



Department for Transport

Great Minster House
33 Horseferry Road
London, SW1P 4DR

Telephone :
e-mail: transportinfrastructure@dft.gov.uk
Web: www.gov.uk/dft

To:

Highways England and Defence
Infrastructure Organisation

12 November 2020

CC:
Somerset County Council
South Somerset District Council

Dear Sir/Madam

Planning Act 2008 and The Infrastructure Planning (Examination Procedure) Rules 2010

Application by Highways England ("the Applicant") for an Order granting Development Consent for the A303 Sparkford to Ilchester Dualling.

REQUEST FOR COMMENTS FROM HIGHWAYS ENGLAND AND THE DEFENCE INFRASTRUCTURE ORGANISATION

The Examining Authority submitted on 12 September 2019 a Report and Recommendations in respect of its findings on the above application to the Secretary of State for Transport ("the Secretary of State"). Following the Secretary of State's "minded to refuse" letter of 21 July 2020, the Applicant has provided further information to demonstrate how the issues identified in the "minded to refuse" letter are to be addressed. Copies of the responses from the Applicant and Interested Parties can be found at:

<https://infrastructure.planninginspectorate.gov.uk/projects/south-west/a303-sparkford-to-ilchester-dualling/>

The Secretary of State notes the representations received from the Applicant and Defence Infrastructure Organisation ("DIO") in relation to the issue of birdstrike. The Secretary of State notes that late representations have since been made by the DIO and the Applicant in relation to the Unilateral Undertaking provided by the Applicant in regard of bird strike. A copy of their letters, alongside a copy of the Unilateral Undertaking, is appended to this letter. The Secretary of State has decided that it would be appropriate to consult on these representations and the Undertaking before determining the application. He has therefore set a new deadline for a decision on the Application of 29 January 2021 in a Written Ministerial Statement laid in Parliament on 12 November 2020.

The Secretary of State would welcome comments from the Applicant and the DIO regarding the matters raised by DIO and the Applicant in their letters and whether these issues can be resolved by agreement ahead of the statutory decision deadline of 29th January 2021.



The deadline for any response is 11th December 2020.

Given the coronavirus (COVID 19) emergency, the Planning Inspectorate are currently unable to accept hard copies of consultation responses. Responses to the matters outlined in this letter should be submitted by email to: A303SparkfordtoIlchester@planninginspectorate.gov.uk. If you will have difficulty in submitting a response by the consultation deadline, or difficulty in submitting a response by e-mail, please inform the Case Team.

Your response will be published on the A303 Sparkford to Ilchester Dualling Project page of the Planning Inspectorate's website as set out above as soon as possible after 11th December.

This letter is without prejudice to the Secretary of State's decision whether or not to grant development consent for the A303 Sparkford to Ilchester Dualling Scheme and nothing in this letter is to be taken as indicating what that final decision might be.

Yours faithfully

Natasha Kopala

Caroline O'Neill
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Hannah Sanderson
Senior Project Manager
Highways England
Temple Quay House
2 The Square, Temple Quay
Bristol
BS1 6HA

Tel: 0300 123 5000

5 October 2020

Dear Caroline

A303 Sparkford to Ilchester - s.106 Unilateral Undertaking

Highways England has completed the attached s.106 unilateral undertaking ("UU") which is submitted to the Secretary of State for Transport in support of the A303 DCO application.

Highways England has completed the UU to ensure that legally binding obligations are placed on Highways England to secure ongoing bird monitoring and management measures at the five ponds which will be constructed as part of the A303 scheme and will be located near to RNAS Yeovilton.

During the DCO Examination, the Defence Infrastructure Organisation (DIO) - on behalf of the Ministry of Defence (MoD) - raised concerns regarding the potential of birdstrike resulting from the nesting and breeding of certain species of birds on the ponds. In making a recommendation to the Secretary of State for Transport, the Examining Authority concluded that the birdstrike issue weighs against the grant of the DCO. The Secretary of State for Transport issued a Minded to Refuse letter in July 2020 setting out that it required further detail from Highways England regarding the birdstrike issue and whether further mitigation measures (through scheme design or otherwise) could be provided to overcome the MoD's concerns. Highways England's response to this request was provided in August 2020 and noted that discussions with the MoD in respect of securing ongoing mitigation in respect of the ponds was still under discussion.

Highways England has since continued dialogue with the MoD and understands the MoD's concerns and requirements in respect of design, bird monitoring and management of the ponds. Highways England considers that it can amend the design of the ponds through the DCO design approval process in order to deter the use of the ponds by birds. The draft DCO was updated in August 2020 and submitted to the Secretary of State for Transport confirming that the DIO will be a consultee in respect of

these design measures, giving it the ability to make representations to Highways England (and in turn through the consultation report which Highways England will have to submit to the Secretary of State for Transport, under article 5 of the draft DCO) to the Secretary of State.

In terms of long-term monitoring and management matters relating to the ponds, Highways England is proposing to secure these measures by way of the UU, pursuant to section 106 of the Town and Country Planning Act 1990. The purpose of this is to ensure that legally binding obligations are given to South Somerset District Council ("SSDC") (as the relevant local planning authority) and the Ministry of Defence ("MoD"). These obligations are enforceable and are relevant to the use of the land on which the ponds will be located. They will bind the land on which the ponds will be situated and bind successors in title. A draft of the UU was shared with both the Council and the MoD in advance of its submission to the SoS. The MoD provided Highways England with initial comments on this draft and these comments have been taken into account as part of this final submitted version.

The enclosed UU includes specific measures such as an ongoing commitment by Highways England to undertake bird monitoring at the ponds. This is to inform and better understand what species of birds (if any) are using the ponds. The UU also sets out specific bird management measures (such as scaring) which will be undertaken to deter the use of the ponds by birds. It also includes a built-in process to ensure that Highways England undertakes bird management measures where these are requested by the MoD. As such, they are intended to give both SSDC and the MoD comfort in respect to Highways England's ongoing commitment to minimise any issue of birdstrike at the ponds.

