

APPELLANT'S STATEMENT OF CASE

PREPARED ON BEHALF OF HIGH SPEED TWO (HS2) LIMITED

**APPEAL AGAINST REFUSAL BY LONDON BOROUGH OF HILLINGDON COUNCIL OF
SCHEDULE 17 SUBMISSION FOR APPROVAL OF PLANS AND SPECIFICATIONS FOR
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**

**COLNE VALLEY VIADUCT, WETLANDS ECOLOGICAL MITIGATION SITE, LAND TO
THE WEST OF HARVIL ROAD, HAREFIELD**

LPA reference: 73263/APP/2017/3838

DLA Piper Reference: TI/PC/380900/49

1. INTRODUCTION

1.1 This Statement of Case has been prepared by DLA Piper (UK) LLP on behalf of High Speed Two (HS2) Limited ("**Appellant**").

1.2 This appeal is made under Paragraph 22, Schedule 17 of the High Speed Rail (London - West Midlands) Act 2017 ("**Act**") against the refusal by London Borough of Hillingdon ("**Council**") in respect of a submission ("**Submission**") made by the Appellant under Schedule 17 of the Act for the approval of plans and specifications for 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 ("**Works**") at land to the West of Harvil Road, Harefield ("**Site**").

1.3 The Council's formal decision notice dated 20 March 2018 ("**Decision Notice**") is reproduced at Appendix 1 of the Appeal Bundle.

1.4 The Application was refused for the following reasons:

"1. 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.

2. 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 developments permitted limits."

1.5 The Appellant's Statement of Case is structured as follows:

1.5.1 section 2 briefly explains the background to the Act and provides some context to the wider works authorised by the Act;

1.5.2 section 3 sets out the provisions of the Act which are pertinent to this appeal, clarifying that the process under the Act is distinguished from that under the Town and Country Planning Act 1990;

1.5.3 section 4 explains the proposed works comprised within the Submission;

1.5.4 section 5 describes the Site and its location;

1.5.5 section 6 provides background and context to the Submission;

1.5.6 section 7 then identifies and explains the various guidance and supporting documents that have been introduced to supplement the Act;

1.5.7 section 8 then expands on the environmental minimum requirements, which are identified in section 7, and explains how they create a mechanism which controls the delivery of phase one of High Speed Two;

1.5.8 having extensively set out the statutory framework and the relevant associated guidance, section 9 then sets out the Appellant's case and addresses each of the Council's reasons for refusal; and

1.5.9 section 10 sets out the conclusions of the Appellant's case.

2. HIGH SPEED TWO

2.1 The Act, which received Royal Assent on 23 February 2017, authorises development of the high speed railway link between the West Midlands and London ("**Phase One**"). It is the first phase of a longer high speed railway link from London to Manchester and Leeds.

2.2 On Royal Assent, Transport Secretary Chris Grayling said:

*"HS2 will be the world's most advanced passenger railway and the backbone of our rail network. Royal Assent is a major step towards significantly increasing capacity on our congested railways for both passengers and freight; improving connections between the biggest cities and regions; generating jobs, skills and economic growth and helping build an economy that works for all."*¹

2.3 Further, the Department for Transport has published a document entitled "*High Speed Two - From Concept to Reality - Moving Britain Ahead*"² in which Mr Grayling states:

"This government is investing in world class infrastructure to ensure that the UK can compete on the global stage. HS2 is an ambitious and exciting project and we are seizing the opportunity it offers to transform our country for generations to come."

2.4 It is anticipated that HS2 will create approximately 25,000 jobs during construction as well as 2,000 apprenticeships. It will also support growth in the wider economy, which is estimated to be worth an additional 100,000 jobs.³

2.5 The importance of HS2 for the UK's economy as well as its railway network should not be underestimated. The Act itself has undergone Parliamentary scrutiny over a number of years. The route for Phase One has been identified and approved⁴ and the environmental impacts associated with Phase One have also been assessed and accepted.⁵

2.6 While the principal of development is established by the Act, the Schedule 17 process offers local planning authorities, in certain circumstances, the ability to approve certain works.

2.7 In addition to the controls contained in the Act, there are a number of further mechanisms which are applicable to the Appellant when delivering Phase One. One such control is the Environmental Minimum requirements ("**EMRs**"). These are explored in greater detail in sections 7 and 8 of this Statement of Case but are effectively a suite of documents which have been developed in consultation with local planning authorities and other relevant stakeholders

¹ Official Government Publication "*Full speed ahead as HS2 gets Royal Assent*" (23 February 2017), accessed via: <https://www.gov.uk/government/news/full-speed-ahead-as-hs2-gets-royal-assent>

² (July 2017) - A copy of this document is annexed to this Statement of Case at Appendix 2 and provides a useful background to HS2 and its fundamental importance to the future of Great Britain.

³ Statistics accessed via: <https://www.gov.uk/government/news/full-speed-ahead-as-hs2-gets-royal-assent>

⁴ Further details on the approved route can be accessed via: <https://www.gov.uk/government/publications/plans-and-sections-as-amended>

⁵ The Environmental Statement for Phase One can be accessed via: <https://www.gov.uk/government/collections/hs2-phase-one-environmental-statement-documents>

in relation to the environmental impacts of the design and construction of Phase One. As explained below, the Appellant is contractually bound to comply with the controls set out in the EMRs.⁶

- 2.8 This Statement of Case explains the statutory framework under which Phase One is to be delivered, particularly in the context of the Submission. It shall then demonstrate how the Appellant has complied with all of the requirements of the legislation and associated guidance and will ultimately demonstrate that the Council has not justified its refusal of the Submission.

⁶ Please refer to section 7 of this Statement of Case for further information on the contractual obligation of the Appellant to comply with the EMRs. An introduction to the EMRs and the control of environmental impacts for Phase One is available in "*High Speed Two Phase One Information Paper E1: Control of Environmental Impacts*." A copy of this information paper is located at Appendix 3 of this Statement of Case.

3. THE LEGISLATIVE FRAMEWORK

- 3.1 For the purposes of this Statement of Case, unless otherwise indicated, all references to statutory provisions are references to the Act and reference to paragraphs are to paragraphs in Schedule 17 to the same.
- 3.2 Planning permission for the carrying out of the development authorised by the Act ("**Phase One**") is deemed to have been granted for the purposes of Part 3 of the Town and Country Planning Act 1990 ("**1990 Act**") by virtue of section 20(1) of the Act. Pursuant to section 20(3) of the Act, such deemed permission is subject to the conditions contained in Schedule 17.
- 3.3 The Schedule 17 process has been likened to an reserved matters application pursuant to an outline planning permission under the 1990 Act, whereby the principal of development has already been accepted but certain details are subject to further approval.⁷ The grounds on which a local planning authority can refuse a submission under Schedule 17 are limited to those set out within the relevant paragraph of Schedule 17 of the Act. This is a key difference between the Schedule 17 process and decision-making under the 1990 Act and reflects the fact that the Act has already settled the principal of development and authorised the construction of Phase One.
- 3.4 The deemed planning consent has been granted on the basis of the impacts which were assessed and reported as part of The High Speed Two (HS2) Phase One Environmental Statement ("**Environmental Statement**")⁸. Parliament has judged such impacts as being acceptable in the context of Phase One.
- 3.5 The Submission relates to earthworks and fencing and so it is paragraph 3 that sets out the relevant conditions. It should be noted that paragraph 3 only applies if the relevant planning authority is a qualifying authority for the purposes of the Act (paragraph 3(1)). By paragraph 13 a qualifying authority is a planning authority so specified by an order of the Secretary of State. The Council is identified as a qualifying authority in the High Speed Rail (London – West Midlands) (Qualifying Authorities) Order 2017.
- 3.6 All local authorities along the Phase One route were given the option to become qualifying authorities and so to be able to avail themselves of Schedule 17. Further information on the requirements of qualifying authorities is set out in paragraphs 9.55 to 9.65 below.
- 3.7 In respect of earthworks and fencing, paragraph 3(6) provides that the "*relevant planning authority may only refuse to approve plans or specifications for the purposes of this paragraph*" on the following grounds:

⁷ Please refer to paragraph 3.2 of the High Speed Rail (London - West Midlands) Act 2017 Schedule 17 Statutory Guidance, accessed via: <https://www.gov.uk/government/publications/high-speed-rail-london-to-west-midlands-act-2017-schedule-17-statutory-guidance>

⁸ Published 25 November 2013. The Environmental Statement can be accessed via: <https://www.gov.uk/government/collections/hs2-phase-one-environmental-statement-documents#guide-to-the-environmental-statement>

Earthworks

"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."

Fencing

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

- 3.8 By virtue of section 1(2) of the Act, a work is a *scheduled work* if it is a work specified in Schedule 1 of the Act. The works to which the Submission relates are not listed in Schedule 1 of the Act and consequently do not form part of a *scheduled work*. Therefore, the second ground for refusal listed under *Earthworks* in paragraph 3(6) is relevant to the Submission.
- 3.9 As set out in paragraph 1.2 above, this appeal is made under paragraph 22 and is made against the Council's refusal to approve the Submission made under Part 1 of Schedule 17. Paragraph 22 provides:
- "Where the nominated undertaker is aggrieved by a decision of a planning authority on a request for approval under Part 1 (including a decision to require additional details), it may appeal to the appropriate Ministers by giving notice of the appeal in the prescribed form to them and to the authority whose decision is appealed against within 42 days of notification of the decision."*
- 3.10 The "Appropriate Ministers" for the purposes of paragraph 22 are the Secretary of Transport and the Secretary of State for Housing, Communities and Local Government ("**Appropriate Ministers**"). Paragraph 23 provides that appeals under Schedule 17 are to be determined by the Appropriate Ministers, unless the Appropriate Ministers direct otherwise. The Appropriate Ministers have delegated this function to the Planning Inspectorate, whilst retaining the ability to "recover" the appeal, should they deem it necessary.⁹
- 3.11 It should be noted that the appeal mechanism under the Act is different from that under section 78 of the 1990 Act and paragraph 22(10) prevents an appeal under section 78 of the 1990 Act if a right of appeal is available under Schedule 17.
- 3.12 Paragraph 25(1) provides that appeals shall be determined by way of written representations unless the person deciding the appeal directs otherwise. Paragraphs 25(2) and (3) permit the Appropriate Ministers to make regulations in relation to appeals under paragraph 22, which

⁹ Paragraph 23(2)

they have done in the form of the High Speed Rail (London - West Midlands) (Planning Appeals) (Written Representations Procedure) (England) Regulations 2017 ("**Regulations**").

3.13 In addition, the Department for Transport has issued guidance on how the appeal process should work in practice ("**Appeals Guidance**").¹⁰

3.14 Unlike an appeal under section 78 of the 1990 Act, the Planning Inspectorate is not being asked to consider the appropriateness of the development as a whole as part of this process. Rather, paragraph 22(2) sets out the question before the Appropriate Ministers:

"on an appeal under this paragraph, the appropriate ministers may allow or dismiss the appeal or vary the decision of the authority whose decision is appealed against, but may only make a determination involving -

(a) the refusal of approval, or

(b) the imposition of conditions on approval,

on a ground open to that authority."

3.15 Therefore, in respect of the earthworks proposed pursuant to the Submission, the Inspector can only consider:

3.15.1 whether the design or external appearance of the earthworks ought to and could reasonably be modified in order to preserve a site of archaeological or historic interest or nature conservation value; and

3.15.2 if such earthworks ought to, and could reasonably, be carried out elsewhere within the Act limits.

3.16 Further, should the Inspector be minded to refuse the appeal, the Inspector would be required to issue a decision notice explaining:

3.16.1 why and how the Works should be modified in order to preserve a site of archaeological or historic interest or nature conservation value; and

3.16.2 where the works ought to be relocated to within the Act limits.

3.17 In respect of fencing, the Inspector can only consider whether the fencing ought to, and could reasonably, be carried out elsewhere within the Act limits. Again, this would require the Inspector to conclude on where the fencing out to be located to within the Act limits.

3.18 It is a critical characteristic of paragraph 3 that the onus is on the decision-taker to demonstrate that each component of the relevant test is made out. As this Statement of Case will demonstrate, the Council has failed to undertake this exercise and has demonstrated a lack of understanding of the positive obligation on it to justify any refusal under Schedule 17.

¹⁰ The Appeals Guidance can be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690162/planning-appeal-procedures-recovered-appeals-call-ins.pdf

4. PROPOSAL

- 4.1 The Works have already been granted deemed planning permission pursuant to section 20 of the Act (please refer to section 3 of this Statement of Case above) and form part of a habitat creation scheme related to the HS2 Colne Valley South Embankment.
- 4.2 The Works are required as a mitigation measure in order to facilitate a multitude of wider works which are being undertaken in the Colne Valley area,¹¹ including a viaduct approximately 3.4km long which will carry the proposed railway line over the Colne Valley.¹² The Site itself is required in order to facilitate the following works:
- 4.2.1 rail alignment formation including southern launch of the Colne Valley viaduct from the Colne Valley South Embankment;
 - 4.2.2 engineering earthworks;
 - 4.2.3 temporary earthworks storage stockpile;
 - 4.2.4 satellite construction compound;
 - 4.2.5 two electricity substations with associated utility insertions;
 - 4.2.6 flood compensation areas;
 - 4.2.7 ecological/mitigation ponds; and
 - 4.2.8 plantings.¹³
- 4.3 The wider works listed above do not form part of this Submission and it should be noted that the Submission only relates to, and seeks approval for, 360m² of earthworks required to create a new habitat within to which great crested newts that need to be relocated as a result of Phase One can be relocated to, as shown on drawing 1EW03-AEC-PL-DGA-CS01_CL01-011200 and comprising:
- 4.3.1 one mitigation pond, with a total surface area of 150m²;
 - 4.3.2 two hibernacula suitable for great crested newts, each with a surface area of 30m² (6m x 5m); and

¹¹ The Colne Valley area has been assessed throughout the Environmental Statement submitted in support of Phase One. It is referenced throughout the Environmental Statement as CFA7.

¹² For further details of the works proposed in the Colne Valley Area, please refer to paragraph 2.2.7 of Volume 2 (CFA7) of the Environmental Statement submitted in support of Phase One. For ease of reference an extract containing the relevant paragraphs has been reproduced at Appendix 4.

¹³ As detailed in paragraph 1.1.2 of the "Project Plan for Test Pit and Trial Trench Investigations for Dews Farm Colne Valley South Embankment", a copy of which was submitted in support of the Submission and it located at Appendix 5 of this Statement of Case.

- 4.3.3 one reptile bank suitable for basking reptiles, with a surface area of 150m² (20m x 7.5m).
- 4.4 The Submission also seeks approval of the location of permanent fencing to be erected around the boundary of the Site, together with the location of one field gate in the north-eastern corner for access.
- 4.5 All other works listed in paragraph 4.2 above are outwith this Submission and can be delivered regardless of the outcome of this appeal, subject to the approvals under Schedule 17 and other necessary consents.
- 4.6 Further background and context to Phase One and the Submission is set out in section 6 of this Statement of Case.

5. THE SITE AND LOCATION

Site Description

- 5.1 The Colne Valley Viaduct South Embankment Wetland Habitat Creation Site is located approximately 290m to the south-east of the Hillingdon Outdoor Activity Centre and approximately 1.1km to the south of the settlement of South Harefield. It is located immediately north of the Chiltern Main Line railway. The Site is approximately 0.85ha and lies to the south of the HS2 railway line (please see site location plan ref. 1EW03-AEC-PL-DGA-CS01_CL01-011050 - a copy of which is reproduced at Appendix 6 of this Statement of Case) After the construction phase, the Site will be located approximately 90m southwest of the Colne Valley Viaduct that is being constructed to carry HS2.

