



# MetroWest+

## Portishead Branch Line (MetroWest Phase 1)

**Planning Inspectorate Reference: TR040011**

**Applicant: North Somerset District Council**

### **8.2 – Legal Opinion from Stephen Tromans QC regarding the Report to Inform the Habitats Regulations Assessment**

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**Version: 2**

**Date: March 2021**



**IN THE MATTER OF  
METROWEST PHASE 1  
PROJECT**

**The Avon Gorge Woodlands SAC**

**The Conservation of Habitats and Species Regulations  
2017**

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**OPINION**

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1. I am instructed to provide this advice by North Somerset District Council (NSDC) in the context of an application for a DCO, with the intention that the Opinion will accompany the DCO application and will help to inform the Examining Authority in producing its Report on Impacts on European Sites. The version of the Opinion dated 13 November 2019 has been updated in this version to reflect legal and factual developments since that date<sup>1</sup>, in particular:
  - (a) Amendments to the Conservation of Habitats and Species Regulations 2017 to reflect the arrangements on the United Kingdom leaving the EU.
  - (b) The provision of new guidance on 24 February 2021 by the Government on Habitats Regulation Assessment and Protecting European Sites
  - (c) Factual developments during the course of the Examination, in particular in respect of the compensation to be delivered in relation to the loss of protected woodland and grassland.

**Facts**

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

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<sup>1</sup> The ES, HRA, and Avon Gorge Vegetation Management Plan have similarly been updated and amended in terms of these developments and I have reviewed these latest versions.

Portishead to allow for passenger services. In order to reopen the line from Portishead to Pill, NSDC needs to obtain a DCO.

3. Part of the existing operational railway runs through the Avon Gorge Woodlands SAC and the Avon Gorge SSSI. The main habitats in question are *Tilio-Acerion* woodland<sup>2</sup> and *Festuca-Brometalia* grassland<sup>3</sup>. The *Tilio-Acerion* woodland is a priority habitat and some of it is diverse ancient woodland with uncommon species in the ground flora. In addition the site supports many rare plants, which include endemic whitebeam trees found nowhere else in the world.
4. Likely significant effects as a result of the project could not be excluded and hence an appropriate assessment (HRA) was required. The Stage 2 HRA concludes that the possibility of an adverse effect on integrity could not be ruled out because there would be clearance during the construction work in the SAC of: (1) 0.06ha of *Festuca-Brometalia* grassland (a loss of 0.84% of the SAC total); (2) 0.73ha of *Tilio-Acerion* woodland priority habitat (0.69% of the SAC total); and (c) up to 27 whitebeam trees. Nothing in the February 2021 Guidance affects that conclusion.
5. The extent of the work is affected by the more rigorous safety requirements which apply as a result of converting the freight line to a passenger line.
6. Within the SAC the application site is subject to an existing Site Management Statement (SMS) and a Vegetation Management Plan (VMP), both produced by NR, which have been approved by Natural England (NE) and are irrespective of the DCO Scheme.
7. The current NR SMS (*Avon Gorge SSSI and SAC POD Branch Line*) is valid for 5 years from 1 July 2018 until 30 June 2023. It replaces the previous SMS which expired in 2008. It is produced under s. 28H of the Wildlife and Countryside Act 1981 (as amended) in respect of routine maintenance operations. These operations are agreed with NE and are granted assent under s. 28H. The SMS also states that it is intended to help both NR and NE to fulfil their duty as public bodies under s. 78G to conserve and enhance the special interest features of the SSSI when performing their duties. The primary focus of the SMS is on operations necessary to maintain the railway, by for example keeping the line clear of vegetation, maintaining drainage and controlling burrowing animals such as rabbits. However, it does include removal of introduced or invasive species as a “secondary but important priority” with a programme and techniques to be agreed with NE following an ecology survey. It also (para. 3.2) contains

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<sup>2</sup> Mixed woodland on base-rich soils associated with rocky slopes: Annex 1 Habitat 9180

<sup>3</sup> Semi-natural dry grassland and scrubland on calcareous substrates: Annex 1 Habitat 6210.