Highways England is proposing to secure these obligations via the UU (as opposed to an agreement) predominantly because of timings. Highways England does not consider that there is enough time left in the DCO process to negotiate and agree a trilateral agreement between itself, the district council and the MoD. The drafting of the obligations in the UU has been informed by discussions with the MoD (which specifically requested the use of a section 106 deed rather than a private agreement with Highways England). Whilst Highways England is confident that the provisions deliver the necessary protections for the airfield, Highways England is open to further discussions on the content of the obligations and is to consider entering into a further section 106 agreement after the grant of the DCO to supersede the UU, if this is something the SSDC or the MoD consider appropriate.

Highways England considers that the UU in addition to the provisions in the draft DCO provide the SoS with the comfort that the bird strike issue will be appropriately managed at all stages, including long term operation, and that there is a robust enforcement mechanism available at each stage to ensure that the safety considerations in relation to the operation of the air base are properly protected.

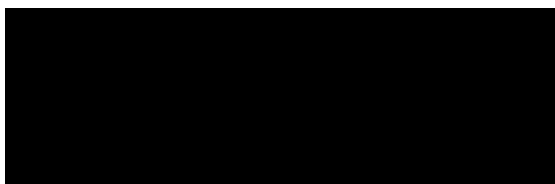
It is worth noting that Highways England does not own the land for the ponds at this stage. Nevertheless, Highways England has bound land within the scheme which it does own and included a process in the UU which places it under an obligation to provide SSDC and the MoD with a confirmatory deed within 20 working days of it acquiring the freehold land on which the ponds will be located. The intention of this is to ensure that the pond land will be bound by the obligations in the UU as soon as that land is acquired by Highways England. The land being bound by the UU is land owned by Highways England such that the obligations can be given to SSDC and the MoD through the s.106 process. The UU also includes a provision which restricts the use of Highways England's land being bound by the UU until it acquires or possesses (temporarily or otherwise) the land required for the ponds. Highways England confirms that it owns the freehold to this bound land and this position is confirmed by the Book of Reference (please see plot 5/3k). Highways England considers that this is a pragmatic and legally sound way to proceed and also considers that the Secretary of State may afford weight to these obligations when reviewing the birdstrike issue.

Finally, Highways England considers it necessary to emphasise that it will act in good faith to acquire the freehold land of the ponds in accordance with its internal policies. Highways England's current approach to acquisition is to acquire land contained within the DCO via a General Vesting Declaration. As such, Highways England will ensure that the pond land is acquired before the scheme is open for traffic and that the measures detailed in the UU will be secured and will bind that land following its acquisition.

By providing the UU in sealed and dated form it is hoped that this will enable the SoS to keep to his intended decision-making timetable.

We would be grateful if you could please confirm safe receipt of this email, together with the attached UU and that a copy of both will be passed to the SoS as soon as possible.

Yours sincerely



Hannah Sanderson
Senior Project Manager
Email: Hannah.Sanderson@highwaysengland.co.uk
Telephone: 0300 123 5000

**Unilateral Undertaking relating to The A303 Sparkford to Ilchester
Dualling Development Consent Order**

**made pursuant to
Section 106 of the Town and Country Planning Act 1990**

Given by:

Highways England Company Limited (1)

to

South Somerset District Council (2)

and

Secretary of State for Defence (3)

THIS UNILATERAL UNDERTAKING is made this 30 day of September 2020

AND GIVEN BY:

- (1) **HIGHWAYS ENGLAND COMPANY LIMITED** (Company registration number: 09346363) whose registered office is at Bridge House, 1 Walnut Tree Close, Guildford, Surrey GU1 4LZ (**Highways England**);

To:

- (2) **SOUTH SOMERSET DISTRICT COUNCIL** of the Council Offices, Brympton Way, Yeovil, Somerset BA20 2DS (**the Council**); and
- (3) **SECRETARY OF STATE FOR DEFENCE** of the Ministry of Defence, Whitehall, London, SW1A 2HB (**MoD**)

RECITALS

- 1 The definitions used in these Recitals are the same as those set out in the Definitions section below
- 2 The Council is the Local Planning Authority for the purposes of the Act for the area in which the Site and the Ponds are located
- 3 Highways England has submitted the Application for the Development to the Secretary of State for Transport and is the freehold owner of part of the Site
- 4 As part of the Development Highways England proposes to construct and maintain the Ponds
- 5 The MoD owns and operates the airfield currently known as RNAS Yeovilton which is in close proximity to the Ponds
- 6 During the Examination into the Application the MoD raised concerns regarding the potential for "birdstrike" to occur from the Ponds as the Ponds may attract wildfowl which has the potential to be hazardous to aircraft
- 7 Following the conclusion of the Examination, on 12 September 2019 the Examining Authority (ExA) recommended to the Secretary of State for Transport that the Application be refused, partly on the basis that it does not consider that Highways England can deliver the changes to the Ponds suggested by the MoD within the parameters of the Application

- 8 The Secretary of State for Transport issued a Minded to Refuse letter on 27 July 2020 asking Highways England for further information in respect of the Ponds which Highways England responded to on 17 August 2020
- 9 Highways England considers that it can deliver the necessary design changes to the Ponds within the parameters of the Application (and the DCO) and, being resolved to minimise any impacts on RNAS Yeovilton, has set out comprehensive mitigation measures as part of the Application
- 10 In addition to these measures Highways England considers it expedient to commit to further maintenance and monitoring measures to be secured during the operation of the Development as outlined in this Deed which are material to the determination of the Application and are development consent obligations as set out in s.106(9)
- 11 The development consent obligations set out in this Deed are contingent on the grant and Commencement of the DCO and the Commencement of the Ponds

DEFINITIONS

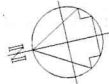
For the purposes of this Agreement the following expressions shall unless the context otherwise requires have the meanings given to them below:

"the Act"	means the Town and Country Planning Act 1990 as amended
"Anniversary"	means 12 months from the specified date or period
"Application"	means the application for a DCO sought under the Planning Act 2008
"Birds"	means Canada Goose (<i>Branta canadensis</i>), Egyptian Goose (<i>Alopochen aegyptiaca</i>), Greylag Goose (<i>Anser anser</i>), Grey Heron (<i>Ardea cinerea</i>), Little Egret (<i>Egretta garzetta</i>), Common Crane (<i>Grus grus</i>), gulls of all species (<i>Larus</i> sp.), dabbling duck species (Anatini), and starlings (<i>Sturnus vulgaris</i>)
"Bird Management Measures"	means the measures set out in (but not limited to) paragraph 1.5 of Schedule 1
"Bird Management Officer"	means a representative of Highways England with whom the Council or the MoD may liaise in respect of the Bird Management Measures

"Bird Monitoring Data"	means any data (including data obtained through WeBS) relating to the Birds' use of the Ponds
"Commencement of Development"	means the carrying out on the Site of any material operation pursuant to section 155 of the Planning Act 2008 and in accordance with the DCO and for the avoidance of doubt nothing in this Deed shall have any bearing on the definition of "Commence" or its derivatives contained within the DCO
"Commencement of the Ponds"	means the date on which the works to construct the Ponds begins
"Completion of Construction"	means the date on which the construction of the Ponds is completed
"Completion of Construction of the DCO"	means the date on which the Development is completed
"Confirmatory Deed"	means a confirmatory deed to be provided to the Council and the MoD by Highways England substantially in the form of the draft deed set out in Schedule 2 of this Deed
"Construction Phase"	means the period during which the Ponds are being constructed by Highways England
"DCO"	means a Development Consent Order to be known as <i>The A303 Sparkford to Ilchester Dualling Development Consent Order 202[]</i> granted by the Secretary of State for Transport authorising the construction, operation and maintenance of the Development
"the Development"	means the development described in the Application and authorised by the DCO
"Establishment Period"	means the period of two years from Completion of Construction
"Examination"	means the statutory examination undertaken by the Examining Authority into the Application

"Open to Traffic"	means open to use by the public for vehicular traffic following Completion of Construction of the DCO and shall exclude use and vehicular traffic required by Highways England for the purposes of constructing the Development
"Operational Phase"	means operational phase of the Development which begins on Completion of Construction of the DCO
"Party"	means any party to this Deed and shall include 'party' 'Party' or any variation thereof
"Plan 1"	means the plan appended to this Deed bearing reference HE551507-GTY-LLO-000-DR-BL-50001 showing land owned by Highways England shown by a dashed red line and included in the DCO to be bound by the development consent obligations set out in this Deed
"Ponds"	means the area of land on which five (5) ponds to be developed under the terms of the DCO are to be located (subject to the detailed design requirements set out in the DCO) including land required for landscaping and planting purposes required in respect of the maintenance of the ponds, as shown by a dashed red line on the Ponds Plans
"Ponds Plans"	means the plans appended to this Deed showing the location of the Ponds and bearing drawing number: HE551507-GTY-ELS-000-DR-LX-50329 (for pond 1) HE551507-GTY-ELS-000-DR-LX-50332 (for pond 2) HE551507-GTY-ELS-000-DR-LX-50331 (for pond 3) HE551507-GTY-ELS-000-DR-LX-50330 (for pond 4) HE551507-GTY-ELS-000-DR-LX-50333 (for pond 5)
"Request for Action"	means a written request submitted by the MoD to highways England sent in accordance with Schedule 1
"RNAS Yeovilton"	means the land at the airfield currently known as Royal Naval Air Station Yeovilton located near Yeovil, Somerset

This document should not be relied on as a substitute for professional advice. It is intended for general information only and should not be used as a basis for any specific action. The information contained herein is not intended to constitute an offer of any financial product or service, nor is it intended to be used in connection with any specific transaction. The information contained herein is not intended to be used in connection with any specific transaction. The information contained herein is not intended to be used in connection with any specific transaction.



KEY TO SYMBOLS

 HIGHWAYS ENGLAND LAND TO BE BOUND
 DCO BOUNDARY

REV	DATE	REVISION NOTE	JW	JSG	CHKD
P01	22/06/20	\$106 ISSUE	JW	JSG	
P02	25/06/20	\$106 ISSUE	JW	JSG	



CONTRACTOR



GallifordTry

CLIENT



PROJECT TITLE

A303 SPARKFORD TO ILCHESTER DUAL LING

PROJECT STAGE
PCF STAGE 5

A303 s106 - LAND TO BE BOUND

SUITABLE FOR INFORMATION

SHEET SIZE A1	SCALE 1:1000	STATUS S2	REVISION P02
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DRAWING NUMBER
HE551507-GTY-LL0-000-DR-BL-50001



- 1 TITLE BOX SHALL BE USED FOR THE PURPOSE SHOWN IN THE TITLE BOX ONLY
- 2 ALL DIMENSIONS ARE IN METRES UNLESS STATED OTHERWISE
- 3 ALL LEVELS ARE ABOVE ORDNANCE DATUM
- 4 DO NOT SCALE FROM THIS DRAWING
- 5 THIS MAP IS DERIVED FROM ORDNANCE SURVEY MATERIAL WITH PERMISSION OF ORDNANCE SURVEY ON BEHALF OF THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE. CROWN COPYRIGHT UNAUTHORISED REPRODUCTION INFRINGES CROWN PATENT RIGHTS AND MAY LEAD TO PROSECUTION FOR CIVIL PROCEEDINGS
- 6 FENCING UNLID SHOWN FOR REFERENCE. FOR FENCING TWISSES REFER TO FENCING DRAWING SERIES
HE551507-GT4FHE000 OR CH 50110 - 50014

KEY TO SYMBOLS

- | | |
|---|--|
|  | DO NOT EXIST LIMITS |
|  | EXISTING VEGETATION TO BE RETAINED |
|  | PROPOSED WOODS MAX AS PER LABEL |
| | PROPOSED UNBUILT THRES AND SHALIN MAX AS PER LABEL |
|  | PROPOSED HOVOD (LE 5.1) |
|  | PROPOSED NATIVE (LE 4.3) |
|  | PROPOSED NATIVE WITH INTERMITTENT (LE 4.4) |
|  | PROPOSED NEED |
|  | PROPOSED SCRUB AND/OR FORDS |
|  | LIFE BUILT AT FORDS |
| | PROJ BARRIER TO PROTECT SPECIES |



 GallifordTry

PROJECT TITLE
A303 SPARKFORD TO ILCHESTER DUALLING

A303 POND 1 & LANDSCAPE

SAFETY, HEALTH & ENVIRONMENTAL INFORMATION

TO BE READ IN CONJUNCTION WITH HAZARD REGISTER
DOC REF: HE51507-GTY-GHS-000-SH-ZX-50001

HAZARD REF AND BRIEF DESCRIPTION OF HAZARD.