Ecological Features

Habitats

- 5.2 The Site is located within a field used as pasture for the grazing of cattle until it was acquired by the Appellant using its powers of compulsory acquisition under the Act. The field is bordered by established hedgerows and mature trees. The Site is bordered by mature trees and scrub to the west and south, whilst there is currently no physical delineation from the remainder of the field to the north and east. Beyond the trees to the west of the Site is Hillingdon Outdoor Activity Centre. The Chiltern Main Line railway is located immediately south of the Site, whilst further agricultural land is located to the north and east.
- 5.3 The southern boundary, which separates the Site from the Chiltern Main Line railway is classified in the Environmental Statement as broad-leaved semi-natural woodland, whilst the western boundary is classified as dense continuous scrub.¹⁴ The hedgerows forming the northern and eastern boundaries of the agricultural field are classified in the Environmental Statement as native, species rich hedgerows with trees.¹⁵
- 5.4 The Site is located approximately 260m north-east of the Frays Valley Local Nature Reserve. The Dews Dell Site of Borough Importance¹⁶ is located approximately 330m north-east of the Site.

¹⁴ Please see the Environmental Statement, Volume 5, Map Books, CFA7 Colne Valley Ecology, Map Reference EC-02-011. Accessed via:

http://webarchive.nationalarchives.gov.uk/20140613012910/http://assets.dft.gov.uk/hs2-environmental-statement/volume-5/ecology/MB41_VOL5_EC_CFA07_WATERMARKED.pdf

¹⁵ Please see the Environmental Statement, Volume 5, Map Books, CFA7 Colne Valley Ecology, Map Reference EC-02-011. Accessed via:

http://webarchive.nationalarchives.gov.uk/20140613012910/http://assets.dft.gov.uk/hs2-environmental-statement/volume-5/ecology/MB41_VOL5_EC_CFA07_WATERMARKED.pdf

¹⁶ Dews Dell is locally listed by the Council as a Grade I Site of Borough Importance. Paragraph 4.4 of the Council's Unitary Development Plan (adopted 1998) Saved Policies 27th September 2007 provides that a Grade I Site of Borough Importance is a "*site of quality which exists in very few places in London and have especially*

- 5.5 Approximately 0.28ha of the Site lies within the Mid Colne Valley Site of Metropolitan Importance for Nature Conservation ("**Mid Colne Valley SMI**"). The land within the Mid Colne Valley SMI land is located at the south-western part of the Site. Pursuant to the Submission, the only works proposed on that part of the Site which is included within the Mid Colne Valley SMI are the two hibernaculum, which have been assessed to have a negligible impact on the Mid Colne Valley SMI.¹⁷ It should be noted that soil spreading will also occur in the south-western part of the Site, although such works do not require approval under Schedule 17.¹⁸
- 5.6 It should be noted that when the Environmental Statement for Phase One was prepared in 2013, all of the Site was located outside of, but directly adjoining the Mid Colne Valley SMI. The extent of the Mid Colne Valley SMI has since been revised to include the south-western part of the Site. However, *"this is not considered to represent a new or different significant effect to that previously reported in the Environmental Statement."*¹⁹

Heritage

- 5.7 Dews Farm is a locally listed building²⁰ located approximately 280m to the north of the Site.
- 5.8 The Site is located within the Colne Valley Archaeological Protection Zone ("**Colne Valley APZ**") an area of acknowledged archaeological potential. The Site has potential for Palaeolithic remains within Thames Terrace gravels associated with CVA044²¹ and lies

varied fauna and flora." A copy of the relevant sections from the Council's Saved Policies is located at Appendix 7 of this Statement of Case.

¹⁷ Please refer to paragraphs 8.49; 9.28; and 9.52 below

¹⁸ The Council has been provided with confirmation of the same by way of a letter from Winkworth Sherwood LLP dated 6 March 2018. A copy of this letter is located at Appendix 8 of this Statement of Case. By way of background, Winkworth Sherwood advised the Department for Transport on all matters relating to the promotion of the Act.

¹⁹ During initial consultations with between the Appellant and the Council regarding the Submission, the Council raised concerns relating to part of the Site being included within the Mid Colne Valley SMI. In response to a request for further information, the Appellant's agent, AECOM, issued an ecology note to the Council. The note can be accessed via the Council's planning portal for the Submission and a copy is located at Appendix 9 of this Statement of Case.

²⁰ Please see the Environmental Statement, Volume 7, CFA7, paragraph 6.3.6. . For ease of reference an extract containing the relevant paragraphs has been reproduced at Appendix 10 of this Statement of Case.

²¹ Pursuant to paragraph 6.1.4 of the Environmental Statement, Volume 7, CFA7, assets within study areas were identified with a unique reference code. The reference codes are listed in the Technical Appendices to Volume 5 of the Environmental Statement, a copy of which is located at Appendix 11 of this Statement of Case.

within the extent of CVA021²², an area of Mesolithic activity at Dews Farm evidenced by finds of transept axes, cores and flakes, animal bones and teeth. Previous archaeological investigations in the surrounding area have also identified organic sediments of possible Mesolithic date²³.

- 5.9 A cropmark indicative of a possible ring ditch is recorded to the north-east of (but outside) the Site, although given the small size of the cropmark (approximately 5m diameter) and its shape (elongated) it is perhaps more likely to be a small quarry.²⁴
- 5.10 The find spot of an early Saxon spearhead has been recorded within the proximity of Dews Farm, which could indicate the previous existence of a Saxon burial ground within proximity of the Site.²⁵
- 5.11 Remote sensing surveys undertaken to inform the Phase One Environmental Statement have identified a curvilinear/ditched enclosure and field boundary/bank features immediately east of the Site, but again outside of it.²⁶

²² Please refer to the Technical Appendices to Volume 5 of the Environmental Statement, a copy of which is located at Appendix 11 of this Statement of Case.

²³ Please refer to paragraph 3.2 of the Project Plan for Trial Trenching of 18 inch pipe – spur, 450NB Pipeline Diversion (007) Fulmer to Haste Hill (doc no: 1EW02-CSJ-EV-PLN-S002-000002), a copy of which is located at Appendix 12 of this Statement of Case and paragraph 2.2 of the Project Plan for Test Pit and Trial Trench Investigations for Dews Farm Colne Valley South Embankment (Doc no: 1EW03-FUS-EV-REP-CS01_CL01-0001818), a copy of which is located at Appendix 5 of this Statement of Case.

²⁴ Please refer to paragraph 3.4 of the Written Statement submitted in support of the Submission, a copy of which is located at Appendix 13 of this Statement of Case.

²⁵ Please refer to paragraph 3.4 of the Written Statement submitted in support of the Submission, a copy of which is located at Appendix 13 of this Statement of Case.

²⁶ Please refer to Table 4 (entry G13) and the map labelled CH-004-07.02 of the Technical Appendices to Volume 5 of the Environmental Statement, copy of which is located at Appendix 11 of this Statement of Case.

6. BACKGROUND AND CONTEXT

- 6.1 The Submission forms part of wider works being undertaken as part of Phase One to deliver the Colne Valley Viaduct South Embankment. This is a significant part of Phase One and the Appellant has identified in the Environmental Statement that Phase One has the potential to cause an adverse impact on the local ecology in the Colne Valley area.²⁷ As a result, it has identified a site of limited ecological value (which was ploughed for pastoral purposes up until 2016 when the Appellant compulsorily acquired it), in order to create a high quality ecological mitigation site. . It is envisaged that great crested newts and reptiles whose current habitat will be affected by the main Colne Valley Viaduct South Embankment Works will be relocated to the Site, creating valuable new habitat while helping to mitigate an adverse impact of Phase One.
- 6.2 Although the Works themselves were not assessed as part of the Environmental Statement, the Environmental Statement does provide that the Site is intended for ecological mitigation. Therefore, the necessary impacts at the Site have been appropriately considered and assessed through the Environmental Statement.
- 6.3 In short, the Appellant is proposing to transform part of an pastoral field with limited ecological value into a habitat for endangered and protected species whose existing habitat will be affected by Phase One.
- 6.4 As set out in paragraph 5.2 above, the Site was previously an agricultural field which was used for pastoral purposes until it was acquired by the Appellant using its powers of compulsory acquisition under the Act in 2016. The agricultural use of the Site only ceased when it was compulsorily acquired by the Appellant. The Council has sought to justify its refusal of the Submission on the basis of an alleged improvement in the ecological value of the Site since the agricultural use (and particularly ploughing) ceased. Even if the Council were correct to find an increased ecological value, this misses the fundamental point that if the Site is not used to deliver the Works it will be returned to its original owner and reincorporated into the wider field that remains in agricultural use.
- 6.5 That the Site will be so returned is certain by virtue of both the Government's general policy that surplus land be offered back to its original owner referred to as the Crichel Down Rules and contained in "*Compulsory purchase process and The Crichel Down Rules*."²⁸ In addition to the generally applicable Crichel Down Rules, the Appellant is contractually bound by the Secretary of State to follow a series of EMRs throughout the preparation for, and delivery of, Phase One.²⁹ Forming part of these EMRs is the Environmental Memorandum, paragraph 4.11 of which provides that:

²⁷ Please refer to the Environmental Statement, Volume 2, CFA 7, paragraph 7.4, a copy of which is located at Appendix 14 of this Statement of Case.

²⁸ Ministry for Housing, Communities and Local Government, *Compulsory purchase process and The Crichel Down Rules*, February 2018. A copy of the relevant sections of the guidance containing the Crichel Down Rules is located at Appendix 15 of this Statement of Case.

²⁹ Please refer, for example, to paragraphs 7.4 to 7.8 of this Statement of Case.

"Former agricultural land not required for the railway or its mitigation will, where practicable, be restored to agricultural use after completion of HS2 construction."

- 6.6 Any increase in ecological value since the cessation of agricultural use is therefore only temporary and of little if any weight in the context of this appeal, to the extent that such matters are relevant at all.

7. THE ACT AND ASSOCIATED GUIDANCE

- 7.1 Section 3 above summarises how Schedule 17 operates within the context of the Act. This section of the Statement of Case summarises how associated guidance has been introduced to control and monitor how the Appellant delivers Phase One.

Statutory Guidance and Development Agreement

- 7.2 Paragraph 26(1) allows the Secretary of State to issue statutory guidance and planning authorities are required by paragraph 26(2) to have regard to such guidance in the exercise of their functions under Schedule 17. In exercise of this power, the Secretary of State published guidance in February 2017 ("**Guidance**"). A copy of the Guidance is located at Appendix 16 of this Statement of Case and can be accessed via:
<https://www.gov.uk/government/publications/high-speed-rail-london-to-west-midlands-act-2017-schedule-17-statutory-guidance>.
- 7.3 Paragraph 4.4 of the Guidance states that the approvals under Schedule 17 have been:
"carefully defined to provide an appropriate level of local planning control while not unduly delaying or adding cost to the project. Planning authorities should not through the exercise of the Schedule seek to... modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways."
- 7.4 Pursuant to a Development Agreement which governs the relationship between the Secretary of State for Transport and the Appellant for the delivery of the entire HS2 Two project,³⁰ the Appellant is contractually obliged *"to comply with and discharge the Undertakings, Assurances and Requirements."*³¹ Clause 1 of the Development Agreement contains definitions and interpretations for the agreement and provides that the EMRs (as explained below) form part of the Undertakings, Assurances and Requirements to which the Appellant is contractually obliged to adhere.
- 7.5 The relevant section of the Development Agreement is located at Appendix 17 of this Statement of Case and creates a contractual obligation on the Appellant to comply with the EMRs, which obligation is enforceable by the Secretary of State against the Appellant.
- 7.6 It is therefore clear that Schedule 17, the Guidance and the environmental minimum requirements (as explained below) are intrinsically linked and form an overarching framework that the Appellant must adhere to and which the Council must take account of and not seek to replicate or modify.
- 7.7 Notwithstanding the controls and measures placed on the Appellant throughout the EMRs (which are explored in further detail in paragraphs 7.9 to 7.15 and section 8 of this Statement of Case below), under the terms of the Development Agreement, the Appellant has a duty to

³⁰ Dated 8 December 2014 and amended on 17 July 2017 and accessed via:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629173/hs2-development-agreement-july-2017.pdf

³¹ Please see clause 10.1(N) of the Development Agreement

"comply with Best Current Practice."³² Best Current Practice is defined in the Development Agreement as follows:

"means the exercise of that degree of skill, care, diligence, prudence and foresight which would reasonably be expected from time to time from a delivery vehicle experienced in managing and delivering large scale programmes similar in scope and complexity to the Core Programme, taking into account successful, reliable and safe examples of relevant modern designs, construction methods, systems and systems operation, railway operation, management, maintenance and governance procedures used on recent national or international high speed railway projects"

- 7.8 Therefore, the Appellant is obliged and is committed to delivering HS2 to the best possible standards.

Environmental Minimum Requirements

- 7.9 The EMRs are explained and set out in the High Speed Rail (London-West Midlands) Environmental Minimum Requirements General Principles document published by the Secretary of State in February 2017 ("**General Principles**"). A copy of the General Principles is located at Appendix 18 of this Statement of Case. The General Principles are accompanied by a number of annexures. Copies of the General Principles and annexures (which together make up the EMRs) are available at:

<https://www.gov.uk/government/publications/environmentalminimum-requirements>.

- 7.10 Paragraph 1 of the General Principles explains that the objective of the EMRs is to ensure that Phase One is delivered in accordance with the Environmental Statement that was undertaken during the passage of the Act through Parliament. The Appellant is required to adhere to the EMRs when designing and constructing Phase One:

"The controls contained in the EMRs, along with powers contained in the High Speed Rail (London - West Midlands) Act (the Act) and the Undertakings given by the Secretary of State, will ensure that impacts which have been assessed in the ES will not be exceeded..." (Paragraph 1.1.3 of the General Principles.)

- 7.11 In order to achieve the stated aim of delivering Phase One so that its impact is as assessed in the Environmental Statement, paragraph 1.1.1 of the General Principles provides that *"The Secretary of State will require the nominated undertaker to adhere to the arrangements provided for in the Environmental Minimum Requirements (EMRs) in designing and constructing the Phase One of High Speed Two Works."*

- 7.12 Paragraph 1.1.5 of the General Principles provides that *"the nominated undertaker will in any event ... use reasonable endeavours to adopt mitigation measures that will further reduce any adverse environmental impacts caused by Phase One of HS2, insofar as these mitigation measures do not add unreasonable delays to the construction programme."*

- 7.13 Further, paragraph 1.1.4 provides that *"Any nominated undertaker will be contractually bound to comply with the controls set out in the EMRs and as may be developed during the passage of the Act through Parliament."* This contractual obligation is set out in the Development Agreement.

³² Please refer to clause 10.1(L) of the Development Agreement.

- 7.14 The General Principles and Development Agreement therefore make clear that the Appellant is contractually obliged to comply with the controls and measures contained within the EMRs.
- 7.15 The components of the EMRs are set out in paragraph 3.1.1 of the General Principles and include a requirement on the Appellant as the nominated undertaker to comply with:
- 7.15.1 the Code of Construction Practice ("CoCP"). This is Annex 1 to the General Principles, a copy of which is located at Appendix 19 to this Statement of Case;
 - 7.15.2 the Planning Memorandum. This is Annex 2 to the General Principles, a copy of which is located at Appendix 20 to this Statement of Case;
 - 7.15.3 the Heritage Memorandum. This is Annex 3 to the General Principles, a copy of which is located at Appendix 21 to this Statement of Case; and
 - 7.15.4 the Environmental Memorandum. This is Annex 4 to the General Principles, a copy of which is located at Appendix 22 to this Statement of Case.
- 7.16 Section 8 below explains how the EMRs operate within the context of the Submission.

Planning Forum

- 7.17 Annex 2 to the General Principles is the Planning Memorandum. Amongst other issues, the Planning Memorandum sets out the importance of the Planning Forum and places a requirement on qualifying authorities, as a requirement of them continuing to be so designated, to abide by the conclusions of the Planning Forum.³³
- 7.18 The level of detail to be provided in a Schedule 17 submission is defined in Planning Forum Note 1 (Content of Submissions and Standard Templates),³⁴ Planning Forum Note 2 (Drawings for Plans & Specifications Approvals)³⁵ and Planning Forum Note 3 (Written statements and Design & Access Statements)³⁶.

³³ Please refer to paragraph 4 of the Planning Memorandum.

