of the Applicant and others is robustly tested. The examination involves:
 - a. An initial assessment of the application;
 - b. A preliminary meeting;
 - c. A number of rounds of written representations, including responses to ExA questions;
 - d. The potential for the holding of hearings, including compulsory acquisition hearings;
 - e. The submission of local impact reports by local authorities;

- f. The provision of statements of common ground;
 - g. The potential for the appointment of an assessor;
 - h. The potential appointment of a barrister, solicitor or advocate;
 - i. The conduct of site inspections.
- 14.** The above process is necessary not only for an Examining Authority (ExA) to reach a robust recommendation on a DCO proposal but also to ensure that the right environmental safeguards are attached to the DCO via requirements.
- 15.** In this case:
- a. The examination was conducted by five experienced inspectors (Wendy McKay, Alan Novitzky, David Richards, Ken Taylor and Edwin Maund);
 - b. The examination was conducted between 2 April and 2 October 2019;
 - c. The detailed and rigorous examination consisted of:
 - i. Open floor hearings
 - ii. Site inspections
 - iii. Consideration of Relevant Representations, various rounds of written representations
 - iv. The asking and answering of detailed written questions,
 - v. Various issue specific hearings
 - vi. Submission and consideration of updated versions of the DCO the DAMS and OEMP;
- The detailed timetable can be found [here](#).
- d. The Examining Authority's Report (ExAR) was delivered on 2 January 2019; and
 - e. The first SoS decision was made on 12 November 2020 following additional rounds of consultation and consideration of submissions.
- 16.** The Secretary of State's Statement of Matters recognises that a significant amount of updated information is required in relation to the redetermination of the scheme. This includes submissions in relation to the reasons for the High Court's quashing of the decision but also (a) updates to the Environmental Statement and (b) submissions on the carbon impact of the proposal, including cumulatively with other proposed schemes. Further, this process is occurring over two years since the ExA reported and a year and a half since the Secretary of State reached his first decision.
- 17.** National Highways has submitted a welter of information, with more to come. A great deal of this is technical evidence which especially requires interrogation. A large part of the information /reports of NH are not accepted as definitive by the Stonehenge Alliance and numerous interested parties. The SA and other interested parties will also

be submitting a wealth of information and evidence. Some of this also takes the form of technical evidence.

18. Further, the documents of NH, SA and interested parties rely upon and incorporate evidence which has previously been submitted to the Examination and therefore must be taken into account in any determination. Thus, the number of documents submitted (at present around 51 by NH) is misleading as those documents themselves incorporate and refer to a number of other documents already submitted to the Examination.

19. Regulation 21 of the EIA Regulations states:

'21.— Consideration of whether development consent should be granted

(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must—

- (a) examine the environmental information;
- (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
- (c) integrate that conclusion into the decision as to whether an order is to be granted; and
- (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.

(2) The reasoned conclusion referred to in paragraph (1)(b) must be up to date at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application.

(3) When considering whether to impose a monitoring measure under paragraph (1)(d), the Secretary of State must—

- (a) if monitoring is considered to be appropriate, consider whether to make provision for potential remedial action;
- (b) take steps to ensure that the type of parameters to be monitored and the duration of the monitoring are proportionate to the nature, location and size of the proposed development and the significance of its effects on the environment; and
- (c) consider, in order to avoid duplication of monitoring, whether any existing monitoring arrangements carried out in accordance with an obligation under the law of any part of the United Kingdom, other than under any law that

implemented the Directive, are more appropriate than imposing a monitoring measure.'

- 20.** The volume and type of material is therefore not suitable to a re-determination by the Secretary of State without any input from an expert and inquisitorial examining authority which is able to ask detailed penetrating questions of the parties, can conduct site visits and advise as to the true impacts of the proposal and alternatives and also as to any necessary amendments to the DCO and its requirements. Put shortly, the Secretary of State requires the expertise of an examining panel as envisaged under the PA 2008 and the EIA regulations. This is not only relevant to the merits of the proposal but also the requirements which it is to be subject to.
- 21.** It can be noted that the ExA for the examination procedure was a panel of 5 inspectors. Section 61 PA 2008 sets out the procedure for deciding whether to appoint a single person or a panel of inspectors. The criteria (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418015/examinations_guidance-final_for_publication.pdf) for appointing a panel as opposed to a single person relate to: the complexity of the case and the level of public interest in the outcome. Those factors remain in relation to the re-determination decision.
- 22.** The need for information to be properly interrogated in this case is underscored by the damning conclusions which the Secretary of State has reached as to the heritage impact of the scheme. A summary of the findings is set out at para. 2.9 of our submission on Alternatives; however, they bear repeating here. In short, the Secretary of State has found:

 - a. The Scheme represents 'the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land' (para. 258 of the High Court Judgment and para. 5.7.225 ExAR and adopted by SoS at his Decision Letter (DL)[10]);
 - b. The overall impact to the WHS (i.e. once benefits have also been taken into account) would be 'significantly adverse' (para. 279 High Court Judgment);
 - c. The scheme would not produce an overall net benefit for the WHS and, in that sense, it is not acceptable *per se* (para. 282 High Court Judgment);
 - d. There would be net harm to OUV attributes, integrity and authenticity of the WHS (para. 285 High Court Judgment);

- e. Attributes (3), (5) and (6) of the OUV would suffer 'major harm' (para. 97 High Court Judgment and ExAR 5.7.227-229 and adopted by SoS at DL[10]);
- f. 'Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List' (ExAR 5.7.326 cited at para. 103 High Court Judgment)
- g. The Longbarrow Junction falls firmly within the settings of the WHS as a whole and of asset groups 12 and 13 (ExAR 5.7.241). Seen from above, the Longbarrow Junction would 'dwarf all other individual features, including the Stones' (ExAR 5.7.243 and adopted by SoS at DL[10]). Further its broad geometric outlines would be evident at surface level and would 'appear at odds with the surrounding smaller scale morphology of rectilinear fields and small groupings of traditional buildings' (ExAR 5.7.224 and adopted by SoS at DL[10])
- h. 'The Junction, together with the cutting leading to the western portal, represents a single, very large, continuous civil engineering undertaking, spanning the western boundary of the WHS. Given the arbitrary nature of the boundary and the underling expansive and unified character of the cultural landscape, the junction would have effects on the OUV similar to those described for the cutting and western portal.' (ExAR 5.7.245 and adopted by SoS at DL[10])
- i. 'The harm [caused by the Longbarrow Junction] reflects that caused by the cutting on the OUV, including a continuation of the harm to the Wilsford/Normanton dry valley. Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible.' (ExAR 5.7.247 and adopted by SoS at DL[10])
- j. The OUV of the WHS would be harmed by 'potentially serious loss of assets...because of the civil engineering excavation works' (ExAR 5.7.308 and adopted by SoS at DL[10])
- k. The Secretary of State has 'serious concerns regarding the effects of elements of the Proposed Development on the OUV of the WHS, and on the cultural heritage and the historic environment of the wider area' (ExAR 5.7.207 and adopted by SoS at DL[10])

- l. The western part of the WHS would be ‘seriously disturbed by the intervention of the cutting and the western portal’ (*sic*) (ExAR 5.7.217 and adopted by SoS at DL[10]);
- m. The presence and scale of the cutting would be much greater than shown in Highways England’s ‘Western Cutting Zone of Theoretical Visibility study [REP7-025]’ (ExAR 5.7.223 and adopted by SoS at DL[10])
- n. Whilst much harm arises from the effect of existing roads including the A303 ‘the roads could be removed at any time, should a satisfactory scheme be put forward, just as the A344 was removed, leaving little permanent effect on the cultural heritage of the Stonehenge landscape.’ (ExAR 5.7.224 and adopted by SoS at DL[10])
- o. The eastern portal and cutting would ‘harm the landscape values of the OUV. In addition, the Countess barrows would be a little nearer the line of the road than at present, having a slight negative effect on the OUV. However, the main danger to Blick Mead would be harm or loss to Mesolithic remains through changes in patterns of ground water, which could give rise to enormous damage...’ (ExAR 5.7.256 and adopted by SoS at DL[10])
- p. The Secretary of State found the following overall effects to each of the OUV attributes (ExAR 5.7.307-313 and adopted by SoS at DL[10]):

Attribute 1: Stonehenge itself as a globally famous and iconic monument.

The tunnel would remove the intrusion of trunk road traffic, allow partial reunification of the WHS, and reconnection of the Avenue. However, the recognised importance of Stonehenge would suffer were the major permanent and irreversible engineering works proposed to take place within the WHS and its setting.

Attribute 2: The physical remains of the Neolithic and Bronze Age funerary and ceremonial monuments and associated sites. The tunnel would allow preservation of the monuments and sites under which it would pass and prevent any further traffic damage arising from the surface roads. However, potentially serious loss of assets could occur because of the civil engineering excavation works.

Attribute 3: The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape. The removal of the existing road would enhance the settings of sites and monuments, reunify much of the landscape, and reunite the Avenue. However, this would be at the expense of the intervention of major engineering works in the Wilford/Normanton dry valley, both within and to the west of the WHS, which would irreversibly harm the landscape of the WHS

including the settings of monuments either side of the valley, the site of the Early Bronze Age route to Stonehenge, flanked by significant arrays of monuments, as well as the wider setting of the landscape.