HAZARD REF	BRIEF HAZARD DESCRIPTION
HAZ C 040	Disinfectant and toilet cleaning products are

Risks of slips and falls when planting on drainage ponds slopes

HAZ-M-011	Risks of slips and falls when maintaining planting on drainage ponds slopes
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[illegible]

"the Site"	means the land comprised within the redline boundary shown on Plan 1
"WeBS"	means a wetland bird survey to ascertain Birds use of the Ponds such surveys to be based on WeBS methodology for the WeBS Core Count amended to suit birdstrike hazard purpose
"Working Days"	any day on which the clearing banks in the City of London are reasonably anticipated to be open to the public

1 INTERPRETATION

For the purposes of this Deed:

- 1.1 Reference to any act of Parliament or section of such act shall include reference to any replacement or modification or re-enactment of it
- 1.2 The masculine gender includes the feminine and neuter genders and vice versa
- 1.3 The singular includes the plural and vice versa
- 1.4 Reference to persons include firms companies corporations authorities and other bodies and vice versa
- 1.5 References to the Council's or the MoD's consent shall mean the prior written consent of the Council or the MoD which consent shall not be unreasonably withheld or delayed and shall be expressed to be pursuant to this Deed and such consent shall be in addition to and not in substitution for any other permission that may be necessary
- 1.6 References to any party in this Deed shall include their successors in title and assigns
- 1.7 Any covenant by Highways England not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing
- 1.8 If any provision in this Deed is held to be illegal invalid or unenforceable the legality validity and enforceability of the remainder of this Deed so far as is practicable is to be unaffected
- 1.9 Nothing in the clause headings to this Deed shall affect its interpretation
- 1.10 Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the DCO) granted after the date of this Deed

IT IS HEREBY AND DECLARED as follows:

- 1.11 This Deed is made in pursuance of the provisions of Section 106 of the Act
- 1.12 The covenants and agreements by Highways England contained within Schedule 1 of this Deed are development consent obligations for the purposes of Section 106 of the Act with the intent that the same shall be enforceable by the Council and the MoD against Highways England and its successors in title and any person corporate or otherwise claiming through or under it an interest or estate in any part of parts of the Ponds as if that person had also been an original covenanting party in respect of the interest or estate for the time being held by them
- 1.13 Highways England shall not be liable for any breach of this Deed unless it has an interest in/is the owner of the part of the Ponds in respect of which such breach occurs or held such an interest at the date of the breach

2 CONDITIONALITY

- 2.1 This Deed is conditional and the development consent obligations contained within Schedule 1 to this Deed shall only take effect upon:
- (a) the grant of the DCO;
 - (b) Commencement of the Development; and
 - (c) Commencement of the Ponds
- 2.2 If the DCO expires without Commencement of the Development and Commencement of the Ponds or is quashed revoked or otherwise withdrawn or modified by any statutory procedure without the consent of Highways England this Deed shall cease to have effect
- 2.3 This Deed is provided on the condition that where this Deed ceases to have effect the Council shall on written request vacate or cancel the entry made in the Local Land Charges register in relation to this Deed or otherwise to record the fact that it has come to an end and no longer affect the Site
- 2.4 This Deed is provided on the condition that if aircraft cease to use RNAS Yeovilton the obligations in this Deed shall cease to have effect provided that the Council provides written confirmation to Highways England that the use of RNAS Yeovilton for use by aircraft or aviation purposes has ceased
- 2.5 This Deed is provided on the condition that if the Ponds are permanently removed, infilled or the use of the Ponds is permanently changed such that there is no water on which Birds can feed or breed the obligations in this Deed shall cease to have effect

2.6 LAND CHARGE

- 2.7 This Deed shall be registered as a Local Land Charge in the Local Land Charges Register maintained by the Council

3 VARIATIONS

- 3.1 Variations of the terms of this Deed (other than minor amendments or variations of a transitory nature not affecting the nature or extent of liability hereunder) may be evidenced only by a supplemental deed executed as a deed of variation unless the Council and the MoD otherwise indicates in writing or is a party thereto and a copy of any supplemental agreement shall be sent to the Council for the purpose of amending the Local Land Charges Register
- 3.2 The parties may rescind or vary this Deed without the consent of a third party to whom an express right to enforce any of its terms has been provided

4 NOTICES

- 4.1 Any notice given under this Deed shall be deemed to have been validly served on or communicated to the relevant party upon whom such notice is being served if sent by prepaid post recorded delivery or delivered by hand to their registered address (if appropriate) or such other address for services as shall from time to time be notified in writing
- 4.2 The Developer will serve fourteen days' written Notice upon the Council and the MoD following:
- (a) Commencement of Development;
 - (b) Commencement of the Ponds; and
 - (c) Completion of Construction

5 DETERMINATION OF DISPUTES

- 5.1 Subject to clause 5.8 if any dispute arises relating to or arising out of the terms of this Deed any Party may give to the others written notice requiring the dispute to be determined under this clause 5
- 5.2 The notice is to propose an appropriate Specialist and specify the nature and substance of the dispute and the relief sought in relation to the dispute
- 5.3 For the purposes of this clause 5 a "Specialist" is a person qualified to act as an expert in relation to the dispute having not less than ten years' professional experience in relation

to developments in the nature of the Development and property in the same locality as the Site