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

8. NR has produced a document (31 May 2019) showing planned work for the first year programme under the SMS. However, this does not at present include positive commitments to address invasive species. The focus is mainly on works of vegetation maintenance for safety reasons. The revised HRA states that NR confirmed during the Examination that the VMP for the line to Portishead will be taken forward as part of a national exercise to comply with NR's new biodiversity standards.
9. The Avon Gorge VMP (AGVMP, Appendix 9.11 to Volume 4 of the DCO Scheme Environmental Statement) sets out management actions to compensate for the losses arising from the DCO Scheme. Planting of whitebeam saplings (grown from seed taken from the site and propagated and grown at Paignton Zoological Gardens) is proposed on specified areas of land either during or at the end of the construction phase, depending on whether the planting is undertaken on FC land or NR land, followed by management and monitoring for 10 years. It also contains positive management measures to be implemented during the construction phase, which are intended to result in improved management of the relevant habitats. The management is intended to be in areas which would benefit whitebeam trees in particular and to clear scrub and non-native species in areas of *Festuca-Brometalia* grassland, about twice the size of the area lost.
10. The AGVMP in its original form proposed the woodland and grassland management compensation measures on land owned by NR, but also included the possibility of compensation for woodland loss by positive management on Forestry Commission (FC) land outside of the SAC/SSSI but adjoining it, as an alternative in whole or in part to sites identified on NR land. During the Examination process it became apparent that the preference of NE was for the woodland compensation to be delivered on the land owned by the FC, essentially because in its view: (a) this would avoid possible harm to

other species of vegetation present on some of the compensation sites proposed on NR land; and (b) there is difficulty in distinguishing clearly between site management measures which NR should be carrying out in any event and the compensatory measures. NSDC does not agree that these concerns are sufficiently serious to preclude the use of the NR land, and has presented its reasons for this to the Examination. However, in fact NSDC would also prefer to use the FC land if that could be secured.

11. During the course of the Examination negotiations took place between NSDC and the FC which resulted in Heads of Terms being agreed and signed, followed by a concluded Agreement. This will allow the necessary access rights for NSDC and obligations on FC to undertake the specified planting and ongoing management for a period of 10 years, together with “step-in” rights for NSDC to have access and itself carry out the works and management in the event that FC does not wish to carry out the work itself.
12. The AGVMP as amended now reflects these arrangements in respect both of woodland management and replacement whitebeam planting.
13. In respect of woodland management, two alternative proposals for compensation for the loss of qualifying SAC woodland habitat are presented in the AGVMP. However, unless the Secretary of State specifies otherwise in determining the DCO application, all compensatory positive woodland management will be undertaken on land adjacent to the SAC which is owned by the Secretary of State for Environment, Food and Rural Affairs and managed by the FC, in accordance with the detailed woodland management plan and monitoring at Annex M to the AGVMP. The land used for compensation will be accorded protected status as a matter of policy, being treated as a European site under the Habitats Regulations with the expectation that in due course it will meet the SAC designation criteria.
14. In respect of whitebeams, two alternative packages to compensate for the loss of up to 27 individual rare whitebeam trees are presented in the AGVMP. Package 1 proposes four planting locations on NR land. Package 2 proposes two planting locations on NR land and one planting location on land owned by the Secretary of State for Environment, Food and Rural Affairs and managed by FC. Both packages are described in Annex H. Unless the Secretary of State specifies otherwise in determining the DCO application, Whitebeam Planting Package 2 will be delivered rather than Package 1. As stated above, an agreement has been made between NSDC and the FC to secure delivery of the compensation measures on FC land. NSDC will retain

responsibility under the DCO for measures on FC land for the duration of the AGVMP.

15. Given the possibility of an adverse effect on integrity of the SAC, the competent authority may only agree to the project on the basis of imperative reasons of overriding public interest (IROPI) and if there are compensatory measures to ensure overall protection of the coherence of the Natura 2000 network. A central issue is the distinction between such compensatory measures and the “normal” management measures which NR would be required to undertake in any event. This was flagged up as an issue by NE in its discretionary (charged) advice dated 7 June 2019 and as noted above has been the subject of further and ongoing discussion between NE and the promoters of the scheme.
16. At application stage the AGVMP envisaged the provision of a larger number of sites and area of land than is required as compensation by positive management. The compensation proposals are based on 1.6ha of positive management in total. The AGVMP (Ver 01) allowed for an “adaptive approach” to compensation, enabling NE to evaluate the compensation site options in combination with compensation measures to be provided by NR through the SMS and VMP, and to agree those that achieve the optimum outcome for the SAC in the light of the prevailing circumstances, which included NE’s concerns about adverse effects on some sites in NR ownership. The final arrangements under the AGVMP no longer rely on an adaptive approach, but as set out above, contemplate woodland management entirely on FC land together with Package 2 for whitebeam planting, subject to the Secretary of State determining otherwise. This solution accords with the preference of both NSDC and NE.