Attribute 4: The design of Neolithic and Bronze age funerary and ceremonial sites and monuments in relation to the skies and astronomy. The Proposed Development would enhance this Attribute through the removal of surface traffic and light pollution which can interfere with appreciation of solstice events and the night sky.

Attribute 5: The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other. The removal of the road would lead to the reunification of much of the landscape, to an extent restoring the relationships of sites and monuments to each other. However, this would be at the expense of much more fundamental spatial severance and visual disturbance to the relationship of monument groups either side of the Wilford/Normanton dry valley, and the significant space they create between them, and to the setting of the WHS as a whole caused by the intervention of the Longbarrow Junction.

Attribute 6: The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel. The removal of the road and the reunification of much of the landscape, together with the reconnection of the Avenue, would benefit aspects of the landscape assembly of sites, monuments and their interrelationships, whilst the associated engineering works would substantially harm other aspects. In the ExA's view, the benefits would not outweigh the harm arising from the excavation of a deep, wide cutting and other engineering works, within the WHS and its setting, of a scale and nature not previously experienced historically in this 'landscape without parallel'.

Attribute 7: The influence of the remains of Neolithic and Bronze Age funerary and ceremonial monuments and their landscape settings on architects, artists, historians, archaeologists and others. Whilst the present road intrusion would be removed, in the ExA's view, the aesthetic and spiritual damage would be profound and irreversible.

- q. With regard to integrity the Secretary of State found that the proposed development would compromise the opportunity to enhance the integrity or intactness of the WHS 'because of the location of the Longbarrow Junction, an extremely large engineering structure alien to the WHS OUV, at or near an area which might be integrated into the WHS. This would be in addition to the harm to

integrity arising from the continuation of the Junction's road system as a cutting into the WHS, introducing irreparable spatial division and harming understanding, into the WHS.' (5.7.315 ExAR and adopted by SoS at DL[10])

- r. With regard to authenticity the Secretary of State found:

'The authenticity of the WHS would be enhanced by the removal of the surface roads which confuse its ability to clearly and credibly express its cultural values through the attributes noted. However, the Proposed Development would bring a deeper and permanent confusion, through fundamentally altering the assembly which conveys understanding of the historic use of the landscape and its relationships of location and setting, and would thereby inhibit access to the spirit and feeling of the WHS.' (ExAR 5.7.319 and adopted by SoS at DL[10])

'The Proposed Development would seriously harm the authenticity of the WHS.' (ExAR 5.7.320 and adopted by SoS at DL[10])

- s. Overall the Secretary of State found:

'The Proposed Development would benefit the OUV in certain valuable respects, especially relevant to our present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only our own, but future generations. The benefits to the OUV would not be capable of offsetting this harm. The overall effect on the WHS OUV would be significantly adverse.' (ExAR 5.7.321 and adopted by SoS at DL[10])

- 23.** Before embarking on a proposal which, even on the Secretary of State's own view would cause permanent and irreversible harm to the WHS and which risks the WHS having its world heritage status removed it is essential that the Secretary of State is able properly to interrogate all of the environmental information and properly to ascertain whether there is a viable alternative to the proposal. This is particularly the case in circumstances where NH's alternatives assessment (a) does not acknowledge the harm which the SoS has concluded will occur to the WHS and various other assets and (b) makes a number of assertions which are unsupported by any evidence, which cannot be accepted at face-value and require interrogation (see our submission on Alternatives at Section 3).
- 24.** Such examination is also required to enable a fair hearing/process for interested parties. These include the Stonehenge Alliance and also all those whose land is due to be compulsorily purchased and who benefit from protection under Article 1 of the First Protocol of the ECHR. Fairness requires that the evidence of National Highways (NH) (and interested parties) is robustly and rigorously tested.

25. Therefore, in light of the above, the nature of the information and the requirements of the EIA regulations mean that either:

- a. a fresh examination should be held into the proposal;
- b. an extra-statutory inquiry should be established to examine the proposal; or
- c. the proposal should be refused giving NH the opportunity of re-submitting its application with fully updated environmental information and full information on alternatives.

26. Finally, and also relevant to procedure statutory consultees should be consulted to give their view on the proposals in light of:

- a. the conclusions of the ExA;
- b. the conclusions of the Secretary of State in the quashed decision;
- c. the new evidence submitted by NH and interested parties.

Merits

Notwithstanding the above, the Stonehenge Alliance remains of the view that the application for the Proposed Scheme should be refused. A short summary of the case setting out our other submissions follows below.

27. As stated above the Secretary of State has already found that the proposal will do permanent and irreversible harm to the World Heritage Site (see the list of conclusions at para. 21). It is clear from the recent pronouncements of the World Heritage Committee that to proceed with the scheme risks the site being put on the list of world heritage in danger and ultimately losing its status as a World Heritage Site.