³⁴ A copy of Planning Forum Note 1 is located at Appendix 23 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657199/pfn1_content_of_submissions_and_standard_templates.pdf

³⁵ A copy of Planning Forum Note 2 is located at Appendix 24 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652298/pfn2_drawings_for_plans_and_specs_approvals.pdf

³⁶ A copy of Planning Forum Note 3 is located at Appendix 25 of this Statement of Case and can also be accessed via:

7.19 The content of Planning Forum Note 1 and Planning Forum Note 3 were agreed by the Planning Forum on 2 November 2017.³⁷ The content of Planning Forum Note 2 was agreed by the Planning Forum on 7 December 2016.³⁸ The Council had full opportunity to attend meetings of and participate fully in the deliberations of the Planning Forum.

7.20 Planning Forum Note 1 is relevant to the Submission as it specifies the plans and specifications to be submitted pursuant to paragraph 3³⁹ and "*provides details on the content of submissions to be made under the planning regime established by Schedule 17 to the Act and includes templates for the documents that will make up the requests for approval.*"⁴⁰

7.21 Paragraph 3 of Planning Forum Note 1 sets out the documentation that must be submitted in support of a submission pursuant to paragraph 3, as follows:

"1. Submission Letter (for information)

2. Plans and Specifications Pro forma

3. Location plan

4. Plans for approval (and for information where necessary)

5. Samples of materials/finishes, where appropriate

6. Supporting Information (for information)

- Written Statement

- Design and Access Statement (in relation to key design elements and stations)

- An indication of mitigation where reasonably necessary"

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657203/pfn3_written_statements_design_and_access_statements.pdf

³⁷ Please refer to Minute 5 of the minutes of the Planning Forum's meeting on 2 November 2017, a copy of which is located at Appendix 26 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679437/hs2_phase_one_planning_forum_minutes_november_2017.pdf

³⁸ Please refer to Minute 5 of the minutes of the Planning Forum's meeting on 7 December 2016, a copy of which is located at Appendix 27 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601100/Planning_Forum_Minutes_-_December.pdf

³⁹ Please refer to paragraph 3 of Planning Forum Note 1.

⁴⁰ Please refer to paragraph 2 of Planning Forum Note 1.

7.22 The Appellant was not required to provide the Council with all of those documents listed in paragraph 7.21 above as they are not relevant to the Submission. For example, the Appellant was not required to submit samples of materials/finishes for the Works as the Works constitute earthworks. In respect of the fence to be provided as part of the Submission, - paragraph 3.2 of the written statement accompanying the Submission provides:

"Permanent fencing will be erected around the boundary of the site (location only for approval). This fencing will be post-and-wire, unless otherwise specified by the landowner."

7.23 Further, a Design and Access Statement was not required in the context of this Submission. Planning Forum Note 3 provides that a Design and Access Statement *"will accompany, for information, the Plans and Specifications requests for approval under Schedule 17 for key Design Elements and stations."*⁴¹ Footnote 3 to Planning Forum Note 3 provides that "Key Design Elements" are *"as defined in HS2 Information Paper D1"* ("**Information Paper D1**"). A copy of Information Paper D1 is located at Appendix 28 of this Statement of Case and the Key Design Elements are listed at Table 1 of the Information Paper. The Works are not listed as forming part of the Key Design Elements nor are they a station and so a Design and Access Statement was not required to accompany the Submission.

7.24 The Appellant has provided the Council with all relevant documents it is required to have done pursuant to Planning Forum Note 1.

7.25 Pursuant to Planning Forum Note 1, the Appellant has provided the Council with the following in respect of the Submission:

7.25.1 Application Form;

7.25.2 Cover Letter;

7.25.3 Plans and Specifications proforma;

7.25.4 Written Statement for Information - Colne Valley Viaduct South Embankment Wetland Ecological Mitigation Site;

7.25.5 Site Location Plan;

7.25.6 Two further general arrangement documents to illustrate the proposed works, one of which was submitted for approval pursuant to paragraph 3,⁴² with a further plan provided for information only;⁴³

7.25.7 Colne Valley Regional Park Key Environmentally Sensitive Worksite Management Plan produced by Fusion;⁴⁴

⁴¹ Please refer to paragraph 7 of Planning Forum Note 3.

⁴² Plan reference 1EW03-AEC-PL-DGA-CS01_CL01-011100-P04, a copy of which is located at Appendix 29 of this Statement of Case.

⁴³ Plan reference 1EW03-AEC-PL-DGA-CS01_CL01-011200-P04, a copy of which is located at Appendix 30 of this Statement of Case.

7.25.8 A summary of the attachments contained in the Submission;

7.26 In an attempt to alleviate the Council's initial concerns with the Submission, Mr Thomas Smith of Fusion wrote to Mr Ian Thynne of the Council on 12 January 2018⁴⁵ to provide further information and clarification in relation to both ecological and archaeological matters at the Site.

7.27 Following further correspondence with the Council, Mr Thomas Smith wrote a further email to the Council on 31 January 2018⁴⁶ which again sought to allay the Council's concerns and to demonstrate that those concerns were appropriately and properly addressed throughout the EMRs. The email from Mr Smith contained the following documents:

7.27.1.1 an Ecology Memorandum produced by AECOM⁴⁷ dated 31 January 2018 in order to address initial concerns raised by the Council regarding the Submission ("**AECOM Memo**");⁴⁸

7.27.1.2 copies of the Guidance and the Planning Memorandum; and

7.27.1.3 email correspondence with Sandy Kidd of the Greater London Archaeology Advisory Service ("**GLAAS**"),⁴⁹ which included the following attachments:

(a) Location Specific Written Scheme of Investigation for Geophysical Surveys (Greater London, Hertfordshire and Buckinghamshire) 2017;⁵⁰

(b) Project Plan for Test Pit and Trial Trench Investigations for Dews Farm Colne Valley South Embankment;⁵¹ and

⁴⁴ The Appellant has commissioned Fusion as an enabling works contractor on all health, safety and environmental issues relating to the Site and Phase One more generally. It is Fusion who have designed and constructed the Works.

⁴⁵ A copy of this correspondence is located at Appendix 31 of this Statement of Case.

⁴⁶ A copy of this correspondence is located at Appendix 32 of this Statement of Case.

⁴⁷ AECOM are engaged by fusion as the designer for the work package plan for the Submission.

⁴⁸ A copy of the AECOM Memo is located at Appendix 32a of this Statement of Case.

⁴⁹ A copy of this correspondence is located at Appendix 33 of this Statement of Case.

⁵⁰ A copy of this document is located at Appendix 33a of this Statement of Case.

⁵¹ A copy of this document is located at Appendix 5 of this Statement of Case.

- (c) A further suite of plans showing Heritage Assets (reference AC100/3_2), LIDAR DTM Imaging (reference AC100/3_3), 1897 Ordnance Survey (reference AC100/3_4), Ecological Constraints (reference AC100/3_5), utilities constraints (reference AC100/3_6) and Trench Plan (reference AC100/3_7).

7.28 It should be noted that further correspondence was also submitted to the Council from the Appellant. The relevant correspondence submitted was as follows:

7.28.1 A letter from Winkworth Sherwood to the Council dated 6 March 2018;⁵² and

7.28.2 A letter from DLA Piper UK LLP to the Council dated 9 March 2018.⁵³

7.29 Further, initial concerns regarding archaeology were raised by the Greater London Archaeology Advisory Service ("**GLAAS**"). In response to these concerns, Mr Ian Williamson of Fusion wrote to Mr Sandy Kidd of the GLAAS on 29 January 2018.⁵⁴ A formal response was received by the Appellant from Sandy Kidd of the GLAAS on 2 February 2018.⁵⁵

7.30 The details of the various correspondence between the Appellant, the Council and the GLAAS is not explored further in this Statement of Case as the various concerns are borne out in the Council's reasons for refusal and are addressed comprehensively throughout this Statement of Case.

7.31 It should be noted that Natural England raised no objections in respect of the ecology mitigation measures forming the Submission.

7.32 Planning Forum Note 2 details the drawings that will be submitted to planning authorities in the context of Schedule 17 submissions. In respect of earthworks, the Appellant is required to have submitted "*General Arrangements / Plan and Profile*"⁵⁶ The plans listed in paragraph 7.24 above demonstrate the Appellant has submitted more plans than it is required to have done under the requirements of Planning Forum Note 2.

7.33 Table 1 of Planning Forum Note 3 establishes the structure and content of the written statement that will accompany Schedule 17 submissions.

7.34 The Written Statement is clearly in compliance with the requirements set out in Table 1 of Planning Forum Note 3, for the reasons set out below:

⁵² A copy of this letter is located at Appendix 8 of this Statement of Case.

⁵³ A copy of this letter is located at Appendix 34 of this Statement of Case.

⁵⁴ A copy of this correspondence is located at Appendix 34 of this Statement of Case.

⁵⁵ A copy of this letter is located at Appendix 35 of this Statement of Case.

⁵⁶ Please refer to the row labelled "Earthworks" located at Table 1 of Planning Forum Note 2.

Introduction

7.34.1 Paragraph 1 introduces the Works, the Schedule 17 process and the requirements placed on the Appellant. It also outlines the purpose of the document, the submission it is part of and the specific works requiring approval.

7.34.2 Paragraph 1.6 sets out the structure of the written statement.

Location and Characteristics of the Area

7.34.3 This is provided in paragraph 2 of the Written Statement and specifically addresses each of the requirements set out in Table 1 of Planning Forum Note 3. It provides a description of the land uses and main geographical features at, and adjacent to, the Site. It addresses the main environmental features in paragraph 2.3 and the highway network at paragraph 2.5.

Description of the Works

7.34.4 Paragraph 3 of the Written Statement contains a description of the Works and provides that they form part of a habitat recreation scheme related to the HS2 Colne Valley South Embankment. The main features of the Works are located in paragraph 3.1 and the works for approval pursuant to Schedule 17 are listed at paragraph 3.2.

Design Criteria and Rationale

7.34.5 Paragraph 4.2 of the Written Statement provides a rationale to support the design option chosen, with specific reference to the mitigation pond, the reptile basking bank, hibernacula and excavated material.

7.34.6 Paragraph 4.1 of the Written Statement lists the constraints and design drivers associated with the Works.

7.34.7 Paragraphs 4.3, 4.4 and 4.5 provide further information on boundary treatment, access arrangements and maintenance respectively.

Programme and Sequence of Works

7.34.8 A high level description of the programme for the works is provided at paragraph 5 of the Written Statement.

Other main consents associated with the work

7.34.9 There are no other such consents and this does not therefore form a section of the Written Statement.

7.35 Paragraph 7.5.2 of the Planning Memorandum provides that, when making certain requests for approval under Schedule 17, the Appellant will, where reasonably necessary, provide the

Council with an indication or outline of any mitigation measures it proposes to seek approval for subsequently.⁵⁷

7.36 Planning Forum Note 10⁵⁸ (the content of which was agreed by the planning Forum on 2 November 2017),⁵⁹ provides further detail on the purposes of this provision.

7.37 Planning Forum Note 10 provides that for ecology, the indicative mitigation likely to be provided to the Council is as follows:

7.37.1 A plan/plans showing areas (m2) of habitat creation.

7.37.2 The plan(s) will be annotated to indicate the habitats to be created, with information on species selection, to be derived from site survey information to ensure applicability to the location and the habitat to be created. Trees and shrubs shall be supplied through the HS2 Supply Contract. Seed types are based upon proprietary or bespoke mixes.

7.37.3 Outline programme of habitat establishment including management durations.

7.37.4 A brief written description of the of the mitigation setting out the effects it seeks to mitigate and how it would achieve this.⁶⁰

7.38 Accordingly, on 20 October 2017, the Appellant submitted a letter to the Council setting out indicative mitigation measures ("**Indicative Mitigation Letter**") in accordance with the requirements of Planning Forum Note 10.⁶¹ It should be noted that the indicative mitigation shown does not form part of the Submission and does not require approval pursuant to paragraph 3.

⁵⁷ Please note that the requirement to provide the Council with an indicative mitigation plan is also contained within paragraph 7.5.2 of the Planning Memorandum, as explained in paragraph 8.78 below.

⁵⁸ A copy of Planning Forum Note 10 is located at Appendix 36 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657207/pfn10_indicative_mitigation.pdf

⁵⁹ Please refer to Minute 5 of the minutes of the Planning Forum's meeting on 2 November 2017, a copy of which is located at Appendix 26 of this Statement of Case and can also be accessed via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679437/hs2_p_hase_one_planning_forum_minutes_november_2017.pdf

⁶⁰ Please refer to paragraph 5 of Planning Forum Note 10.

⁶¹ A copy of this letter is located at Appendix 37 of this Statement of Case

- 7.39 However, the mitigation planting pursuant to the Submission forms part of the overall mitigation scheme in relation to scheduled works under the Act and the Indicative Mitigation Letter clearly provides that:

"Further mitigation works will be brought forward by HS2's main works contractor, where necessary, and a request for approval to the overall mitigation scheme for the above scheduled works and will be submitted prior to the request to bring into use the scheduled work, in accordance with paragraph 9(4)(b) to Schedule 17. The relevant scheduled work(s) will be listed in the final bringing into use submission."

- 7.40 The Appellant consequently made early contact with the Council, seeking its views on proposed mitigation measures in an attempt to work collaboratively as various works throughout the course of Phase One are undertaken. The Council provided no comment on the Indicative Mitigation Letter.

8. ENVIRONMENTAL MINIMUM REQUIREMENTS

- 8.1 It has been shown in paragraphs 7.17 to 7.34 that the Appellant has submitted all it is required to have done under the Planning Forum notes.
- 8.2 Notwithstanding the above, the EMRs create a process which requires the Appellant to produce certain documents at particular stages not only throughout the delivery of the Works, but Phase One more generally. The system requires a collaborative approach between all parties in preparing for, and executing the works.
- 8.3 Accordingly, the EMRs ensure that the appropriate controls and measures are in place so that the works are delivered appropriately and efficiently throughout. This is a fundamental difference from the 1990 Act planning application process, where a local planning authority has little comfort about how a development will progress post the grant of planning permission unless a series of conditions are imposed on the grant of planning permission. In contrast, the EMRs and the numerous technical documents and guidance which form part of them, ensure both on-going collaboration between the Appellant and both the Council and the statutory consultees and that critical information and works are delivered at the correct times throughout the works, without unnecessarily delaying an infrastructure project that has already received the approval of Parliament.
- 8.4 Although Schedule 17 does provide qualifying authorities with the ability to approve plans and specifications, the context in which these plans and specifications are considered by qualifying authorities should be confined to the established process set out in Schedule 17 and must be considered by local planning authorities in the context of the principles set out in the Planning Memorandum and statutory guidance. Qualifying authorities should not consider matters outside the scope of the Schedule 17 process as they usually would for a planning application under the 1990 Act. Therefore, the EMRs serve to ensure the proper processes are adhered to and that Phase One is delivered appropriately.
- 8.5 The Council's reasons for refusal cite concerns relating to nature conservation and archaeology. Indeed, it is clear from the informatives accompanying the Council's decision notice that the basis for the reason refusal is that a lack of information has been provided to it. Such concerns are repeated in planning officer's report to the Council's Major Applications Sub-Committee (HS2), published on 2 March 2018 ("**Officer's Report**"). A copy of the Officer's Report is located at Appendix 38 of this Statement of Case.
- 8.6 As set out above, the EMRs and associated documents place a requirement on the Appellant to produce certain documents throughout Phase One. In the context of both ecology and archaeology, this section of the Statement of Case will demonstrate the procedures the Appellant is contractually bound to follow⁶² (which include continuous collaboration between the Appellant and the Council) and that ensure the delivery of Phase One to the highest standard. Consequently, it shall also demonstrate that the Council is misguided in requesting a level of information that it is not entitled to in determining a request under Schedule 17.
- 8.7 It is important to re-emphasise that this is not a 1990 Act application. Therefore, the level of information required at this stage is different to that under a 1990 Act planning application. The Schedule 17 process is not a front-loaded one. The Submission is merely one stage in an on-going collaborative process that continues far beyond the application stage.

⁶² By virtue of the Development Agreement.