- 5.4 Any dispute over the type of Specialist appropriate to resolve the dispute may be referred at the request of any Party to the President or next most senior available officer of the Law Society who will have the power with the right to take such further advice as he may require to determine the appropriate type of Specialist and to arrange his nomination under clause 5.5
- 5.5 Any dispute over the identity of the Specialist is to be referred at the request of any Party to the President or other most senior available officer of the organisation generally recognised as being responsible for the relevant type of Specialist who will have the power, with the right to take such further advice as he may require, to determine and nominate the appropriate Specialist or to arrange his nomination. If no such organisation exists or the Parties cannot agree the identity of the organisation then the Specialist is to be nominated by the President or next most senior available officer of the Law Society
- 5.6 The Specialist is to act as an independent expert and:
- (a) each Party may make written representations within ten working days of his appointment and will copy the written representations to the other Parties;
 - (b) each Party is to have a further ten working days to make written comments on the others' representations and will copy the written comments to the other Parties;
 - (c) the Specialist is to be at liberty to call for such written evidence from the parties and to seek such legal or other expert assistance as he or she may reasonably require;
 - (d) the Specialist is not to take oral representations from the Parties without giving each Party the opportunity to be present and to give evidence and to cross-examine each other;
 - (e) the Specialist is to have regard to all representations and evidence before him when making his decision which is to be in writing and is to give reasons for his decision; and
 - (f) the Specialist is to use reasonable endeavours to publish his decision within 30 working days of his appointment
- 5.7 Responsibility for the costs of referring a dispute to a Specialist under this clause 5, including costs connected with the appointment of the Specialist and the Specialist's own costs but not the legal and other professional costs of any party in relation to a dispute will be decided by the Specialist

- 5.8 This clause 5 does not apply to disputes in relation to matters of law or the construction or interpretation of this Deed which will be subject to the jurisdiction of the courts

6 THIRD PARTY RIGHTS

- 6.1 The parties to this Deed do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a Party to it

7 COSTS

- 7.1 Upon completion of this Deed Highways England will pay to the Council and MoD all proper and reasonable legal costs of the Council and the MoD in connection with the preparation negotiation and completion of this Deed

8 JURISDICTION

- 8.1 This Deed is to be governed and interpreted in accordance with the law of England and Wales.

9 EXECUTION

- 9.1 Highways England has executed this Deed as a deed and it is delivered on the date set out above

Schedule 1

Highways England Covenants

Maintenance

- 1 Highways England covenants with the Council and the MoD that it will maintain the Ponds in accordance with the detail approved by the Secretary of State for Transport pursuant to the DCO

Monitoring

- 1.1 Highways England covenants with the Council and the MoD that it shall undertake a WeBS within one month of Commencement of the Ponds
- 1.2 Highways England covenants with the Council and the MoD that the WeBS shall be conducted by Highways England every year for a period of five (5) years beginning on the Anniversary of Completion of Construction
- 1.3 The WeBS shall be undertaken by Highways England to assess the type and size of any population of Birds visiting the Ponds, the Birds' usage of the Ponds (feeding and breeding) and trends in the Birds' numbers

Management

- 1.4 Highways England covenants with the Council and the MoD that it shall implement the Bird Management Measures on the basis of the WeBS and/or other Bird Monitoring Data to minimise the use of the Ponds by Birds which may nest, feed or use the Ponds during the Construction Phase and the Operational Phase of the Development
- 1.5 The Bird Management Measures shall include (but not be limited to):
 - walking across the site until the Birds have left the site;
 - sending a dog to chase the Birds;
 - flags and other distractions including imitation people;
 - goose proof fencing along water or reed interface with land;
 - distress calls;
 - gas guns;
 - pyrotechnics;
 - raptors;
 - shooting;
 - nest and egg removal;
 - habitat management including vegetation control;
 - appropriate licensed population control;

- installing signs around the Ponds which prohibit the feeding of the Birds
- 1.6 Highways England undertakes with the Council and the MoD that the purpose of the Bird Management Measures shall be to:
- prevent breeding colonies of heron, little egret or common crane on the Ponds
 - prevent the breeding of gulls and geese on the Ponds
 - prevent the roosting of gulls on the Ponds
 - prevent the breeding feral geese (Canada Goose, Egyptian Goose and Greylag Goose) on the Ponds
 - undertake bird control measures to ensure that no more than 15 geese are located on the Ponds at any one time
 - undertake bird control measures to ensure that no more than 20 gulls are located on the Ponds at any one time
 - prevent any starling from roosting on the Ponds
- 1.7 Prior to the Construction Phase Highways England covenants with the Council and the MoD that it shall inform the Council and the MoD of the identity of the Bird Management Officer
- 1.8 The Bird Management Officer or their appointee shall undertake the measures referred to in paragraph 1.6 of this Schedule 1
- 1.9 Subject to paragraph 1.10 in the event that the Council or the MoD considers there to be presence of Birds on the Ponds which constitute a safety concern in respect of the operation of aircraft entering or exiting RNAS Yeovilton the MoD shall inform Highways England of such an event in writing and Highways England shall undertake any one or more of the specific Bird Management Measures identified in paragraph 1.6 within 2 Working Days (a **"Request for Action"**)
- 1.10 In the event that Highways England fails to undertake a Request for Action the MoD may enter the Ponds and undertake any action it considers necessary in order to remove, deter or minimise the risk of the Birds to RNAS Yeovilton

Licence

- 1.11 Subject to paragraph 1.12 of this Schedule 1 Highways England grant to the MoD (which includes its agents and assigns) a licence to enter the Ponds for the sole purpose of undertaking the Bird Management Measures (including any measures the MoD considers necessary where paragraph 1.10 of this Schedule 1 applies) which the MoD considers

necessary for the purpose of safeguarding the safety of aircraft entering and exiting RNAS Yeovilton