### **Legislation, cases and guidance**

17. The starting point in this matter is that by Article 6(4) of Directive 92/43/EC as amended (the Habitats Directive) because of the conclusions reached in the HRA, the competent authority may only agree to the project if three legal criteria for derogation are met. As retained EU law this provision remains binding after the UK’s departure from the EU and is reflected in the requirements of the Conservation of Habitats and Species Regulations 2017 Part 4,<sup>4</sup> as amended,<sup>5</sup> which apply to DCOs.<sup>6</sup> The requirements have been helpfully explained in recent Guidance published by the Government on 24 February 2021, directed to competent authorities.
18. The Guidance states that the three legal tests for derogation are to be applied in the

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<sup>4</sup> In particular regs. 64 and 68

<sup>5</sup> By the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579

<sup>6</sup> Reg.84.

following order:

- (a) There are no feasible alternative solutions that would be less damaging or avoid damage to the site.
  - (b) The proposal needs to be carried out for imperative reasons of overriding public interest. In the case of a priority habitat the reasons may only be considerations relating to human health or public safety or beneficial consequences of primary importance for the environment (absent a positive opinion from the relevant national government in England or Wales).
  - (c) The necessary compensation measures can be secured.
19. The Guidance now provides a clear framework as to each of these tests to be followed by competent authorities, including what alternatives may be regarded as suitable, what is required by the IROPI test, and the criteria to be applied to compensatory measures. The HRA document has been updated to reflect this Guidance, and demonstrates clearly how the DCO Scheme meets the tests in the new Guidance. It may be noted that the Guidance requires (a) notification to the Secretary of State of the competent authority's HRA and supporting evidence; and (b) obtaining the opinion of the Secretary of State by consulting the Department for Environment, Food and Rural Affairs when applying the IROPI derogation to permit a project affecting the integrity of a priority habitat for reasons other than human health, public safety or important environmental benefits.
20. Art. 6(1) of the Directive requires member states to establish the necessary conservation measures for SACs, involving if need be appropriate management plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the Annex I natural habitat types and Annex II species present on the site.
21. Art. 6(2) requires member states to take appropriate steps to avoid, in SACs, the deterioration of natural habitats. There is no direct transposition of this requirement in the Conservation of Habitats and Species Regulations 2017 as amended, but there is a duty on competent authorities (including public bodies and statutory undertakers) to help protect, conserve and restore European sites under regulation 9, and this is now also the subject of Guidance published on 24 February 2021: *Duty to Protect, Conserve and Restore European Sites*.
22. There has been something of a flurry of decisions from the Court of Justice of the EU (CJEU) on these provisions over the last year or so. These are summarised, in my view

accurately and comprehensively, in the HRA. So far as I am aware, there are no new significant decisions since the HRA was drafted, and the summary in it remains correct.

23. In **Case C-521/12 T.C. Briels v. Minister van Infrastructuur en Milieu** the CJEU made clear the distinction between mitigating measures to prevent adverse effects on the integrity of the site and what are in reality compensatory measures: para. 33. Knowledge of the implications for the site is a necessary precondition for determining the nature of compensatory measures: para. 36. It also made clear that compensatory measures, provided they protect the overall coherence of Natura 2000, may be implemented within the affected site or in another part of the Natura 2000 network: para. 38.
24. The distinction was emphasised in **Joined Cases C-387/15 and C-388/15 Hilde Orleans and others v. Vlaams Gewest** where it was held that the future creation of habitat, the completion of which would take place after the project was not to be taken into consideration in assessing the effect of the project on integrity. Such measures could be categorised as compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein were satisfied (para. 64).
25. In **Case C-323/17 People Over Wind, Peter Sweetman v. Coillte Teoranta**, the CJEU distinguished between what it termed conservation measures under Art. 6(1), preventive measures under Art. 6(2) and compensatory measures under Art. 6(4): para. 25. It also emphasised (para. 24) that the provisions of Art. 6 must be construed as a coherent whole in the light of the conservation objectives pursued by the Directive and that indeed Article 6(2) and 6(3) are designed to ensure the same level of protection of habitats and species (para. 23). The case was the subject of PINS guidance in the Advice Note 5/2018 (29 May 2018), which is also referred to in the HRA.
26. In **Case C-164/17 Edel Grace, Peter Sweetman v. An Bord Pleanála** the distinction was restated (paras. 47, 50). It emphasised the problem of taking into account under Art. 6(3) measures to create new habitat, which are often difficult to forecast with certainty and may only be apparent in the future – such benefits are unlikely to be established with the requisite degree of certainty required under Art. 6(3) to rule out adverse effects on integrity (paras. 52-54).
27. In **Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v. College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland** (the Dutch Nitrogen Cases) the CJEU considered authorisation procedures for agricultural activities which