Heritage Memorandum

- 8.8 As set out in paragraph 7.15.3 above, the Heritage Memorandum is Annex 3 to the General Principles and forms part of the EMRs.
- 8.9 The Heritage Memorandum *"sets out how the historic environment (including heritage assets and their setting) will be addressed during the design and construction of Phase One of HS2"* (paragraph 1.2.1) and *"presents the commitments of the Secretary of State to the historic environment and heritage assets"* (paragraph 1.3.1) which, crucially, is *"made **binding** on the nominated undertaker by means of this Memorandum and the rest of the EMRs."* (paragraph 1.3.1) (emphasis added).
- 8.10 Critically, paragraph 1.3.2 of the Heritage Memorandum states that it *"provides a framework for the nominated undertaker, Historic England, local authorities and other stakeholders to work together to ensure that the design and construction of Phase One of HS2 is carried out with proper regard to the historic environment."* Therefore, there is a clear emphasis on collaboration between the Appellant, Historic England and the Council. This emphasis permeates throughout the EMRs and its associated documents and makes clear that the Appellant must consult throughout the process of carrying out the Works.
- 8.11 Paragraph 2 of the Heritage Memorandum sets out the objectives of the document and requires the nominated undertaker to *"have proper regard to the policies set out in the NPPF, notably section 12 'Conserving and enhancing the historic environment', in order to protect the significance of ... heritage assets (including archaeological sites and deposits)." In achieving the stated objective of avoiding direct impacts on heritage assets, the Appellant is required to "deliver a programme of heritage mitigation, including but not limited to investigation, recording, analysis, reporting and archiving."* Consequently, there is a requirement on the Appellant to undertake the appropriate analysis before carrying out the Works.
- 8.12 Paragraph 3.2.1 provides the purpose of the Heritage sub-group *"is to provide the framework for effective engagement and information-sharing on high-level technical matters."* The Heritage sub-group has met quarterly since 2013.⁶³ This demonstrates the commitment of the Appellant to working collaboratively with all consultees through positive engagement. As set out in paragraph 3.2.1, the purpose of the Heritage Memorandum is to *"provide the framework for effective management and information-sharing on high-level technical heritage matters."* Accordingly the objectives of the Heritage sub-group are as follows:
- 8.12.1 *"enable engagement on high-level technical heritage matters between the nominated undertaker, Historic England and local authorities;*
- 8.12.2 *discuss and agree route-wide heritage principles and practices to be applied, as appropriate, at the project level; and*

⁶³ Meeting notes and resources can be accessed via: <https://www.gov.uk/government/collections/hs2-phase-one-planning-forum-heritage-subgroup><https://www.gov.uk/government/collections/hs2-phase-one-planning-forum-heritage-subgroup>

- 8.12.3 *facilitate the integration of heritage matters into other aspects of the design process.*"⁶⁴
- 8.13 Further, paragraph 3.3.1 of the Heritage Memorandum provides in respect of location-specific engagement:
- "During the development of the detailed design, and the implementation of enabling and construction works, the nominated undertaker will continue to engage with Historic England and the relevant local authority ... on the approach to the mitigation and investigation and recording of affected heritage assets on a location-specific basis, or any other grouping of assets as appropriate to the arrangement of the works."*
- 8.14 The above passage and the establishment of the Heritage sub-group make clear that the Schedule 17 process is an on-going process which is designed to ensure continuous dialogue and collaboration between the Council and the Appellant, together with any other relevant consultees - the Submission stage is just one stage in this process. This is distinct from an application under the 1990 Act whereby the Council only has one opportunity to grant or refuse a planning application.
- 8.15 Paragraph 4 of the Heritage Memorandum details how investigation, recording and mitigation measures should be addressed. Paragraph 4.4 provides:
- "All works affecting heritage assets undertaken in connection with HS2 works will be carried out by suitably qualified, experienced and competent individual professionals and organisations. The nominated undertaker will require all such works undertaken to have appropriate regard to national planning policy, archaeology and built heritage standards, national guidelines and codes of practice appropriate to the project; this includes publications by Historic England, the Chartered Institute for Archaeologists and the Institute of Historic Building Conservation."*
- 8.16 Of particular importance in the Heritage Memorandum is paragraph 4.6 which sets out the approach to investigation and recording of heritage assets, referencing the "Generic Written Scheme of Investigation: Historic Environment Research and Delivery Strategy" ("**GWSI:HERDS**"). GWSI:HERDS *"sets out a 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 scheme."*⁶⁵
- 8.17 The GWSI:HERDS is a comprehensive document which establishes the objectives for historic environment works and is further supplemented by *"strategies, technical standards and procedures that provide the detailed mechanisms for the delivery of the works."*⁶⁶ GWSI:HERDS was subject to discussion and consultation via the Heritage sub-group of the Planning Forum, which benefitted from the Council's input, amongst several other local planning authorities, Historic England and technical experts.

⁶⁴ Please refer to Paragraph 3.2.2 of the Heritage Memorandum.

⁶⁵ Please refer to paragraph 4.6.1 of the Heritage Memorandum

⁶⁶ Please refer to paragraph 4.6.1 of the Heritage Memorandum

- 8.18 Technical standards and procedures are part of the project requirement specification for all Phase One works. Of relevance to heritage and archaeology are the following documents:

Technical Standard: Specification for historic environment investigations⁶⁷

- 8.18.1 This document provides the standards and minimum requirements for each type of historic environment investigation expected to be undertaken, including those that are applicable to all investigations and specialist methodologies. Paragraph 1.3.2 provides that *"Text from sections 3 and 4 of this Technical Standard shall be adapted or copied into the Project Plan⁶⁸ / LS-WSI⁶⁹ in order to suit the specific location. It is the responsibility of the Contractor producing the Project Plan and LS-WSI to ensure that each Project Plan and LS-WSI is tailored to the specific requirements of each location whilst following the methodologies and guidance set out in this specification."* Further, section 4 is entitled the *"Specialist methodologies for investigation"* and *"provides the methodologies and guidance to be selected and included in the preparation of Project Plans and LS-WSIs."*⁷⁰ Paragraph 4.1.2 is clear that the *"methodologies in section 4 shall be applied by the Contractor as standards and minimum requirements for each type of investigation."*

Technical Standards: Specification for historic environment project plans and location specific written schemes of investigation⁷¹

- 8.18.2 This document provides the *"specification for the production of project plans and Location-Specific Written Schemes of Investigation for all historic environment investigation and recording works across Phase One of HS2 ..."*⁷²

⁶⁷ Document reference: HS2-HS2-EV-STD-000-000035. A copy of this document is located at Appendix 39 of this Statement of Case.

⁶⁸ Paragraph 4.6.4 of the Heritage Memorandum provides that location specific written schemes of investigation will be include individual project plans for specific activities and a programme of heritage work.

⁶⁹ Paragraph 4.6.2 of the Heritage Memorandum confirms that where appropriate for the purposes of delivering investigation and recording, additional detailed desk-based assessment and/or field evaluation will be carried out which will inform location specific written schemes of investigation, which will be developed in consultation with Historic England and the relevant local authority and will follow the objectives set out in the GWSI: HERDS.

⁷⁰ Please refer to paragraph 4.1.1 of Technical Standard: Specification for historic environment investigations.

⁷¹ Document reference: HS2-HS2-EV-STD-000-000035. A copy of this document is located at Appendix 40 of this Statement of Case.

⁷² Please refer to paragraph 1.1.1 of Technical Standards - Specification for historic environment project plans and location specific written schemes of investigation.

- 8.18.3 Paragraph 1.7.2 states that *"During the construction and post-excavation stages, the Contractor shall continue discussions with Historic England and the local authorities as project plans and LS-WSIs are developed. The Contractor shall include discussions relating to the design of evaluation and investigation works and may include requests for specific information. In preparing revisions of the project plans and LSWSIs, account will be taken of observations made by Historic England and the local authority."*
- 8.19 A copy of the GWSI:HERDS is located at Appendix 41 of this Statement of Case and can also be accessed via:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642655/hs2_phase_one_historic_environment_research_and_delivery_strategy.pdf
- 8.20 Paragraph 1.3.2 of the GWSI:HERDS explains:

"At its heart, the GWSI: HERDS seeks to step away from an approach that merely records archaeological and other historic environment features because they are present within the footprint of a development; instead it seeks to define the purpose for such activities to ensure that all investigations provide tangible knowledge and other benefits. The GWSI: HERDS does not include an allowance for recording for recording's sake; 'preservation by record' is not a concept inherent to the GWSI: HERDS; a more accurate description of the GWSI: HERDS philosophy would be 'investigation with purpose.'"
- 8.21 It is clear, therefore, that both the GWSI:HERDS and the Technical Standards documents must be adhered to by the Appellant when undertaking Phase One as both documents form part of the Heritage Memorandum, which is itself an EMR.
- 8.22 In recognition of its responsibilities in delivering Phase One in accordance with the EMRs, GWSI:HERDS and the relevant technical standards, the Appellant has produced and provided the Council with the following:
- 8.22.1 A Project Plan for Test Pit and Trial Trench Investigations for Dews Farm Colne Valley South Embankment ("**Archaeology Project Plan**");⁷³ and
- 8.22.2 Enabling Works Central Section - Location Specific Written Scheme of Investigation for Geophysical Surveys (Greater London, Hertfordshire and Buckinghamshire) 2017 ("**Archaeology LSWSI**").⁷⁴
- 8.23 As set out throughout this section, the EMRs place an obligation on the Appellant to produce further, site-specific documentation. The Appellant is not required to have provided the Council with such documents at this stage, and in most cases, the Appellant is simply required to have produced the necessary documents and undertaken the appropriate analysis prior to construction. Notwithstanding this, the Appellant has provided the Council with an extensive

⁷³ Document reference: 1EW03-FUS-EV-REP-CS01_CL01-001818, a copy of which is located at 5 of this Statement of Case.

⁷⁴ Document reference: 1EW03-FUS-EV-REP-C000-000293, a copy of which is located at Appendix 42 of this Statement of Case.

amount of information in relation to archaeology which it considers is sufficient for the Council to be able to determine the Submission, as follows:

- 8.23.1 Colne Valley Regional Park Key Environmentally Sensitive Worksite Management Plan;
 - 8.23.2 Written Statement for Information - Colne Valley Viaduct South Embankment Wetland Ecological Mitigation Site;
 - 8.23.3 Location Specific Written Scheme of Investigation for Geophysical Surveys (Greater London, Hertfordshire and Buckinghamshire) 2017;
 - 8.23.4 Project Plan for Test Pit and Trial Trench Investigations for Dews Farm Colne Valley South Embankment; and
 - 8.23.5 A further suite of plans showing Heritage Assets (reference AC100/3_2), LIDAR DTM Imaging (reference AC100/3_3), 1897 Ordnance Survey (reference AC100/3_4), Ecological Constraints (reference AC100/3_5), utilities constraints (reference AC100/3_6) and Trench Plan (reference AC100/3_7).
- 8.24 In response to initial concerns raised by the Council in respect of archaeology, the Appellant has also written to the Council, as demonstrated in paragraph 7.28 above.
- 8.25 As with the documents produced to date, the content and form of these documents must be in accordance with the EMRs (incorporating the GSWI: HERDS and the technical requirements).
- 8.26 Paragraph 4.6.3 of the Heritage Memorandum provides:
- "Works may include the protection and preservation of assets in situ, investigation and recording in advance of enabling and construction works, and/or the implementation of investigation and recording during enabling and construction works. It may be preferable in some instances to preserve heritage assets where they are found, which may be achieved through design."*
- 8.27 After the Appellant has undertaken heritage investigations, paragraph 4.6.5 places an obligation on it to assess and analyse the records generated and the artefacts and samples collected. The Appellant is then required to publish those results via a range of media and to work collaboratively with Historic England and the Council in this respect. The Appellant must also ensure that any artefacts discovered will be dealt with properly and appropriately:
- "The nominated undertaker recognise[s] the need to deposit the HS2 archaeological and built heritage archive appropriately and is committed to working with Historic England and local authorities to identify suitable repository/ies to enable the deposition of the artefacts and records generated by the HS2 heritage works."*

Code of Construction Practice - Heritage

- 8.28 Annex 1 to the General Principles is the CoCP, another document with which the Appellant is required to comply pursuant to paragraph 3.1.1 of the Guidance. The CoCP contains a series of proposed measures and standards of work that the Appellant should adhere to throughout the Phase One construction period.

- 8.29 Paragraph 8 of the CoCP deals with cultural heritage and requires that all works are undertaken in accordance with the Heritage Memorandum, and states that "*Work will follow accepted archaeological and built heritage practice and guidance, taking account of the relevant sections of the National Planning Policy Framework.*"⁷⁵
- 8.30 The CoCP notes that, together with the Project Requirement Specification, GWSI:HERDS set out "*the project mechanisms for the lead contractor to design the historic environment works, undertake evaluation, deliver investigations, undertake analysis, disseminate results and deposit the archive during the design and construction of Phase One of HS2.*"⁷⁶
- 8.31 The CoCP also provides that prior to the commencement of enabling or construction works, the Appellant must prepare a series of plans which respond to the specific objectives of GWSI:HERDS for each specific package of activity. These will be developed in consultation with the Council and Historic England and will "*follow the principles set out in the GWSI:HERDS.*"⁷⁷
- 8.32 The suite of documents listed in paragraphs 8.22 and 8.23 above, which have been provided to the Council, demonstrate that the Appellant, as required by the CoCP, has followed the requirements set out in the GWSI:HERDS and has provided the Council with all that it is required to have done to date. In archaeological terms, the Works are currently at the evaluation stage and the Project Plan and LSWSI together demonstrate the project mechanisms for the Works, including how the Appellant intends to undertake analysis and evaluation and deliver its investigations. On completion of the evaluation exercise, the Appellant (as required by the EMRs and GWSI:HERDS) will prepare reports detailing the results which will enable it to design and undertake the next stage of the Works.
- 8.33 It is therefore clear that the EMRs provide sufficient mechanisms and controls that the Appellant must abide by. The EMRs are clear that the Appellant must continue to consult with Historic England and the Council and that appropriate checks and balances must be implemented throughout the process in accordance with GWSI:HERDS. There is a requirement for the Appellant to provide the Council and Historic England with all results and analysis and this will be developed and scrutinised to ensure that heritage matters are appropriately dealt with.

Environmental Memorandum

- 8.34 Nature conservation is also identified specifically within the context of the EMRs. Annex 4 to the General Principles is the Environmental Memorandum.
- 8.35 The Environmental Memorandum "*provides a framework for the nominated undertaker and representatives of the National Environment Forum to work together to ensure that the design and construction of Phase One of HS2 is carried out with due regard for environmental considerations, including the historic environment.*"

⁷⁵ Please refer to paragraph 8.1.1 of the Code of Construction Practice.

⁷⁶ Please refer to paragraph 8.1.3 of the Code of Construction Practice.

⁷⁷ Please refer to paragraph 8.1.4 of the Code of Construction Practice

- 8.36 Paragraph 2 of the Environmental Memorandum lists a series of aims to which the Appellant must have regard during the design and construction stages of Phase One:
- 8.36.1 *"to design and construct Phase One of HS2 such that significant environmental effects are eliminated, controlled or reduced where reasonably practicable;*
 - 8.36.2 *to prevent environmental risks and avoid or control the extent of environmental damage by developing mitigation measures to an appropriate standard and monitoring and enforcing them effectively;*
 - 8.36.3 *to address sustainability principles in on-going design development, taking opportunities for environmental enhancement and compensation where practicable and reasonable; and*
 - 8.36.4 *in doing so, recognise that the nominated undertaker will take a responsible approach to balancing the achievement of environmental principles set out in Section 4 with the overall objectives of Phase One of HS2."*
- 8.37 Therefore, the Appellant is contractually obliged to have regard to these aims throughout the delivery of Phase One.
- 8.38 Paragraph 3.1 of the Environmental Memorandum requires a National Environment Forum to meet throughout the design and construction period of Phase One. The Environmental Health subgroup has been established and minutes of the subgroup's meetings can be accessed via: <https://www.gov.uk/government/publications/hs2-phase-one-planning-forum-environmental-health-subgroup-meeting-minutes-2017>.
- 8.39 Paragraph 3.4 of the Environmental Memorandum refers to the CoCP and provides that the arrangements set out therein are those to which the Appellant and its contractors must adhere.
- 8.40 Paragraph 3.5 of the Environmental Memorandum places stringent requirements on the Appellant and provides that the *"nominated undertaker will develop an Environmental Management System (EMS) in accordance with BS EN ISO 14001. The EMS provides the processes by which environmental management, both within the nominated undertaker's organisation and in relation to its operations, is undertaken to ensure the relevant findings of the Environmental Statement are addressed through the construction phase. The EMS will set out:*
- *The procedures to be implemented to plan and monitor compliance with environmental legislation;*
 - *The key environmental aspects of the works and how they will be managed;*
 - *Staff competence and awareness requirements and how these are achieved and maintained;*
 - *Record keeping arrangements, including reporting to the Sponsor;*
 - *The procedures to be implemented to monitor compliance with the environmental provisions in the Act; and*
 - *Monitoring compliance and the effectiveness of the measures included within the CoCP, the nominated undertaker's environmental policy and*

with all the Environmental Minimum Requirements other than non-environmental aspects of undertakings and assurances."