- 1.12 In entering the Ponds the MoD shall be responsible for the health and safety of its employees, agents and assigns and the MoD shall ensure that it has in place appropriate insurance to cover all activities being undertaken by its employees, agents and assigns and that all such individuals are suitably qualified to undertake the activities which they have been instructed to undertake on the Ponds by the MoD

Cooperation

- 1.13 In order to fulfil the obligations set out in this Deed Highways England and the MoD agree to share any Bird Monitoring Data or otherwise gathered in respect of the Birds' usage of the Ponds
- 1.14 Highways England and the MoD agree to reassess the agreed Bird Management Measures (having regard to the Bird Monitoring Data gathered by each Party) at the following intervals:
- (a) on Completion of Construction;
 - (b) at the end of the Establishment Period; and
 - (c) annually for a period of five [5] years starting on the first Anniversary of the end of the Establishment Period or sooner provided that the Parties agree in writing to a shorter period

Successors in tile

- 1.15 Subject to paragraph 1.16 of this Schedule 1 Highways England covenants with the Council and the MoD that it shall ensure that prior to transferring any part of the Ponds to a third party that it will secure an agreement from that third party in the same terms as set out in this Deed and Highways England covenants with the Council and the MoD that it shall place a restriction on the registered title to the Ponds in the same terms
- 1.16 Where the functions and responsibilities of Highways England are transferred to another body or Government Department pursuant to a Statutory Instrument or Act of Parliament the obligations and covenants will automatically transfer and paragraph 1.15 shall not apply

Costs

- 1.17 Highways England covenants with the MoD that it shall pay the MoD's reasonable costs incurred in respect of undertaking the Bird Management Measures where Highways England has failed to comply with a Request for Action. This payment shall be provided within a period of 28 days of the MoD's Request of Action provided that the MoD has provided Highways England with evidence of their costs incurred and a breakdown of these costs

Reassessment and termination

- 1.18 The obligations in this Deed shall be reassessed by Highways England and the MoD on every Anniversary of this Deed to determine whether the obligations in this Deed are necessary (having regard to all data gathered and the number of instances where Bird Management Measures and / or Requests for Action were undertaken)
- 1.19 In the event that no Bird Management Measures or Requests for Action have been undertaken for a consecutive period of 5 years the obligations in this Deed shall cease to have effect

The Site

- 1.20 Highways England undertakes with the Council and the MoD that the Site shall not be Open to Traffic as part of the Development until Highways England has either acquired an interest in any part of the Ponds or has taken possession (temporarily or otherwise) of any part of the Ponds

Confirmatory Deed

- 1.21 Highways England covenants with the Council and the MoD that it shall provide the Council and the MoD with the Confirmatory Deed within 20 Working Days of acquiring the freehold title to the Ponds

Schedule 2

Draft Confirmatory Deed

DATED

20[]

GIVEN BY:

- (1) **HIGHWAYS ENGLAND COMPANY LIMITED** (Company registration number: 09346363) whose registered office is at Bridge House, 1 Walnut Tree Close, Guildford, Surrey GU1 4LZ (**Highways England**);

TO:

- (2) **SOUTH SOMERSET DISTRICT COUNCIL** of the Council Offices, Brympton Way, Yeovil, Somerset BA20 2DS (**the Council**); and
- (3) **SECRETARY OF STATE FOR DEFENCE** of the Ministry of Defence, Whitehall, London, SW1A 2HB (**MoD**)

RECITALS

- (A) The Definitions in this Deed are the same as those set out in the s.106 unilateral undertaking given by Highways England to the Council and MoD on [] 2020 details of which are set out in the Schedule to this Confirmatory Deed and which regulates the ongoing monitoring and maintenance of the Ponds (the "**Unilateral Undertaking**")
- (B) This Confirmatory Deed relates to Highways England's freehold interest in the Ponds registered at Her Majesty's Land Registry under title no(s) [] and which is shown edged red on the plan annexed to this Confirmatory Deed
- (C) The Council is the local planning authority for the area within which the Ponds are located
- (D) The development consent obligations, covenants and other provisions contained in the Unilateral Undertaking (as detailed in the Schedule) are enforceable by the Council and MoD against Highways England and are binding in respect of Highways England's interest in the Ponds in accordance with the terms of this Confirmatory Deed and the Unilateral Undertaking

OPERATIVE PROVISIONS

1. Operation of this Confirmatory Deed

1.1. This Confirmatory Deed and the obligations contained in it are:

- (a) to the extent that they fall within the terms of section 106 of the 1990 Act, made pursuant to section 106 of the Town and Country Planning Act 1990 as development consent obligations and these and the other provisions referred to in the Planning Agreement are made pursuant to such other enabling powers (statutory or otherwise) as may be relevant and appropriate;
- (b) executed by Highways England so as to bind and subject its estate or interest in the Ponds to the obligations covenants and other provisions contained in the Unilateral

Undertaking (if and to the extent that they remain to be observed performed and complied with at the date of this Confirmatory Deed);

- (c) enforceable in accordance with the Unilateral Undertaking by the Council and the MoD

2. Highways England Obligations

- 2.1. Highways England hereby covenants and undertakes to the Council and the MoD that its interest in the Ponds shall be bound by the obligations covenants and other provisions contained in the Unilateral Undertaking if and insofar as such terms and obligations covenants and other provisions remain to be complied with in accordance with the Unilateral Undertaking as at the date hereof

3. Miscellaneous Provisions

- 3.1. All words and phrases in this Confirmatory Deed shall bear the same meaning as defined in the Unilateral Undertaking except where defined otherwise in this Confirmatory Deed
- 3.2. This Confirmatory Deed shall be registrable by the Council as a local land charge
- 3.3. Any invalidity illegality or unenforceability of any clause or paragraph in the Unilateral Undertaking shall not affect the validity or enforceability of the remaining provisions in this Confirmatory Deed
- 3.4. This Confirmatory Deed shall immediately cease to have effect if and to the extent that the Unilateral Undertaking shall cease to have effect in accordance with its terms

IN WITNESS of which this Deed has been executed and delivered on the day and year above written