cause nitrogen deposition in SACs. A number of the questions addressed by the CJEU are not relevant to this case, dealing with what constitutes a “project” and with authorisation procedures. However, paras. 121-133 of the judgment are of relevance. The key point arising from the judgment for this purpose is at para. 124, which states that the positive effects of necessary measures under Arts. 6(1) (which it called “conservation measures”) and 6(2) (which it called “preventive measures”) cannot be invoked in order to justify under Art. 6(3) authorisation for a project which has an adverse effect on protected sites. The CJEU at para. 125 also reinforced the distinction drawn in **Briels** and **Grace and Sweetman** between protective measures forming part of the project and intended to ensure it does not affect adversely the integrity of the site under Art 6(3); and on the other hand, measures which in accordance with Art. 6(4), are aimed at compensating for negative effects. The upshot is that the appropriate assessment may not rely on conservation measures under Art. 6(1), preventive measures under Art. 6(2), or compensation measures under Art. 6(4) to justify a conclusion of no adverse effect on integrity.

28. Art. 6(4) was also considered by the CJEU in **Case C-441-17 European Commission v. Republic of Poland (the Białowieża Forest case)**. The CJEU stated that as a derogation from Art. 6(3), Art. 6(4) must be interpreted strictly and can be applied only after the implications of a project have been analysed in accordance with Article 6(3). The damage caused to the site must be established in order both to conduct the assessment of IROPI and possibly less harmful alternatives under Art. 6(3) and to determine the nature of compensatory measures under Art. 6(4): see paras. 189 and 191. The CJEU also considered the nature of the obligation to establish conservation measures under Art. 6(1). The Court held that Art. 6(1) requires that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned “... not only be adopted, but also, and above all, be actually implemented” (para. 213).
29. The view of NE in its advisory letter of 7 June 2019 is that it supports the principle of compensatory planting for the loss of rare trees, at optimal locations, either on NR land or on third party land. In so far as proposed “positive management” (primarily control of invasive species) is concerned, NE agrees that this is needed, but suggests that it is essential to demonstrate that the suggested positive management measures “are over and above the works which NR is required to do as part of its duties”. It does not cite any case-law for this, but refers to the Commission guidance on Art. 6 (Commission Notice C(2018) 7621 Final, 21 November 2018) which says (para. 3.7.6):

“Compensatory measures should be additional to the actions that are normal

practice under the Habitats and Birds Directives or obligations laid down in EU law. For example, the implementation of conservation measures under Article 6(1), or the proposal/designation of a new area already inventoried as being of Community importance, constitute 'normal' measures for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the designation, protection and management of Natura 2000 sites."

30. This is repeated at para. 3.7.8 (second bullet) of the Commission Notice:  
"... the compensation must be additional to the contribution to the Natura 2000 network that the Member State should have made under the Directive"
31. I also note what is said at the first bullet of para. 3.7.8:  
"... as a general principle, a site should not be irreversibly affected by a project before the compensation is in place. However, there may be situations where it will not be possible to meet this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as the original habitat negatively affected by a project. Therefore, best efforts should be made to ensure that compensation is in place beforehand and, in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime"
32. The recent Guidance on HRA does not refer explicitly to this case law, but principles derived from the cases are reflected in the practical Guidance on the issue of how to be confident that the compensatory measures will fully compensate for the negative effects of the proposal, for example their technical feasibility, effectiveness, viability and funding, methodology, monitoring, location and timescale. It may be noted however that the Guidance does not as a separate requirement refer to the measures not being additional to normal practice.