- 8.41 As set out above, the Appellant has commissioned Fusion to design and construct the Works. Appendix 43 to this Statement of Case is a certificate confirming that Fusion holds a BS EN ISO 14001 certificate in accordance with paragraphs 3.5.1 and 3.5.2 of the Environmental Memorandum and that it *"operates an Environmental Management System which complies with the requirements of ISO 14001:2015 for ... the project management and design of civil engineering sites."* Therefore, the Appellant, through its agent, holds the relevant certification in order to meet the requirements of paragraph 3.5.1 of the Environmental Memorandum. This certification is audited annually.
- 8.42 In respect of Phase One, and in particular, the Submission, it is clear that there are sufficient requirements on the Appellant and its lead contractor to produce an Environmental Management System which ensures the relevant works are delivered to the optimum standard.
- 8.43 Paragraph 3.6 of the Environmental Memorandum provides that *"it is the intention of the Secretary of State to carry out Phase One of HS2 so that its environmental effects are no greater than as assessed in the HS2 Phase One Environmental Statement. The mechanisms established to control this objective are explained in the HS2 information paper E1: Control of Environmental Impacts."* A copy of the HS2 information paper E1: Control of Environmental Impacts is located at Appendix 44 and provides that *"It is important ... that reassurance is provided that the nominated undertaker will not simply be free to change the design and working practices at will or without any control. There are therefore a number of mechanisms within the [Act] and supporting the [Act] that will control changes to the project and therefore provide reassurance as to the extent of the actual impacts of the construction and operation of the Proposed Scheme."*⁷⁸
- 8.44 Paragraph 4 of the Environmental Memorandum lists a series of principles under which future environmental decisions will be taken. It places numerous requirements on the Appellant to deliver works in accordance with a particular standard. For example, in terms of sustainability, the Appellant is required to undertake works in accordance with the HS2 Ltd Sustainability Policy and its associated commitments.⁷⁹
- 8.45 Paragraph 4.3 of the Environmental Memorandum provides:
- 8.46 *"As the design is developed, the nominated undertaker through its contractors and so far as is reasonably practicable will seek to reduce land taken from habitats, sites of nature conservation or geological importance, public open space and best and most versatile agricultural land. This includes seeking to reduce impacts on protected species."*
- 8.47 The AECOM Memo clearly demonstrates that at the time the Environmental Statement was drafted, the Site fell outside of the Mid Colne Valley SMI. Since the investigations were conducted to inform the Environmental Statement, part of the Site has been included within the Mid Colne Valley SMI, however the AECOM Memo concludes that this *"formerly subject to cultivation but in recent years has been left fallow and now supports a community*

⁷⁸ Please refer to paragraph 1.1.5 of HS2 information paper E1: Control of Environmental Impacts.

⁷⁹ Please refer to paragraph 4.2 of the Environmental Statement.

*dominated by ruderal species, with occasional wetter patches supporting reeds and young willows. These communities are transient and considered to be of limited ecological value".*⁸⁰

- 8.48 Paragraphs 7.4.8 to 7.4.10 of the Environmental Statement Volume 2 CFA7 set out the scale of habitat loss from the wider Phase One works and provides that *"the combined effect of woodland, wetland and grassland loss and disturbance of the breeding bird assemblage will result in a permanent effect on the integrity of the [Colne Valley] SMI that will be significant at the county/metropolitan level."*⁸¹ The AECOM Memo demonstrates that although this area was not assessed as forming part of the Mid Colne Valley SMI, it shall only *"result in the loss of an area of approximately 0.3ha of ruderal vegetation that has developed since 2016. This loss was not considered within the 2013 Environmental Statement ... as at the time this area was identified as being situated outside of the SMI. The new area of vegetation is not critical to maintaining the integrity of the SMI or the species and communities for which it is designated. Based on the scale of the change in impact (0.3ha ruderal vegetation equating to 0.1% of the total SMI) this is not considered to represent a new or different significant effect to that previously reported in the Environmental Statement."*
- 8.49 Therefore, the AECOM Memo provides that the inclusion of part of the Site within the Mid Colne Valley SMI is of extremely limited significance and in fact, the Works will enhance the conservation value of the Site. In any event, the only Works forming part of the Submission which are to be undertaken in the part of the Site falling within the Mid Colne Valley SMI are the creation of two hibernaculum. The AECOM Memo has considered the impact of the hibernaculum on the Mid Colne Valley SMI and has concluded that the impact will be negligible.⁸² Furthermore, the AECOM Memo concludes that the overall impact of the Works will lead to *"an overall increase in conservation value of the area affected, and enable the value of this habitat to be maintained in the long term."*⁸³
- 8.50 As set out in paragraph 7.10 above, the Guidance is clear that the EMRs create a mechanism which ensures the impacts as assessed in the Environmental Statement will not be exceeded. The AECOM Memo is clear that the Works will not exceed the impacts assessed in the Environmental Statement. Paragraph 9.1 of the Planning Memorandum (which the Council signed in order to become a qualifying authority) provides that when determining requests for approval *"the qualifying authority shall take into account the assessments in the Environmental Statement ..."* Therefore, the Council must have regard to the Environmental Statement when determining the Submission and should not seek to reopen
- 8.51 Paragraph 4.4.3 of the Environmental Memorandum provides that *"opportunities for environmental enhancement will be identified and implemented where related to the impacts of the project and where they are considered reasonable and practicable."* As set out above, the AECOM Memo concludes that the Works will *"lead to an overall increase in*

⁸⁰ Please refer to the "Assessment and Conclusion" section of the AECOM Memo, located at page 6.

⁸¹ Please refer to the Environmental Statement, Volume 2, CFA 7, paragraph 7.4.10, a copy of which is located at Appendix 14.

⁸² Please refer to page 5 of the AECOM Memo under the heading "Proposals".

⁸³ Please refer to the penultimate paragraph on page 6 of the AECOM Memo .

conservation value of the area affected, and enable the value of this habitat to be maintained in the long term."⁸⁴ Therefore, in accordance with paragraph 4.4.3 of the Environmental Memorandum, the Appellant has realised an opportunity to enhance the ecological value of the Site.

8.52 Paragraph 4.6.2 of the Environmental Memorandum provides:

"The nominated undertaker will design the landscape and external spaces in line with the principles and promoter's requirements as set out in HS2 Information Paper D1: Design Policy. In particular, DfT and the nominated undertaker will seek to ensure that:

- the design of all landscape and external spaces will be safe, efficient, and meet the requirements of whole-life operation and maintenance alongside initial buildability;*
- the design of all landscape and external spaces will contribute to the government's pursuit of sustainable development, as set out in the National Planning Policy Framework, which involves seeking positive improvements in the quality of the built, natural and historic environment, as well as in people's quality of life;*
- the design cohesion of all landscape and external spaces will be achieved through a strong aesthetic ethos and a recognisable architectural language;*
- the design of all landscape and external spaces will be developed through engagement to seek people's views and ideas on the aesthetic design of the visible buildings and permanent structures;*
- the design of all landscape and external spaces will consider the passenger experience;*
- the design of all landscape and external spaces will limit adverse environmental and visual impacts during design construction and operation; and*
- where possible, the landscape design will identify additional potential regeneration opportunities within area planning frameworks."*

8.53 Further, paragraph 4.6.3 makes clear that landscape design will be appropriately integrated within the local landscape, historic and ecological character, whilst paragraph 4.6.16 provides:

"Where practicable, new planting will not take place where it is likely to cause damage to significant buried archaeological remains. Where it is not possible to avoid buried archaeological remains, they will be investigated and recorded in accordance with the commitments set out in the heritage memorandum."

8.54 In terms of ecological planting, paragraph 4.6.10 provides:

"The nominated undertaker shall maintain to an appropriate horticultural standard landscaped areas to ensure that the project's essential planting scheme successfully establishes and develops to achieve its mitigation objective, and maintain for an appropriate

⁸⁴ Please refer to the "Assessment and Conclusion" section of the AECOM Memo, located at page 6.

period of time in-line with principles set out in HS2 Information Paper E16: Maintenance of Landscaped Areas."

- 8.55 As set out above, these Works constitute an ecological mitigation site which seeks to relocate great crested newts and reptiles which might need to be relocated as a result of Phase One works. The Appellant recognises that it has a duty to protect endangered species and therefore has designed into the EMR process the requirement to obtain the necessary licences to properly address any impacts.
- 8.56 Paragraph 4.8.1 of the Environmental Memorandum requires the Appellant to have obtained the appropriate licences from Natural England where it has identified there will be an effect on protected species.
- 8.57 The Appellant has identified that Phase One will require the relocation of great crested newts (which are a protected species under the Conservation of Habitats and Species Regulations 2017) in numerous locations and has therefore obtained a route-wide, organisational licence from Natural England in respect of activities and operations affecting great crested newts throughout Phase One ("**GCN Licence**"). In order to obtain such a licence, the Appellant was required to demonstrate to Natural England that there would be no detrimental effect on the favourable conservation status of those great crested newt populations located in the vicinity of the route. The licence was issued after extensive liaison with Natural England. The Appellant also provided Natural England with a significant amount of documents in order for the licence to be granted, as follows:

Great Crested Newt: Populations and Habitats Assessment, Phase 1 Route Wide;

Annex 1 - Metapopulation Information;

Annex 2 - GCN metapopulations: Phase 1 habitats pre-construction landscape: Legend Page;

Annex 2 - GCN metapopulations: Phase 1 habitats pre-construction landscape: AMP 1 - AMP 105;

Annex 2 - GCN metapopulations: Phase 1 habitats proposed: Legend Page;

Annex 2 - GCN metapopulations: Phase 1 habitats proposed : AMP 1 - AMP 105;

Annex 3 - Location and distribution of GCN metapopulations within each Sector;

Annex 4 - Terrestrial and Aquatic Habitat Information;

Great Crested Newt: Phase 1 Route Wide Licencing Report; and

Habitat Management Maintenance and Population Monitoring Plan.⁸⁵

⁸⁵ Please note a copy of these documents have not been reproduced for the purposes of the Appeal as their substance does not form part of the current case. Reference to them is to demonstrate the significant volume of information provided by the Appellant to Natural England in order to obtain the licence. Should the Inspector wish to review these documents they can be provided on request.

- 8.58 Furthermore, there are a number of conditions attached to the GCN Licence which determine how the Appellant must approach any works affecting great crested newts throughout Phase One.
- 8.59 Of particular relevance to the Submission are conditions 18 - 21, which relate to habitat enhancement and creation, as follows:
- "18. The Licencee must ensure habitat enhancement is incorporated at the detailed design stage and prior to any works commencing on site. Habitat management is to specify the ecological objectives for each ecological habitat creation area, the measures to be taken and maintain these habitats, and the detailed planting requirements.*
- 19. All habitat creation must take place in advance of that habitat being required by GCN for the relevant stage of its life-cycle (e.g. a replacement breeding pond must be created and functional before the onset of the breeding season). To this end all habitat (terrestrial and aquatic) must be created at least 6 months in advance of its required use, with only months within a plant growing season counting towards this minimum period (March - September inclusive). Where a population is likely to be dependant solely on a pond being lost, the replacement ponds should be created at least 12 months in advance.*
- 20. GCN are not to be translocated to other locations unless the terrestrial and/or aquatic habitats are suitable for GCN. The suitability of the sites is to be confirmed by a suitably qualified person (e.g. an ecologist with a GCN survey licence).*
- 21. Sufficient, appropriately located compensation must be in place and functional as great crested newt habitat for each section of development works prior to the onset of destructive works on that land. It must be clearly documented which compensation measures have been provided for each section of development works. The level of compensation to be provided will be set out in the approved Detailed Design document for each assumed Metapopulation (AMP).*
- 8.60 That the Appellant has been granted the GCN Licence is of high significance. It demonstrates that Natural England, the statutory body charged with advising the government on the natural environment and its protection - including the protection of endangered species, has reviewed the processes the Appellant will follow when delivering Phase One and has placed a high level of trust in the Appellant by granting a route-wide licence in advance of the detail of the mitigation being available.
- 8.61 As set out in paragraph 8.36 above, paragraph 2 of the Environmental Memorandum sets out a number of aims. Of particular relevance in the context of the Submission are the aims to:
- 8.61.1 "develop mitigation measures to an appropriate standard and monitoring and enforcing them effectively"; and
- 8.61.2 "to address sustainability principles in on-going design development, taking opportunities for environmental enhancement and compensation where practicable and reasonable."
- 8.62 As set out in paragraph 7.27.1.1 above, the Appellant commissioned AECOM to produce a memorandum for the purposes of the Submission in order to provide additional background

information in relation to the ecological baseline and to address the Council's initial concerns with the Submission.

- 8.63 The AECOM Memo concludes that *"The pond, hibernacula, reptile basking bank and the oversowing of the rest of the Mitigation Site with a wet grassland seed mix will lead to an overall increase in conservation value of the area affected, and enable the value of this habitat to be maintained in the long term. In addition it will provide further habitat of similar value adjacent to but outside of the current SMI boundary."*⁸⁶
- 8.64 The Works themselves are a mitigation measure in order to protect endangered species which may be affected as a result of Phase One. The AECOM Memo demonstrates that the Appellant identified an appropriate parcel of land which was, until recently, ploughed and in agricultural use.⁸⁷ The AECOM Memo then goes on to certify that, in accordance with the aims set out in paragraph 8.36 above, the Appellant will enhance the ecological value of the Site. This is a point of significant weight given that the alternative is a returning to pastoral farming.
- 8.65 The EMRs also place a requirement on the Appellant to produce an Ecology Site Management Plan. Paragraph 4.8.3 of the Environmental Memorandum provides 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 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. The Ecology Site Management Plans will also be prepared for each statutory and non-statutory site of nature conservation importance and ancient woodland affected by construction. These will include measures to reduce effects. Drafts of these management plans will be discussed with relevant environmental bodies, including the Forestry Commission and Natural England."*
- 8.66 The EMRs are clear that the Ecology Site Management Plan is not a document which the Appellant needs to provide to the Council, whether in the context of a Schedule 17 submission or otherwise. Paragraph 4.3.3 of the Environmental Memorandum is also clear that this is a document that is to be produced during the detailed design stage and prior to construction.
- 8.67 As a consequence, the Appellant is neither required to have yet prepared an Ecology Site Management Plan or to have provided it to the Council. In any event, the Appellant has prepared a draft Ecology Site Management Plan, this is a document which is continuously updated as the Works progress and will ultimately serve to discharge the obligations on the Appellant pursuant to paragraph 4.8.3 of the Environmental Memorandum. The Ecology Site Management Plan will continue to be updated following completion of the Works to ensure that the Site is appropriately maintained, managed and monitored in accordance with the EMRs.
- 8.68 Pursuant to paragraph 4.8.3 of the Environmental Memorandum, the Appellant has provided the relevant environmental body, Natural England, with a draft of the Ecology Site

⁸⁶ Please refer to the penultimate paragraph of the AECOM Memo.

⁸⁷ Please refer to Figures 4 and 5 of the AECOM Memo.

Management Plan for the Site. A copy of the latest draft of the Ecology Site Management Plan is located at Appendix 45 of this Statement of Case.

- 8.69 Paragraph 4.8.4 also ensures that the Appellant is obliged to follow the principles for habitat creation and translocation which are contained within 'Ecological principles of mitigation for HS2 LWM', which forms part of the Environmental Statement.⁸⁸
- 8.70 Further, paragraph 4.8.5 provides that the *"nominated undertaker will maintain or make provision to maintain and monitor any new or managed habitat, for a sufficient period to ensure that the objectives of the proposals for nature conservation and protection of the historic environment are achieved."*
- 8.71 It is therefore clear that the necessary measures are in place to ensure that the correct procedures are adhered to by the Appellant in terms of landscaping and ecology.