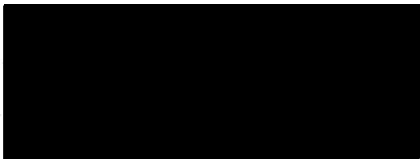
SCHEDULE

The Unilateral Undertaking

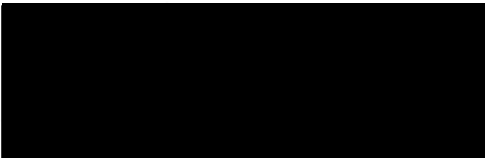
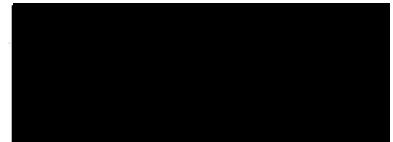
Date	Parties	Details of legal interests bound by the Unilateral Undertaking
[]	(1) Highways England Company Limited (2) South Somerset District Council (3) Secretary of State for Defence	Freehold titles []

IN WITNESS whereof the parties hereto have executed this instrument as a deed the day and year first before written

Executed as a Deed by affixing the common seal of **HIGHWAYS ENGLAND COMPANY LIMITED** in the presence of:



Director or Authorised Signatory



~~Director or Company Secretary or Authorised Signatory~~





Defence Infrastructure Organisation

Defence Infrastructure Organisation
Safeguarding Department
Kingston Road
Sutton Coldfield
West Midlands
B75 7RL

Your Reference: TR010036

Tel: [REDACTED]

Our Reference: 10044194

Email: james.houghton109@mod.gov.uk

Ms N Kopala
Head of Transport and Works Act Unit
Department for Transport
Zone 1/14-18
Great Minster House
33 Horseferry Road
London
SW1P 4DR

28 October 2020

By email only

Dear Ms Kopala,

**Planning Act 2008
The Infrastructure Planning (Examination Procedure) Rules 2010**

**Application by Highways England ("the Applicant") for an Order granting
Development Consent for the A303 Sparkford to Ilchester Dualling.**

I write in response to the signed Unilateral Undertaking and accompanying letter recently submitted by Highways England to the Secretary of State.

This response has been provided by the Defence Infrastructure Organisation (DIO) Safeguarding team, part of the MOD with responsibility for ensuring that operational facilities such as aerodromes, explosive stores, radar facilities and range areas are not compromised by development.

In previous correspondence MOD stated that work was underway on an appropriate Bird Hazard Management Plan attached to the land and existing in perpetuity. MOD had been provided with a draft planning agreement and provided comments aimed at ensuring the plan contained the necessary provisions to minimise any detrimental impact the development might have on aviation safety with the potential to reduce the operational capability of RNAS Yeovilton.

A signed copy of that Unilateral Undertaking has now been provided. The submitted version unfortunately lacks some of the elements MOD would consider fundamental to managing the impact of the development on the operation of RNAS Yeovilton.

There are several key departures between the Unilateral Undertaking as signed and the requirements of MOD, for clarity they are addressed through the numbered list below:

1. Recitals, paragraph 10: MOD require that the Unilateral Undertaking makes clear that it would apply to the construction phase and would be in place in perpetuity. The construction of the A303 project and the creation of the ponds would provide an attractant environment to large and flocking bird species. On completion the ponds created may provide a different form of attractant environment. For the Bird Hazard Management Plan to mitigate the harm of the development it should be drafted in such a way that the default is for it to be in place in perpetuity.
2. Conditionality, paragraph 2.5: This section provides a route for Highways England to removing the requirements of the Bird Hazard Management Plan by removing/infilling or otherwise draining the ponds. Whilst in principle there is merit to this approach, the restoration of the ponds may result in the creation of a different form of attractant environment. To control that risk the wording should be amended to require the submission and approval of those works to ensure that any risk is mitigated.
3. Schedule 1, Monitoring, paragraph 1.2: Greater clarity is required. The wording of the signed draft appears to refer to an annual Wetland Bird Survey rather than the monthly surveys that would provide an appropriate evidence base for management. In addition, the wording of the signed draft provides that the survey is carried out for a period of five years and, in this paragraph, contains no means to extend this time period. To provide for various weather and climatological conditions the default should be that the studies are carried out monthly unless otherwise agreed.
4. Schedule 1, Monitoring, paragraph 1.3: Whilst it is appreciated that Wetland Bird Surveys would be carried out, a means or protocol for making monthly reports available to MOD is required so the efficacy of the approaches employed can be evaluated. These monthly reports should include details and numbers of hazardous bird species, the numbers of birds on the land containing the ponds and the associated landscaping, the form(s) of bird control employed, the reaction of the birds (including direction of dispersal) and the effectiveness of control; also to provide a full record of the number and species of hazardous birds culled by lethal control.
5. Schedule 1, Management, paragraph 1.7: An additional provision to require that points of contact are made available for both the nominated bird management company/individual and RNAS Yeovilton so that bird control could be coordinated.
6. Schedule 1, Management, paragraph 1.9: The two day response time set out would be insufficient to ensure that the operational capability of RNAS Yeovilton can be maintained. A response time of two hours would be more appropriate.
7. Schedule 1, Cooperation, paragraph 1.14(c): It is necessary that MOD are able to reduce the intervals between reviews of the bird management measures. This would allow developing issues to be addressed as and when they arise and would serve to maintain the operation of RNAS Yeovilton.
8. Schedule 1, Reassessment and termination, paragraph 1.19: This section should be deleted. A Bird Management Plan should be in place until such time as the ponds and any attractant environment are removed or where the use for aviation purposes of the airfield currently known as RNAS Yeovilton ceases.

I note that, in their letter dated 5 October 2020, Highways England make clear that they are open to further discussions to review the content of the Unilateral Undertaking. The letter also states that a further planning obligation could be made which would supersede the Unilateral Undertaking dated 30 September 2020. The MOD would also be open to discussing the content of the Unilateral Undertaking in order to ensure that it will provide sufficient confidence that birdstrike risk can be effectively mitigated.