28. Further, the Secretary of State's previous decision in fact under-estimated the level of harm. It is clear from recent knowledge which has become available about the world heritage site and its archeology, together with evidence which has already been submitted as part of the examination, there would be substantial harm to heritage assets (para 5.133 NPSNN). In particular, there can realistically be no argument that the destruction of more than 7ha of the World Heritage Site itself together with the destruction of archeology which is demonstrably of equivalent significance to Scheduled Monuments will amount to substantial harm (see submission by the Consortium of Stonehenge Experts, following the Secretary of State's request of 24.2.22). The same is true of the devastating effect of the road scheme on the setting of numerous scheduled monuments and the WHS itself.

- 29.** However, even if one were to take just the previous findings of the Secretary of State (and from which there is no evidence to downgrade the level of harm caused) the conclusions listed above should clearly be given substantial weight.
- 30.** Therefore, there can be no doubt that the ‘significantly adverse’ effect must weigh heavily against the scheme. Under the NPSNN if this were to be treated as ‘less than substantial harm’ (although it is clear that there is in fact substantial harm, as set out above) then this should be weighed against the ‘public benefits’ of the proposal (NPSNN 5.133).
- 31.** The public benefits of the proposal have been grossly overstated. As set out in our submission on Transport, Carbon and Economic Issues, the cost of the scheme massively outstripped its economic benefit without the inclusion of the fundamentally flawed heritage valuation survey. Now with significant increases in construction costs and new carbon prices, costs are likely to far outweigh any possible benefits even if the heritage valuation survey is included. (See our submission on Transport, Carbon and Economic Issues, Section 5.) Even the Secretary of State in his first decision characterized the economic benefit of the proposal as having ‘moderate weight’ (DL para.18). It is therefore clear that the public benefits come nowhere close to outweighing the heritage harm. Further, they do not outweigh the heritage harm together with the other categories of harm as addressed below.
- 32.** Further, the heritage harm led the High Court to conclude that there were exceptional circumstances in this case and therefore alternatives should be considered. That was clearly right given the level of harm which has been found by the Secretary of State. However, the Secretary of State has not been provided with adequate information by NH in this regard. The alternatives assessment presented by NH is not fit for purpose. We address this in our submission on Alternatives. In short summary, it fails to address the findings which the Secretary of State made with regard to the harmful impact of the proposal. Further, it wholly fails to consider carbon impact including the impact of embodied carbon. The position remains that there are viable, less harmful and less costly options for relieving the A303 in the location of Stonehenge and the availability of these potential options should lead to a refusal of this scheme which would cause permanent and irreversible damage.
- 33.** In light of the Climate Emergency declared by parliament and the Government’s commitment to net zero, the carbon impact of the proposal (both individually and cumulatively) weighs heavily against the scheme. Yet again, NH has failed to provide full information in relation to this to allow a proper assessment of the scheme (see

paragraphs 3.21, 6.4 and 6.6 of our submission on Transport, Carbon and Economic Issues).

- 34.** The NPSNN states that carbon impacts will be considered as part of the appraisal of scheme options (in the business case) (NPSNN 5.17). The whole business case of NH is not fit for purpose based as it is on out of date information. It does not consider the full carbon impact of the proposal and alternatives, including embodied carbon. Further, it was conducted on the basis that the proposal would be beneficial in heritage terms. As stated in our submissions at Section 5 of our submission on Transport, Carbon and Economic Issues, that was a fundamental miscalculation.
- 35.** In our response to the Secretary of State's Statement of Matters letter, Bullet Point 4, we question the approach of NH to new guidance on Cultural Heritage and Landscape and Visual Impact Assessment, the latter notably in relation to setting. We note that the Applicant's HIA has not been revised to take into account the finding of significant adverse effects of the Scheme by the Secretary of State. Attention is drawn to serious failings in updates on or missing Biodiversity baseline surveys and reports. Examination of the many geotechnical ground investigation and groundwater data reports has been undertaken by our specialist Dr Reeves who concludes that there must continue to be serious concerns about the adverse impacts of tunnelling through the Chalk bedrock of the Stonehenge landscape, such that he is of the opinion that these matters should be submitted to re-Examination under an Inspector with the relevant expertise who may give independent expert advice to the Secretary of State.
- 36.** Under the Secretary of State's request for submissions on Any Other Matters (SoM letter, Bullet Point 5), we address the 2021 Decision of the WH Committee and the High Court Judgment, both of which have a crucial bearing on any new decision of the Secretary of State.
- 37.** Overall, therefore, the proposal is contrary to the NPSNN and should be refused. Further, the adverse impacts of the proposal (which include significant heritage harm and also carbon and climate change impact together with the potential for much less harmful alternatives) outweigh the benefits of the proposal and the DCO ought to therefore be refused.