Code of Construction Practice - Ecology

- 8.72 As set out in paragraph 8.28 above, Annex 1 to the General Principles is the CoCP which contains a series of proposed measures and standards of work that the Appellant should adhere to throughout the Phase One construction period.
- 8.73 Of particular relevance to ecology is paragraph 9 of the CoCP and ensures that *"appropriate measures will be adopted to protect the ecology of Phase One of HS2, with special attention to specified areas of ecological value, as identified within the ES."*⁸⁹
- 8.74 Paragraph 9.1.4 of the CoCP lists the ecological management measures which will be applied, as appropriate, throughout Phase One. Amongst these measures (and as set out in paragraph 8.65 above) is the requirement to produce an Ecology Site Management Plans for ecological habitat creation areas. The Appellant is therefore obliged to produce further documentation including the following, as appropriate:
- 8.74.1 *"summary of features of interest for all known areas of nature conservation interest (as identified within the ES) which may be affected due to construction;*
- 8.74.2 *Plans ... showing the locations of all known areas of nature conservation interest that may be affected due to construction, including access routes;*
- 8.74.3 *provision of guidance on best ecological practice methods to be followed in order to mitigate potential ecological effects during construction;*
- 8.74.4 *procedures to be adopted in the event of unanticipated discovery or disturbance of protected species or important habitats ... "*
- 8.75 With regard to monitoring, paragraph 9.3 of the CoCP provides that the *"nominated undertaker will define a programme for undertaking ecological surveys prior to and during construction. The surveys will be used to verify the baseline ecological conditions described*

⁸⁸ Please refer to paragraph 4.8.4 of the Environmental Memorandum.

⁸⁹ Please refer to paragraph 9.1.1 of the CoCP.

in the ES, to refine the mitigation and control measures required during construction as appropriate and to provide appropriate monitoring during construction."

- 8.76 The CoCP relates solely to construction and as a result is not relevant during the design stage of the Works. However, it is clear that the CoCP imposes further requirements on the Appellant to ensure that ecology is appropriately considered and the appropriate measures are adhered to both during and post-completion of the Works.
- 8.77 The Appellant is alert to these future requirements and the draft Ecology Site Management Plan⁹⁰ principally addresses the current conditions and status of the site prior to habitat creation measures being implemented and identifies specific objectives and targets for the ESMP relating to both establishment and end condition in accordance with section 9 of the CoCP.

Planning Memorandum - Indicative Mitigation

- 8.78 Paragraph 7.5.2 of the Planning Memorandum provides:

"When designs of HS2 works are submitted for approval, the nominated undertaker shall, where reasonably necessary for the proper consideration of the design proposed, provide an indication or outline of the appropriate mitigation measures (if any) which it intends to submit subsequently under paragraphs 9 or 12 of the Planning Conditions Schedule. Where the works for approval will have a mitigating effect in relation to operational noise from the railway or new roads, the nominated undertaker will provide information to show, so far as is reasonably practicable at that stage in the design process, how the noise mitigation performs and the expected conditions. While not material to approvals under paragraph 2 or 3, this information will provide reassurance in advance of the request for approval under paragraph 9 that the mitigation is appropriate, and will present an opportunity to raise concerns."

- 8.79 The Appellant has complied with this EMR requirement by providing the Council with the Indicative Mitigation Letter. The Indicative Mitigation Letter did not form part of the Submission and is outside the scope of Schedule 17. However, the Appellant has sought the Council's informal agreement or, in the absence of such agreement, has invited the Council to comment on the proposed mitigation measures. The Council has not acknowledged the Indicative Mitigation Letter, let alone provided any comment on the details set out therein.

Code of Construction Practice - Local Environment Management Plan

- 8.80 Paragraph 4.1.3 of the CoCP provides that the requirements of the CoCP will apply to the whole of Phase One and will be supplemented by Local Environment Management Plans ("LEMP") for each relevant local authority area.
- 8.81 In collaboration with the Council and other stakeholders, an LEMP for the Council's area was produced in December 2017.⁹¹

⁹⁰ As referenced in paragraph 8.67 above and located at Appendix 45 of this Statement of Case.

⁹¹ A copy of the LEMP for the London Borough of Hillingdon can be accessed via: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669421/hillingdon_local_environment_management_plan.pdf and is reproduced at Appendix 46 of this Statement of Case.

- 8.82 Section 8 of the LEMP for the London Borough of Hillingdon addresses cultural heritage, however this largely serves to repeat the position set out above - that the Appellant is obliged to adhere to the control measures contained in the CoCP, the Heritage Memorandum and the GWSI:HERDS.⁹²
- 8.83 Paragraph 8.3.1 provides that *"Where practicable, construction methodologies will be required to reduce the impacts on heritage assets. The CoCP sets out the provisions that will be adopted to control those effects, including the use of appropriate equipment and methods to limit ground disturbance and settlement followed by monitoring, protection and remediation. A programme of settlement monitoring and the implementation of avoidance measures where appropriate will be undertaken by the Contractor."*
- 8.84 Furthermore, paragraph 8.3.3 provides that *"where practicable below ground assets will be preserved in situ beneath mitigation earthworks through the adoption of appropriate design measures."* Therefore, the Appellant is committed to minimising the disturbance to any historical remains. Paragraph 8.3.4 goes on to stress that so far as possible *"construction methodologies will reduce the impacts on buried and upstanding remains."*
- 8.85 In any event, paragraph 8.3.5 provides that *"the programme of archaeological and built heritage works will be undertaken by specialist Contractors appointed by the nominated undertaker prior to and during, the construction period in accordance with the provisions of the LS-WSI for archaeology and built heritage."* Therefore, it is clear that the Appellant is committed to delivering Phase One in an robust manner which ensures that any harm posed to the cultural heritage is properly managed.
- 8.86 Section 9 of the LEMP for the London Borough of Hillingdon addresses ecology and identifies the Mid Colne Valley SMI as a sensitive receptor⁹³. Paragraph 9.3 lists local control measures which will be taken in respect of ecology. With regards to great crested newts, the Appellant must *"adhere to the requirements of HS2 great crested newt organisational licence, method statements, and Ecology Site Management Plans."*⁹⁴
- 8.87 Paragraph 9.4 of the Council's LEMP provides that *"contractors will be required to undertake appropriate monitoring of the consequences of construction works on ecological resources and of the effectiveness of the management measures designed to control ecological effects, as detailed in Section 9.3 of the CoCP."* This paragraph emphasises the responsibility on the Appellant to continue to monitor the Site and to adhere to best ecological practice throughout the delivery of Phase One.

⁹² Please refer to paragraph 8.1 of the Council's LEMP.

⁹³ Please refer to paragraph 9.2.1 of the Council's LEMP.

⁹⁴ Please refer to table 1, located after paragraph 9.3.1 of the Council's LEMP.

9. THE APPELLANT'S CASE

- 9.1 This section of the Statement of Case will address the reasons for refusal and will demonstrate why they are not appropriate, both in the context of the Schedule 17 framework set out throughout this document, and for other site-specific reasons.

The reasons for refusal

- 9.2 The Application was refused for the following reasons:

"1. 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.

2. 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 developments permitted limits."

- 9.3 Accompanying the decision notice are a series of "informatives" which provide an insight into the rationale for the Council's reasons for refusal.

- 9.4 The reasons for refusal are summarised below:

Local Traffic Management Plan

- 9.5 The Council has raised concerns regarding a lack of information relating to construction traffic access to the Site.

- 9.6 To support this concern, the Council refers to the CoCP, which states: *"Prior to the commencement of the works, the nominated undertaker will require that local traffic management plans (LTMPs) will be produced in consultation with the highway and traffic authorities, the emergency services and other relevant key stakeholders."*

- 9.7 The Council then further provides in the informatives:

"No earthworks are to commence until an appropriate LTMP is produced by HS2 Ltd. The Council requires HS2 Ltd to set out suitable proposals and arrangements as part of the LTMP process to satisfy it that safe access and egress from the works site can be maintained at all times by construction vehicles."

- 9.8 The Council has misinterpreted the Schedule 17 process by providing the above in support of its reasons for refusal. Conditions relating to road transport are located in paragraph 6 and would form the basis of a separate submission under Schedule 17, should they be necessary under the provisions of that paragraph. Such issues are not relevant to the matters that are the subject of the current submission.

- 9.9 The Council is correct that, should an LTMP be necessary, no works would be able to commence until an LTMP had been produced. However, this alone would not justify a reason for refusal as the controls are already in place by virtue of the relevant paragraph in the CoCP, as quoted by the Council in the informatives section of its reasons for refusal.

Site Specific Planting

- 9.10 The Council has stated that it does not consider *"the details relating to landscaping, ecological planning and site restoration are adequate as presented. The restoration package needs to be far more detailed prior to the Council confirming the approach is adequate. The details should include but not be limited to:*

Pond lining (puddled clay preferred)

Soft landscape proposals include schedules, specifications and appropriate planting plans

Management and Maintenance plans and schedules

Hard Landscape details (fences, gates, tracks and ancillary works)

Long term access arrangements for maintenance

Site security measures

Ecological enhancement plan showing the interaction of the site with the surrounding area

Detailed proposals for land ownership and responsibilities

Detailed information on how the pond will be filled and levels maintained."

- 9.11 It has been shown throughout this Statement of Case that the Schedule 17 process is distinct from a 1990 Act planning application. Under the latter, the Council could legitimately require all of the above details of design to be submitted at the application stage. In contrast, the Schedule 17 is not a front-loaded one. It is the EMRs, which the Appellant is contractually bound to follow, which specifically address each of the concerns raised by the Council, as follows:

Pond lining -

- 9.11.1 this falls outside the scope of Schedule 17 and is not something the Appellant is required to provide under a submission pursuant to paragraph 3.
- 9.11.2 Notwithstanding the above, the Appellant did indicate in the written statement accompanying the Submission that *"The use of a geosynthetic liner may be required if determined to be necessary for the pond to provide standing water for the entire year."*⁹⁵
- 9.11.3 It has been shown throughout this Statement of Case that the EMRs create a process whereby the Appellant should seek to collaborate with the Council throughout. The Appellant is also contractually bound to follow the EMRs which include a series of controls and documents which govern how the ecological mitigation will be delivered. The Appellant is committed to, and is obliged under the terms of the GCN Licence, to provide a habitat that is suitable for great crested newts - it will therefore need to carry out the necessary investigatory works to ascertain the appropriate pond lining - this is a requirement of the EMRs. However, such works are beyond the scope of what the Council is required to approve under paragraph 3.

⁹⁵ Please refer to paragraph 4.2 of the Written Statement accompanying the Submission.

9.11.4 The Council should not be seeking to duplicate a process which has already been considered as part of the wider Phase One works. In any event, the Appellant is obliged under the EMRs to deliver a "*high quality design*" which is "*sensitive to the landscape character of the local area.*"⁹⁶

9.11.5 Therefore the controls and information sought by the Council in respect of pond lining is already provided for in the EMRs. The Council should not seek to replicate the controls of the EMRs and should rely on the fact that the Appellant is contractually obliged to follow the EMR requirements.

Soft landscape proposals include schedules, specifications and appropriate planting plans

9.11.6 As above, the Council is requesting sight of details which are beyond the scope of plans and specifications to be submitted pursuant to paragraph 3. Details relating to soft landscaping are not relevant to the preservation of archaeology or ecology and accordingly, cannot form part of a reason for refusal under paragraph 3.

9.11.7 In any event, the Council is requesting this information prematurely. Paragraph 4 of the Environmental Memorandum lists a series of principles the Appellant is obliged to adhere to throughout Phase One. One listed principle is "*Landscape and visual*"⁹⁷ and commits the Appellant to producing a "*high quality design that is sensitive to the landscape character of the local area, including the historic environment, to avoid and minimise effects as much as reasonably practicable.*"⁹⁸

9.11.8 Further, paragraph 4.6.2 makes clear that the Appellant is obliged to design the landscape and external spaces of Phase One in line with the requirements set out in Information Paper D1: *Design and Policy* and in particular, the Appellant must seek to ensure that:

9.11.8.1 *"the design of all landscape and external spaces will be safe, efficient, and meet the requirements of whole-life operation and maintenance alongside initial buildability;*

9.11.8.2 *the design of all landscape and external spaces will contribute to the government's pursuit of sustainable development, as set out in the National Planning Policy Framework, which involves seeking positive improvements in the quality of the built, natural and historic environment, as well as in people's quality of life;*

9.11.8.3 *the design cohesion of all landscape and external spaces will be achieved through a strong aesthetic ethos and a recognisable architectural language;*

⁹⁶ Please refer to paragraph 4.6.1 of the Environmental Memorandum.

⁹⁷ Please refer to paragraph 4.6 of the Environmental Memorandum

⁹⁸ Please refer to paragraph 4.6.1 of the Environmental Memorandum

- 9.11.8.4 *the design of all landscape and external spaces will be developed through engagement to seek people's views and ideas on the aesthetic design of the visible buildings and permanent structures;*
- 9.11.8.5 *the design of all landscape and external spaces will consider the passenger experience;*
- 9.11.8.6 *the design of all landscape and external spaces will limit adverse environmental and visual impacts during design construction and operation; and*
- 9.11.8.7 *where possible, the landscape design will identify additional potential regeneration opportunities within area planning frameworks."*
- 9.11.9 In respect of planting plans, paragraph 4.6.5 of the Environmental Memorandum provides: *"All planting will be done in line with the Green Infrastructure (GI) concept, a form of environmental best practice and policy that has been used to inform HS2 Ltd's approach to developing Phase One of HS2."*
- 9.11.10 Furthermore, in accordance with paragraph 7.5.2 of the Planning Memorandum, the Appellant has provided the Council with Indicative Mitigation Letter. The Indicative Mitigation Letter did not form part of the Submission and is outside the scope of Schedule 17. However, the Appellant has sought the Council's informal agreement or, in the absence of such agreement, has invited the Council to comment on the proposed mitigation measures which include planting plans. As it is required to do under the EMRs, the Appellant has sought to work collaboratively with the Council in preparing appropriate planting plans.
- 9.11.11 As set out above, the Council has provided no response to the Indicative Mitigation Letter and has consequently failed to engage with the Appellant regarding planting plans. Had the Council properly engaged with the EMR process, the Council, together with the Appellant would have been able to develop a mutually appropriate series of planting plans outside the scope of what is required under the Submission.
- 9.11.12 However, the Council has failed to work collaboratively with the Appellant, it has failed to consider the Indicative Mitigation Letter in the context of the wider Phase One works and such failure is evidenced by the fact the council has referenced a lack of planting plans in its reason for refusal.
- 9.11.13 It is clear, therefore, that the controls and information sought by the Council in respect of landscaping is already provided for in the EMRs. The Council should not seek to replicate the controls of the EMRs, nor should it refuse an application on a perceived lack of information when the Appellant is contractually obliged to follow the EMR requirement.

Management and Maintenance Plans and Schedules

- 9.11.14 The written statement accompanying the Submission provides that *"The approach to the maintenance of the site will follow the approach set out in HS2*

Information Paper E16 - Maintenance of Landscaped Areas."⁹⁹ Paragraph 4.6.10 of the Environmental Memorandum makes this a contractual obligation on the Appellant:

"The nominated undertaker shall maintain to an appropriate horticultural standard landscaped areas to ensure that the project's essential planting scheme successfully establishes and develops to achieve its mitigation objective, and maintain for an appropriate period of time in-line with principles set out in HS2 Information Paper E16: Maintenance of Landscaped Areas."