I trust the above information provides sufficient detail, if I can provide any further clarification or information please do not hesitate to contact me.

Yours sincerely,

James Houghton
Senior Safeguarding Manager
DIO Estates

Caroline O'Neill
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Hannah Sanderson
Senior Project Manager
Highways England
Temple Quay House
2 The Square, Temple Quay
Bristol
BS1 6HA

Tel: 0300 123 5000

10 November 2020

Dear Ms O'Neill

A303 Sparkford to Ilchester dualling s.106 Unilateral Undertaking

Further to the MoD's (Ministry of Defence) letter dated 28 October 2020, Highways England would like to provide some clarifications in respect of the points raised.

Highways England's position is that the terms of the submitted unilateral undertaking (UU) are sufficient to ensure that any impacts from birdstrike are appropriately mitigated. Highways England completed the UU to satisfy the MoD's requirement to have an agreement in place which attaches to the land and exists in perpetuity. The UU is a planning obligation tied to land which is enforceable in perpetuity; it cannot be unilaterally revoked by Highway England and therefore already provides the long-term certainty sought by the MoD. Not only this, but Highways England considers that the proposals adequately address the issues raised by the MoD.

The MoD's main concerns focus on monitoring bird activity and implementing mitigation measures. At this stage of the application, which is before the detailed design of the scheme has been finalised and approved, Highways England considers that the UU is appropriate and enforceable.

Highways England is happy to enter into further discussions and an agreement with the local planning authority and the MoD at a later stage to amend some of the minor details at issue (if the DCO is granted). Nevertheless, for the purposes of the DCO application, Highways England considers that there is enough control for the Council and the MoD in the UU to ensure that appropriate bird mitigation is secured as part of the scheme. This is in addition to the changes proposed by Highways England now included in the dDCO and the Outline Environmental Management Plan.

The MoD argues in its letter that the UU lacks some fundamental elements required to manage the impacts of the development. Taking the MoD's numbered points in turn (please note that definitions used here are the same as those used in the UU):

1. The recital is only an informative part of the UU. Nevertheless, Highways England can confirm that the UU operates during construction and the operation of the scheme and measures are included in the UU which ensure this continues (see paragraph 1.4 of Schedule 1).
2. We would confirm that in the event that ponds may be infilled then design proposals will be forwarded to the MoD for consultation and agreement in order that risks can be mitigated prior to any works being completed on site.
3. Highways England has specified yearly surveys within the UU, but is now proposing monthly surveys in the Bird Hazard Management Plan (BHMP). Highways England would also point out paragraph 1.13 which provides for cooperation and sharing of bird monitoring data between Highways England and the MoD, and paragraph 1.14 (c) which allows for the Bird Management Measures to be agreed between the Parties where necessary. As such, these clauses give Highways England flexibility to respond to changing circumstances.
4. In terms of the monthly reporting procedure, this is dealt with in paragraph 3 of this letter, and in greater detail in the draft BHMP. In terms of the detail included in the Wetland Bird Survey, the definition of this ("WeBS") allows for a survey to be undertaken in accordance with the WeBS Methodology to suit birdstrike hazard purposes. As such, the definition is flexible and can accommodate the detail noted by the MoD. Of course, if the MoD have concerns with the approach then they can recommend changes at that time by way of a Request for Action, or, if ultimately required, invoke paragraph 1.10 to undertake measures themselves at Highways England's cost.
5. It is not clear what additional information the MoD requires in respect of paragraph 1.7 of Schedule 1; it is envisaged that named individuals will be provided during the construction period and again when the scheme enters operation. Nevertheless, the expectation from Highways England's perspective is that the Bird Management Officer will be the point of contact who will liaise with the MoD (as per the definition) in order to achieve the objectives, set out in the UU.
6. In respect of the timings contained in paragraph 1.9 and the request to respond to a Request for Action within two hours, Highways England notes that in the operational stage there will not be staff permanently on site able to respond within that period. However, that period will follow the construction phase where it is proposed that the Ponds will be formed early in the programme to allow monitoring, identification and remediation of any problem while the contractors and the Ecological Clerk of Works are onsite. By the operational phase therefore there will be some years of monitoring data on which to base the next phase of monitoring and response details, which we would propose to agree via consultation with the MOD.

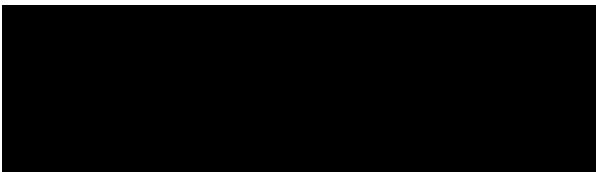
7. Highways England considers that this point is addressed by the inclusion of “or sooner provided that the Parties agree in writing to a shorter period.” This gives the Parties the ability to reduce the timescales if necessary to reassess the Bird Management Measures, particularly in the light of the results of any Bird Monitoring Data. This allows flexibility and gives both Highways England and the MoD the ability to adapt and implement the most effective mitigation measures.
8. The purpose of paragraph 1.19 in Schedule 1 is to reflect the fact that if there is no issue with the Ponds for a period of 5 years (i.e. no birds on site and the MoD has not raised any concerns at all in that period) then it is reasonable to conclude that the measures in the Deed are not required. Highways England considers that this is reasonable.

To confirm, Highways England is content to undertake further discussion with the Ministry of Defence on the content of the s.106 and where their preferences can be accommodated Highways England will consider these in due course. However, on the basis of the UU and the clarifications provided in this email Highways England does not consider that there are fundamental issues between it and the MoD.

For the purpose of the determination of the DCO application, Highways England considers that the UU secures the relevant mitigation required by the MoD and, coupled with the terms of the dDCO and the OEMP, any minor changes can be secured through the approval of those documents as Highways England has already proposed.

We would be grateful if you could please confirm safe receipt of this letter, and that this will be passed to the SoS as soon as possible.

Yours sincerely



Hannah Sanderson
Senior Project Manager
Email: Hannah.Sanderson@highwaysengland.co.uk
Telephone: 0300 123 5000