#### **Advice as requested**

33. It was anticipated when instructing me to provide this Opinion that one or more Statements of Common Ground on the matters covered in this Opinion between NSDC, NE and possibly other parties would be submitted during the Examination process. NSDC's intention was to append to each such Statement of Common Ground this Opinion having obtained the agreement of all parties to support the approach taken in the HRA Report. In fact the relevant Statement of Common Ground with NE has now gone through a number of iterations and will be submitted in final agreed form by Examination Deadline 6.
34. The HRA Report, both as originally submitted and in the final revised form which I have seen, in my view takes an approach which is legally correct and which follows the correct sequence under Arts. 6(3) and 6(4). It plainly takes account of recent case law from the CJEU and UK, which it correctly identifies, describes and applies. It also in my view takes proper account of PINS Guidance in Advice Note 10 on HRA and Note 05/2018 on

avoidance and reduction measures. For example, it is recognised that NR conservation measures do not form part of the DCO application, which is correct as a matter of law, in the light of the cases described above and in the HRA (see para. 1.1.27). It also now takes full account of the most recent Government Guidance of February 2021, explains how that Guidance is satisfied and provides the evidence base required by the Guidance. This aspect is discussed in more detail below.

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

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

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

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

36. The correct approach, in accordance with the case law of the CJEU described above, is to identify, through the process of appropriate assessment, what adverse impact on the integrity of the SAC will occur as a result of the project: this then determines the nature of the compensation measures necessary in order to ensure protection of the overall coherence of Natura 2000. The starting point is that the compensation package should relate to the harm caused by the project. The overall result required by Art. 6(4), of the Directive reflected in reg. 64 of the Habitats Regulations, as explained in my original Opinion, was the protection of the overall coherence of Natura 2000. The effect of the subsequent amendments to the Regulations under the EU withdrawal legislation is that the reference to overall coherence of the Natura 2000 network is now replaced by the national site network. The test set out in the recent Guidance requires that all compensatory measures necessary to fully offset the damage that will or could be caused to the European site should be secured; and that the compensation measures themselves must not have a negative effect on the national network of European sites as a whole, despite the negative effects of the proposal on the European site.

37. It is not the role of compensation measures to ensure that conservation measures under Art. 6(1) or preventive measures under Art. 6(2) are taken – these are distinct

obligations which apply irrespective of any impact of the project. Compensatory measures could of course comprise the same types of management measures as under Arts. 6(1) or 6(2) but the rationale is different. Compensation measures should in my view be designed on the basis that the necessary management measures will be undertaken in any event. The HRA Report (section 11.1) recognises this.

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

39. This in my view is consistent with what I understand to be the “conservation + compensation” approach.

40. It seems to me that there is a logical distinction to be drawn between the general “necessary” conservation measures and the specific compensation measures. This is because the specific compensation measures are targeted at addressing the harm caused by the project. By way of example, measures to improve the condition of the *Tilio-Acerion* woodland where the whitebeam trees will be lost (section 11.2). The conservation measures as embodied in the SMS and associated documents are significantly more generalised and less targeted than the compensation measures proposed. It seems probable that the compensation measures are more likely to deliver benefits than the relatively weaker conservation measures. As indicated above this has been the subject of some measure of debate between NSDC and NE during the Examination, but in view of the agreement reached with FC, which will allow measures to be delivered as appropriate on FC land, and the way in which this will feed through into the DCO by reference to the AGVMP, it is a debate which has become academic for the purposes of this application (subject of course to the Secretary of State’s views on which compensation package should ultimately be required).

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

41. I should make clear that this question was relevant at the time of my original Opinion in view of the adoption of the “adaptive” approach to woodland management compensatory measures as explained above. The question is not now so relevant,

since the adaptive approach is no longer part of the AGVMP. However, I have retained this section of the Opinion for completeness and to assist the understanding of the Examining Authority and Secretary of State.

42. The Directive does not prescribe whether compensation takes place on the affected site or elsewhere: the only criterion is whether it does adequately compensate for the adverse effect on integrity by ensuring the overall coherence of Natura 2000. Equally, the recent Guidance plainly allows compensation to take place at suitable locations outside the site, though compensation closer to the affected site is generally preferred over more remote locations. Therefore compensation by management on FC land is permissible, provided of course it meets the criteria in the Commission Notice and now in the recent Government Guidance: sufficiently targeted to the harm; feasible and effective; technically feasible; adequate in extent; located in areas where they will be most effective; and acceptable in timing; how well secured it is; its monitoring over time; and timing. I deal with these issues further below. As explained above, the policy context is that the compensation land is likely ultimately to be afforded legal protection by being designated as an SAC, and in the interim enjoys equivalent protection as a matter of policy. The landowner of the property managed by the FC on which compensation measures are proposed is the Secretary of State for Environment, Food and Rural Affairs, who is the appropriate authority under regulation 12 of the Habitat Regulations and has a duty to designate as special areas of conservation sites that meet the criteria for sites of national importance. The Secretary of State for Environment, Food and Rural Affairs c/o Forestry Commission is party to the agreement with NSDC to provide compensation measures on the land managed by the FC.
43. The first point is therefore to demonstrate that 1.6ha (1.45ha woodland and 0.15ha grassland), taking account of an appropriate ratio, represents an area for management which is adequate to compensate for the habitat lost or damaged. This is an area by definition additional to the areas required to be managed to provide conservation measures. Provided it is clear that the candidate areas are suitable, I see no reason why (provided there is a clear legal obligation imposed in the DCO) it could not be left to NE to determine which areas should be utilised to deliver the 1.6ha as compensation, considering this in conjunction with the measures which NR will have to deliver in any event and in the light of circumstances and knowledge at the time. As explained above, this is not the solution to compensation ultimately agreed with NE, however.