- 9.11.15 Paragraph 4.8.5 also of the Environmental Memorandum also provides that the *"nominated undertaker will maintain or make provision to maintain and monitor any new or managed habitat, for a sufficient period to ensure that the objectives of the proposals for nature conservation and protection of the historic environment are achieved."*
- 9.11.16 Furthermore, paragraph 9.3 of the CoCP provides that *"the nominated undertaker will define a programme for undertaking ecological surveys prior to and during construction. The surveys will be used to verify the baseline ecological conditions described in the ES, to refine the mitigation and control measures being required during construction as appropriate and to provide appropriate monitoring during construction."*
- 9.11.17 Furthermore paragraph 7.5 of the Guidance is clear that management and maintenance plans fall outside the scope of the requirement of paragraph 3:
- 9.11.18 *"With regard to approvals of details of building and other construction works only the actual design, external appearance and siting of the works for which plans are submitted for approval are relevant, and conditions imposing requirements as to the maintenance or operation of the works may not be imposed. This is because the matter for approval is the design and external appearance of the building or work, not its use. Schedule 17 should not therefore be used to control matters such as opening times and/or cleaning regimes."*
- 9.11.19 Therefore, it is clear that throughout the EMRs, there are various measures and controls imposed on the Appellant to ensure the Site is appropriately managed and maintained. However, it is also clear that the Council is again misguided in justifying its reason for a refusal on the basis of a perceived lack of information. Had the Council properly applied the EMR process and Guidance, it would have understood that management and maintenance plans do not form part of paragraph 3 submissions.
- 9.11.20 This is a further example of the Council attempting to seek to replicate controls that are already provided for in the EMR process.

Hard Landscape details (fences, gates, tracks and ancillary works)

- 9.11.21 Paragraph 3.2 of the written statement accompanying the Submission provides:

⁹⁹ Please refer to paragraph 4.5 of the written statement accompanying the Submission.

9.11.21.1 *"Permanent fencing will be erected around the boundary of the site (location only for approval). This fencing will be post-and-wire, unless otherwise specified by the landowner; and*

9.11.21.2 *One field gate in the north-eastern corner for agricultural/maintenance access (location only for approval)."*

9.11.22 No other tracks or ancillary works are proposed and the Submission therefore contains the appropriate level of detail in this regard, in accordance with the Planning Forum notes.¹⁰⁰

Long term access arrangements for maintenance

9.11.23 Such information is beyond the scope of the Schedule 17 submission. Paragraph 3 of Schedule 17 is specific that it only applies to earthworks and fencing *"to the extent that it consists of [their] construction"*, future maintenance access arrangements fall beyond the scope of construction and are not relevant to the Submission.

9.11.24 Paragraph 7.5 of the Guidance is clear that such information falls outside the scope of a paragraph 3 submission.

Site security measures

9.11.25 Again, this is not relevant to the construction of the earthworks or fencing and should not form part of the plans and specifications submitted pursuant to paragraph 3.

Ecological enhancement plan showing the interaction of the site with the surrounding area

9.11.26 The AECOM Note demonstrates how the Works will enhance the nature conservation value of the Site. However, this is not a requirement of the Schedule 17 process and the Council is seeking something here that it is not entitled to. This Statement of Case has shown how Schedule 17 serves to control how Phase One is delivered. The Appellant is contractually obliged to adhere to the EMRs and it is these which set the context of the how the wider Phase One works will be delivered. The legislation, the EMRs and the associated documents have been designed to as to ensure that all works are properly delivered, that they integrate with one another and, ultimately, that they serve to make the most significant piece of infrastructure in the UK a success.

9.11.27 The Council should not be seeking a level of information that it is not entitled to and that Parliament has judged to be unnecessary. The EMRs serve to ensure the correct procedures and requirements are adhered to throughout the delivery of Phase One. The Appellant is contractually obliged to abide by the EMRs and the Council should not be seeking to amend this regime.

¹⁰⁰ Copies of Planning Forum Note 1, Planning Forum Note 2 and Planning Forum Note 3 are located at Appendices 23, 24 and 25 of this Statement of Case respectively

- 9.11.28 The Appellant has also produced an Environmental Statement which has assessed the impacts caused by Phase One and gives the works wider context. By seeking further information, the Council is effectively modifying the Schedule 17 process and what will be produced as a result of close adherence to the EMRs. It must again be stressed that this is not a 1990 Act application. The scope of the works as part of Phase One are so extensive and important that a front-loaded process would be impossible. Accordingly, Schedule 17 and the EMRs have been developed to ensure the best possible standards are achieved throughout the delivery of Phase One.

Site Wide Restoration and Mitigation

- 9.12 *"The Council is concerned and disappointed at the lack of vision for the wider area in which these proposals sit. HS2 will have a significant impact with construction activities of various scales and durations over a vast area, all of which will need to be restored. The proposals presented as part of this Schedule 17 submission are isolated to one element of the wider mitigation of HS2. The Council understands this approach is being adopted for at least two other similar proposals soon to be submitted."*
- 9.13 The Council has again failed to consider the EMRs. It has been demonstrated above that paragraph 4 of the Environmental Memorandum creates a series of principles which the Appellant must follow. It is the EMRs which ensure the Appellant will follow the correct procedures throughout the delivery of Phase One.
- 9.14 The critical point in respect of site restoration is that there will be no site restoration required after the Works have been completed. Unlike other works being undertaken in Phase One, this is not a temporary ancillary worksite; it is an ecological mitigation site that will endure in perpetuity and so no restoration is required.
- 9.15 However, even in the event site restoration was required, such works would fall outside the scope of paragraph 3 submissions. Should site restoration be necessary as a result of the works carried out pursuant to the Submission, they would form part of a separate submission made under a completely different paragraph of Schedule 17 - paragraph 12 relates to site restoration and provides:
- "The nominated undertaker must, after discontinuation of the use of any site for carrying out operations ancillary to the construction of any of the scheduled works, restore the site in accordance with a scheme agreed with the relevant planning authority."*¹⁰¹
- 9.16 Further, paragraph 4.5 of the Environmental Memorandum specifically addresses Site reinstatement. The informative suggests that the Council is considering works beyond the scope of the Submission as the focus of post-completion works at the Site will relate to on-going mitigation and monitoring - ensuring that endangered species continue to receive adequate protection.
- 9.17 Paragraph 4.5.1 of the Environmental Memorandum is also clear that such reinstatement works shall be undertaken in accordance with an agreed scheme between the Appellant and the Council.

¹⁰¹ Schedule 17(12)(1)

"The High Speed Rail (London - West Midlands) Act requires that, upon completion of construction works, where temporary possession of sites has been undertaken, they shall be returned to a condition in accordance with a scheme to be agreed with both the owners of the land and the relevant planning authority. In a case where the site has been permanently acquired, it must, after use has finished, be restored in accordance with the scheme agreed with the relevant planning authority."

- 9.18 Therefore, should site reinstatement works be necessary, the necessary controls and measures are already in place through paragraph 12 of Schedule 17 and throughout the EMRs. Accordingly, the Council should not seek to duplicate or second-guess an established regime which ensures Phase One is delivered in the most appropriate manner.
- 9.19 The last of the Council's informatives goes on to state: *"Designing each proposal in isolation removes the prospect of a greater vision and will only deliver pockets of ecological mitigation, many of which may end up being fenced and gated with no public access. In turn, it is not clear that HS2 Ltd can deliver a comprehensive package, particularly since the details emerging are greatly different from those presented in the environmental statement."*
- 9.20 *The Council requires a far greater vision and this needs to be set out through a restoration masterplan that delivers the necessary ecological mitigation, but also integrates community and public benefits in a comprehensive and aligned manner. The Council expects a marked change in approach to restoration."*
- 9.21 As demonstrated in paragraphs 9.11.21 to 9.11.28 above, the Council is requesting something that is beyond the scope of Schedule 17. The Environmental Statement and documents submitted in support of Phase One show the wider context of Phase One. However, the EMR process was designed to ensure that appropriate controls and measures are in place throughout the delivery of Phase One. The EMRs place a series of objectives and targets which must be met by the Appellant throughout the delivery of Phase One. The *"greater vision"* sought by the Council is contained throughout the EMRs and the Council should be content, in the same way that Parliament was before them, that the EMRs and associated documents contain the requisite level of controls to ensure Phase One is delivered to the optimum possible standard. The Council should not seek to amend this process.

Compliance with the EMRs and the Planning Forum Notes

- 9.22 Section 3 above demonstrates how Schedule 17 operates and 7 above explains how the EMRs form part of the Schedule 17 framework.
- 9.23 Furthermore, paragraphs 7.18 to 7.40 of this Statement of Case demonstrates that the Appellant has submitted to the Council all the documents it is required to have done under the agreed position set out in Planning Forum Note 1, Planning Forum Note 2 and Planning Forum Note 3.
- 9.24 Section 8 above shows that the Appellant is contractually obliged to comply with the EMRs and the Council should rely on this rather than seek to duplicate, supplement or second guess the regime. It is a system which has been designed to ensure the smooth delivery of Phase One, whilst ensuring that appropriate checks and balances are in place and applicable to the Appellant. The process was approved by Parliament and the intention is that it is not revisited for each application the Appellant makes under Schedule 17.
- 9.25 In the second of its informatives the Council alleges that insufficient information has been provided. However, it has received all the information the Appellant is required to submit at this stage in the process. The Planning Forum Notes, together with the EMRs, ensure the

correct level of information will be provided at appropriate timescales within the context of the Works. By insisting on a level of information it is not entitled to, the Council is acting contrary to the Schedule 17 process, a process which has been scrutinised and approved by Parliament. In doing so, it is unjustifiably delaying a project which as set out in section 2 of this Statement of Case is of critical importance to the UK.

- 9.26 Furthermore, the Council has approved another submission at a neighbouring sites at Harvil Road for exactly the same type of development, as follows:

9.26.1 Submission reference: 73195/APP/2017/3486 - plans and specifications submission under Schedule 17 for earthworks to create 2 no. ponds, one hibernaculum and one reptile bank, together with fencing erected along the northern, eastern and southern boundaries of the site ("**Harvil Road Application**").¹⁰²

- 9.27 A copy of the Harvil Road site location plan is located at Appendix 48 of this Statement of Case. As with the Site, the Harvil Road site is located within the Colne Valley APZ. Therefore the same archaeological considerations are applicable to the Submission as were applicable to the Harvil Road submission.

- 9.28 The Harvil Road site does fall outside of the Mid-Colne Valley SMI, however, as shown throughout the AECOM Memo and in paragraphs 5.5 and 5.6 of this Statement of Case, the only part of the Works to be constructed within the Mid Colne Valley SMI are two hibernaculum suitable for great crested newts and reptiles. The AECOM Memo concludes that the impact of the hibernaculum will The AECOM Memo has considered the impact of the hibernaculum on the Mid Colne Valley SMI and has concluded that the impact will be negligible.¹⁰³ Furthermore, the AECOM Memo concludes that the overall impact of the Works will lead to "*an overall increase in conservation value of the area affected, and enable the value of this habitat to be maintained in the long term.*"¹⁰⁴. Accordingly, because the majority of the construction works are to be undertaken in that part of the Site falling outside of the Mid Colne Valley SMI and those works falling within it are *de minimis*, the same, or at least substantially similar, ecological considerations are applicable to the Submission as were applicable to the Harvil Road submission.

- 9.29 A summary of the documents submitted in support of the Harvil Road application is located at Appendix 49¹⁰⁵ of this Statement of Case. Critically, the Appellant has submitted a greater level of documents and information¹⁰⁶ for the current Site than it did for the Harvil Road

¹⁰² A copy of the decision notice is located at Appendix 47 of this Statement of Case

¹⁰³ Please refer to page 5 of the AECOM Memo under the heading "Proposals".

¹⁰⁴ Please refer to the penultimate paragraph on page 6 of the AECOM Memo .

¹⁰⁵ A copy of all of the documents submitted in support of the Harvil Road submission can be accessed via: <http://planning.hillingdon.gov.uk/OcellaWeb/showDocuments?reference=73195/APP/2017/3486&module=pl> .

¹⁰⁶ Please refer to the written statement submitted in support of the Harvil Road application, located at Appendix 50 of this Statement of case.

submission. However, the Council clearly considered the level of detail and information submitted in support of the Harvil Road submission was sufficient in order to determine the submission favourably.

- 9.30 The Council is therefore acting inconsistently, having previously approved a submission, containing a lesser amount of detail and information, with identical archaeological factors and similar ecological factors.

No evidence to justify the reasons for refusal

- 9.31 When considering plans and specifications submitted to it for approval under paragraph 3, it has been shown that the Council should consider all of the information provided to it and reach a conclusion based on that information.

- 9.32 For the Appellant's part, it has provided the Council with the necessary information, which is consistent with the EMRs (and the associated documents) and the requirements set out in Planning Forum Note 1, Planning Forum Note 2 and Planning Forum Note 3. The Appellant therefore considers that it has provided the Council with the requisite level of information and that this is sufficient for the Council to determine the Submission under the narrow confines available to it under paragraph 3.

- 9.33 In making such a determination, paragraph 7.7 of the Planning Memorandum is clear that the Council must provide a justification for its decision if it wishes to refuse the Submission.

- 9.34 Paragraph 7.7.1 provides:

"Where an authority refuses approval of a request for approval, in addition to specifying the grounds under the Planning Conditions Schedule for its decision, it shall state clearly and precisely the full reasons for its decision."

- 9.35 Paragraph 7.7.2 provides:

"Where the authority's decision in relation to the determination of plans and specifications has been reached on the ground that some aspect of the operation or work ought to be modified and is reasonably capable of being modified, or that the development ought to be and could reasonably be carried out elsewhere within the relevant limits, the authority shall include an explanation of why and how it considers the modifications should be made."

- 9.36 As a qualifying authority, the Council has signed the Planning Memorandum and is bound by its terms. Therefore, it is not sufficient for the Council to simply refuse the Submission - it must provide a justification for its decision and must show how the Submission ought to be modified. It is shown below that the Council has clearly failed to meet the statutory and EMR requirement placed upon it.

- 9.37 It has been shown comprehensively throughout this Statement of Case that the Appellant has discharged all of its requirements to date relating to the Submission. However, if, having analysed the information submitted, the Council does not consider it meets the requirements of the Planning Forum Notes, it is then required to carry out a further exercise under the terms of paragraph 3.

- 9.38 In respect of earthworks the Council must consider whether 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."* This requires the Council to carefully consider the submitted design proposals and associated documents and to ascertain

whether they *ought to and could reasonably, be modified* for the specific purposes set out in paragraph 3, namely:

- 9.38.1 *"to preserve the local environment of local amenity;*
- 9.38.2 *to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area; or*
- 9.38.3 *to preserve a site of archaeological or historic interest or nature conservation value"*
- 9.39 As in the case of the Submission, if the works do not form part of a scheduled work, the Council must also consider whether the *"development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits"*. Again, the Council must carefully consider whether the development should, and could reasonably, be relocated.
- 9.40 In the case of fencing, the Council is only required to consider whether the *"development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits"*.
- 9.41 There is no evidence the Council has undertaken this exercise. Neither the informatives accompanying the Submission or the Officer's Report indicate that the Council has carefully analysed the submitted documentation and considered whether it should and could be appropriately modified or relocated for the purposes set out in paragraph 3.
- 9.42 The Council has refused the Submission on the basis that it should preserve a site of archaeological or historic or nature conservation value. Therefore, the Council must first demonstrate that the Site has archaeological, historic or nature conservation value. The Council has produced no evidence to this effect.
- 9.43 If the Council was able to evidence that the Site has archaeological, historic or nature conservation value, in order to refuse the Submission pursuant to paragraph 3, the Council must then demonstrate that the works *"ought to ... be modified"* or that the development *"ought to... be carried out elsewhere within the development's permitted limits"* as a result of this value. To satisfy the requirements of paragraph 3, therefore, the Council must demonstrate that the proposed Works harms the archaeological or historic or nature conservation value it has attributed to the Site. As set out in paragraph 9.42 above, the Council has not evidenced that any value is attributable to the Site, let alone that such value would be harmed as a result of the Works.
- 9.44 Furthermore, even if the Council can demonstrate that the Works *ought* to be modified or *carried out elsewhere within the development's permitted limits*, the Council then needs to show that the Works *could reasonably* be so modified or relocated in accordance with paragraph 3. Paragraph 3 therefore requires the Council to demonstrate:
 - 9.44.1 how the Works could be modified; and
 - 9.44.2 where the Works could be relocated to.
- 9.45 The Council has provided no such evidence.
- 9.46 Fundamentally, paragraph 3 does not provide a mechanism for the Council to prevent the development of Phase One, or indeed the mitigation works proposed as part of the Submission. It provides the Council with the ability to modify or relocate the Works in the

event those works *ought* to be so modified or relocated in order to preserve a site which has some archaeological, historic or nature conservation value attributed to it.

- 9.47 In terms of archaeology, there is potential for archaeological value at the Site and this has been acknowledged by the Appellant throughout its submission documents and in the Environmental Statement. However, through the EMRs and GWSI:HERDS, there is already a mechanism in place to ensure that any archaeological value at the site is managed appropriately.
- 9.48 In practice, and in accordance with the EMRs, the Appellant would have two options if it discovered significant archaeological remains, as follows:
- 9.48.1 the first is to relocate the Works away from the archaeological remains, leaving them preserved and in-situ - this is clear from paragraph 4.6.3 of the Heritage Memorandum, which provides "*Works may include the protection and preservation of assets in situ...*" This position was comprehensively set out by Mr Ian Williamson of Fusion, who wrote to Mr Sandy Kidd of the GLAAS on 29 January 2018¹⁰⁷ and explained:
- "Ultimately, at the Colne Valley Wetland site, if archaeological investigation identifies assets which should be preserved in-situ and which 'clash' with proposed pond location, the habitat site will need to be redesigned and, potentially, a new Schedule17 submission made."*
- 9.48.2 The second option is to investigate, record, analyse, report and archive what is discovered, as required by paragraphs 4.6.2 to 4.6.5 of the Heritage Memorandum and set out in the GWSI:HERDS.
- 9.49 Therefore, there is no justification that the Works *ought* to be modified or relocated. The Appellant is alert to its responsibilities relating to archaeology and is contractually obliged to adhere to the principles and processes set out in the EMRs and GWSI HERDS.
- 9.50 Further, the Council has approved the Harvil Road submission, which was also located within the Colne Valley APZ and requires the Appellant to adhere to the same archaeological methodologies. The Council did not consider that the works *ought* to be relocated or modified in that submission and cannot, therefore, justify a reason for refusal in this instance, whereby the same archaeological principles are applicable.
- 9.51 In addition, the Gas Works¹⁰⁸ are due to be undertaken prior to the Works and so any necessary archaeological measures will have already been assessed and completed.
- 9.52 In terms of ecology, only two hibernaculum are to be constructed within the Mid Colne Valley SMI. The impact of the hibernaculum has been assessed and is considered to be negligible. The AECOM Memo also demonstrates that the part of the Site which is included within the Mid Colne Valley SMI is of limited ecological significance. However, any value which is attributable will be lost if this Site is not deemed to be acceptable for the purposes of an ecological mitigation site. Pursuant to the Crichel Down Rules and the EMRs, the land

¹⁰⁷ A copy of this correspondence is located at Appendix 34 of this Statement of Case.

¹⁰⁸ Please refer to paragraphs 9.66 to 9.73 below.

will be returned to agricultural land if it is not used as part of Phase One. The Submission seeks to create a permanent ecological mitigation site (which, pursuant to the AECOM Note, will significantly enhance the ecological value attributable to the Site), whereas any current ecological value at the Site can only be temporary if it is not used for the Works.

- 9.53 Therefore, the Council cannot justify that the Works *ought to, and could reasonably, be* modified or relocated - the appellant is replacing a site of limited, temporary, ecological value and replacing it with a permanent ecological facility which enhances the nature conservation value at the Site.
- 9.54 Therefore, it is clear that the Council has not provided any rationale for its decision to refuse the Submission. It is required under the legislation and the EMRs to justify its decision and to suggest how the Works ought to be modified and where the Works ought to be relocated to. It has failed to provide such a justification and so has not met the statutory or the EMR test.

The Council is acting contrary to the Planning Memorandum

- 9.55 In order to become a "qualifying authority" for the purposes of the Act, the Council is required to have signed the Planning Memorandum (Annex 2 to the General Principles) and pursuant to paragraph 2.1.2, the Planning Memorandum *"is binding on any authority which has chosen to sign it."* As a qualifying authority, the Planning Memorandum is consequently binding on the Council.
- 9.56 In the context of seeking approvals under Schedule 17, paragraph 1.1.2 of the Planning Memorandum provides that it *"seeks to ensure that the process of obtaining these approvals does not unduly hinder construction of HS2. It sets out the process of obtaining submissions, and details the responsibilities of the nominated undertaker and of those planning authorities which choose to sign up to this Memorandum - the qualifying authorities."*
- 9.57 Section 4 of the Planning Memorandum details how the Council must join together with other qualifying authorities and Government representatives to form the Planning Forum in order to *"help co-ordinate and secure the expeditious implementation of the planning provisions in the [Act]."*¹⁰⁹ The Council is consequently a member of the Planning Forum and *"is obliged to take into account its conclusions."*¹¹⁰ Further, paragraph 4.1.4 of the Planning Memorandum provides that *"In considering requests for approval, qualifying authorities will have regard to the Planning Conditions Schedule contained in the [Act], the conclusions of the Forum and the Planning Forum Notes. Qualifying Authorities will also have regard to any statutory guidance given under paragraph 26 of the Planning Conditions Schedule."*
- 9.58 As set out above, the Planning Forum notes¹¹¹ require a certain level of information and detail to be provided to local planning authorities when submitting applications under Schedule 17. Paragraphs 7.17 to 7.34 of this Statement of Case demonstrate that the Planning Forum has

¹⁰⁹ Paragraph 4.1.1 of the Planning Memorandum.

¹¹⁰ Paragraph 4.1.2 of the Planning Memorandum.

¹¹¹ Copies of Planning Forum Note 1, Planning Forum Note 2 and Planning Forum Note 3 are located at Appendices 23, 24 and 25 of this Statement of Case respectively

reached a conclusion on the requisite level of information in order to approve the Submission and that the Appellant has provided the necessary level of detail.

- 9.59 The Council has been provided with the level of information the Planning Forum has deemed sufficient in order to consider an application of this nature. The Appellant has also adhered to all of the requirements under the EMRs and will remain contractually bound to do so in the future. The Appellant considers it has provided the Council with the necessary level of information in order to make a determination under paragraph 3.
- 9.60 When considering submissions under Schedule 17, the Council must ensure that the Appellant has complied with the measures and controls placed upon it through Schedule 17 and the associated statutory guidance. The approval process should not be an opportunity for the Council to re-open issues which have already been resolved or to amend a system which has received Parliamentary approval. Indeed, if the Council had not signed the Planning Memorandum and opted in to being a qualifying authority, the Appellant would not have been required to prepare Submission for this Site as Schedule 17 would not apply to it. Consequently, the Council would not have the power to refuse a submission made under paragraph 3. The Appellant is not required to submit plans and specifications for approval to such "non-qualifying authorities". In such circumstances, the Appellant is still required to abide by the EMRs and to work collaboratively with local planning authorities to ensure works are delivered appropriately.
- 9.61 Naturally, this does not render the "qualifying authority" status irrelevant, but it does provide some context. The default position under the Act is that the Submission would not need approval. Local planning authorities "opt in" to having such status and are duty bound to consider Statutory Guidance, the Environmental Statement, the EMRs and the conclusions of the Planning Forum.
- 9.62 Clearly, as set out throughout this Statement of Case, the Appellant has submitted the requisite amount of information which is considered sufficient for the Council to determine the Submission. The responsibility of a qualifying authority is to apply the test set out in paragraph 3 and consider whether the development ought to, and could reasonably, be relocated or modified. The Council has shown no evidence that it has undertaken this test and cannot therefore show any evidence to justify its reasons refusal.
- 9.63 Furthermore, section 2 of this Statement of Case sets out the significance of Phase One in this country. Paragraph 7.2.1 of the Planning Memorandum sets out the fundamental role qualifying authorities have in the process, namely they should *"not seek to impose any unreasonably stringent requirements on the requests for approval of any ... plans or specifications ... which might frustrate or delay the project, or unreasonably add to its cost. In particular, the qualifying authority shall not seek to impose unreasonably stringent requirements or standards in respect of land use, planning, design or environmental matters."*
- 9.64 The Council has been provided with the appropriate level of information in order to approve the Submission, both in the context of the EMRs and the Planning Forum notes. The information submitted clearly demonstrates that the Works do not need to be modified or relocated, and there has been no evidence submitted by the Council to the contrary.
- 9.65 In addition, the Council has the security that the Appellant is obliged to comply with the EMRs throughout the delivery of the Works and will continue to collaborate with the Council and the relevant consultees going forwards. Requesting an unnecessary level of information at this stage is contrary to how the Schedule 17 process has been designed and the Council is making *"unreasonably stringent requirements"* which are having the direct effect of

frustrating and delaying the project, whilst causing the Appellant to incur the unnecessary cost of having to pursue this Appeal.

Other Scheduled works as part of HS2

- 9.66 As part of the wider works of Phase One which are authorised by the Act, the Appellant is diverting a gas main which shall be installed underneath the proposed Site ("**Gas Works**").
- 9.67 A plan for the Gas Works is attached to this Statement of Case at Appendix 51 The plan demonstrates that a pipeline will be diverted to run the length of the eastern part of the Site, with the majority of the remainder of the Site forming part of the proposed "*Site setting out and working areas*".
- 9.68 The Gas Works themselves are not an earthwork for the purposes of paragraph 3 and therefore falls outside the scope of the Schedule 17 regime - no approvals are required from the Council for the Gas Works.
- 9.69 The Gas Works are therefore proposed to take place beneath the Site.
- 9.70 Because Gas Works will be undertaken prior to commencement of the Works, archaeological concerns will have been dealt with through the EMR process. Indeed, the Appellant has already produced an interim report in respect of the Gas Works.¹¹² As a consequence of the Gas Works, the Appellant will have already adhered to all of the necessary EMRs and all archaeological remains at the site will have been identified and dealt with appropriately. This is particularly significant in the context of the Site falling within an APZ, as the fact that the Gas Works will already have taken place through the Site make it an ideal location to avoid unnecessary disturbance elsewhere. This is a significant consideration that should carry significant weight in considering whether the Site is an appropriate location for the proposed works.
- 9.71 Consequently, any concerns relating to archaeological value will have been removed as a result of the earthworks and associated development required to lay a pipeline underneath the Site.
- 9.72 Furthermore, the letter from GLAAS to the Appellant dated 2 February 2018 is consistent with, and has informed the Council's reason for refusal, yet it has failed to consider the fact that the Gas Works will already have taken place through the Site, therefore rendering the Site an ideal location for the Works as it ensures other areas within the APZ do not need to be disturbed.
- 9.73 Therefore, the archaeology beneath the Site will have been mitigated in accordance with the Heritage Memorandum and GSWI:HERDS.

¹¹² Interim report for trial trenching at 18 inch pipe - spur, 450NB Pipeline Diversion (007) Fulmer to Haste Hill (Document number: 1EW02-CSJ-EV-REP-S002-000018) a copy of which is located at Appendix 52 of this Statement of Case.

10. CONCLUSIONS

- 10.1 The reasons for refusal are rebutted by the Appellant for the reasons outlined in section 9 of this Statement.
- 10.2 The Appellant is required to submit a certain level of information when making a Schedule 17 submission. It has been clearly shown that the Appellant has provided the Council with the requisite information in order to approve the Submission.
- 10.3 It is clear from the Officer's Report and the informatives that the Council expects a higher level of information at the submission stage. However, this is not a 1990 Act application and the Council is not entitled to level of information it requires - this is clear from the analysis set out throughout this Statement of Case.
- 10.4 The EMRs have been created to demonstrate that a critical piece of infrastructure in the UK is delivered appropriately. The EMRs and associated documents ensure the Council will receive the necessary information and documentation in due course, at appropriate stages in the process. They also serve to ensure that a collaborative approach is adopted throughout Phase One between the Appellant, local planning authorities and other relevant expert bodies. It is the EMRs that contractually bind the Appellant to deliver the Works in the appropriate manner.
- 10.5 It is clear that additional controls and information sought by the Council in respect of the Submission are already provided for in the EMRs. The Council should not seek to replicate the controls of the EMRs, nor should it refuse an application on a perceived lack of information when the Appellant is contractually obliged to follow the EMR requirement.
- 10.6 The Council's reasons for refusal are indefensible. The Council has applied the paragraph 3 test inappropriately. This is clear as it has not demonstrated:
- 10.6.1 how or why 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; or
- 10.6.2 that the development ought to, and could reasonably, be carried out elsewhere within the developments permitted limits.

The Council has provided no evidence to justify these reasons for refusal.

- 10.7 If the Site is deemed inappropriate in order to be used as a mitigation site for endangered species in accordance with the Submission and if the Appellant is unable to use the Site for any other form of mitigation measure, the Appellant, pursuant to the Crichel Down Rules, is required to offer the land back to the landowner by virtue of the fact it will not be used for the purpose of Phase One. If the landowner accepts the offer, then the Site will return to an agricultural use and any ecological value which has culminated whilst the Site has been left fallow, will be removed.

- 10.8 In the event the landowner does not accept the land, the Appellant is contractually obliged, pursuant to the EMRs,¹¹³ to restore the land to agricultural use.
- 10.9 In addition, the Council is acting contrary to the requirements placed on it in the Planning Memorandum. By signing the Planning Memorandum, the Council accepted that it must take all of the Planning Forum conclusions and the EMRs into consideration when determining applications for approval. It has failed to do this.
- 10.10 Further, the Council "opted in" to becoming a "qualifying authority". The Schedule 17 process was not designed in this way to allow Councils to opt in and subsequently reconsider the entire Schedule 17 process - refusing submissions without proper consideration of the EMRs. The default position under the Act is that there is no requirement for the Appellant to submit plans and specifications for approval - non-qualifying authorities are forced to rely on the EMR process as a mechanism for ensuring the Appellant delivers Phase One appropriately. The Council should not be second-guessing or modifying a process which has already undergone Parliamentary scrutiny and, ensures Phase One is delivered appropriately.
- 10.11 The Council is also acting inconsistently with regards to other Schedule 17 applications it has received. It is shown in paragraph 9.26 above that the Council has approved another submission made under Schedule 17 at a neighbouring site which would have the same ecological and archaeological vulnerabilities. Critically, the same level of information was submitted to the Council for these other applications and the Council has approved them, whilst providing an identical informative which it has now relied upon to refuse the Submission. It is unclear why the Council is suddenly refusing an identical application (albeit for a neighbouring site) which contains the same level of detail as those it has previously approved.
- 10.12 The Council's reasons for refusal cite concerns relating to the archaeological or historic interest or nature conservation value at the Site. It has been comprehensively shown that, in terms of archaeology, the Appellant is required to adhere to the EMRs and to ensure that archaeology will be investigated, recorded, analysed, reported and archived. Furthermore, as the Gas Works will be undertaken prior to commencement of the Works, any archaeological concerns will have been identified and dealt with through the EMR process before the Works are undertaken. As a consequence, the Site is an ideal location for the Works and directly contradicts the Council's reason for refusal that *the development ought to, and could reasonably, be carried out elsewhere within the developments permitted limits*.
- 10.13 In respect of ecology, it has been shown that the proposed Works will increase the ecological value at the Site and create a permanent ecological value, rather than the limited, temporary nature of the ecological value which currently exists at the Site.
- 10.14 By virtue of paragraph 9.1.1 of the Planning Memorandum, the Council is also required to consider the assessments in the Environmental Statement. The Council has provided no evidence it has met this requirement, nor has it provided any evidence to suggest the impacts as assessed in the Environmental Statement would be exceeded by virtue of the Works to be undertaken. Such an analysis is necessary for the Council to properly demonstrate that the works ought to be modified or relocated. On the contrary, the AECOM Memo clearly demonstrates that the Works do not fall outside the scope of those impacts which were assessed as part of the Environmental Statement.

¹¹³ Please refer to paragraph 4.11.1 of the Environmental Memorandum.

- 10.15 The Council has not provided any justification for its reason for refusal. This is both a requirement of the Act and the Planning Memorandum. The Act does not place the burden of proof on the Appellant to demonstrate in a submission under Schedule 17 that a proposed location for development is the optimum one compared to all other land within the Act limits. To effectively refuse the Submission, there is a burden of proof on the Council to demonstrate how the works ought to be modified and where they ought to be relocated to. Should the Inspector be minded to refuse this Appeal, the same burden of proof would be applicable.
- 10.16 For these reasons, the Appellants respectfully request that the Appeal is allowed.