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

44. Establishing the adequacy of the compensation measures is a matter for the competent authority, applying the recent Guidance. This states that the competent authority should “be confident that the measures will fully compensate for the negative effects of the proposal” and should consider the following:
- How technically feasible and effective the measures will be – based on scientific evidence and previous examples.
  - How financially viable the measures will be – the proposer must have enough funds to cover the costs.
  - How the compensation will be carried out, including how it will be managed and monitored over the time needed and how it has been secured.
  - Distance from the affected site, compensation closer to the site being generally preferred.
  - How long the compensatory measures will take to reach the required quality and amount of habitat.
45. The HRA does in my view demonstrate a correct understanding and application of the legal principles, in particular (para. 1.3.29) the principle of compensation being additional to measures to comply with other obligations under the Directive, and the implications of this for the treatment of measures under the NR SMS.
46. As discussed above, land amounting to 4.15ha within the ownership of the Forestry Commission which is outside but abutting the boundary of the SSSI/SAC is included at the suggestion of NE as area within which there is the option for the siting of up to 1.45ha of woodland compensation measures, as an alternative to using NR land.
47. Use of the FC land has now been secured by legal agreement and as discussed above, this would be the preferred site for the relevant compensation for both NE and NSDC this seems to me to be in line with the adaptive approach to compensation, which I think is legally acceptable.
48. The competent authority will need to be satisfied that the compensation is legally secured. The mechanism for this is through the AGVMP and Requirement 14 of Schedule 2 to the DCO which requires implementation of the AGVMP. As undertaker, NSDC will be responsible for ensuring that the AGVMP measures are undertaken, whether by itself or by NR or the FC. Under the terms of the agreement reached

between the FC and NSDC, the planting and maintenance of whitebeams and the positive woodland management measures will be undertaken by FC, with licences granted to NSDC to ensure that the AGVMP measures are delivered throughout the duration of the Plan and with provision for step-in rights in the event that FC notifies NSDC that it does not wish to undertake the positive management measures or the measures are not being undertaken by FC in accordance with the AGVMP. This should provide the Examining Authority and Secretary of State with the necessary degree of confidence that the compensation is secured and will be carried out in accordance with the AGVMP.

49. The other requirements on compensation mentioned in the Guidance are also met by the AGVMP. The provision of areas of compensation on a 2:1 basis for the woodland areas lost (on a worst case basis), of replacement whitebeams also on a 2:1 basis and of *Festuco-Brometalia* grassland compensation on more than a 2:1 basis provides confidence as to full compensation. The compensatory measures for woodland are to be undertaken within or adjacent to the SAC and cover an area more than double that lost. Therefore, the coherence of the habitat within the national site network will be maintained. As the HRA explains, the loss of an estimated 0.06 ha (0.84%) of qualifying grassland as part of the DCO Scheme is mainly due to the location of a construction compound in a disused quarry and vegetation clearance along the new fence-line. Some of this habitat loss is considered to be temporary and to extend for as long as the construction phase (20 months) and then the time taken to restore the grassland following removal of the site compound and for grassland species to regenerate naturally (in places) along the fence line. Given the small quantity of habitat loss relative to the total extent in the SAC and in the wider national site network, the temporary nature of some of the loss and the proposals to remove scrub and invasive species from an area more than double that lost, the HRA concludes that coherence of the habitat within the national site network will be maintained, which appears to me a correct conclusion.
50. The measures of woodland management and grassland management are well tried and can be shown to be technically feasible and effective. The planting of replacement whitebeam trees is a less certain and established technique, some species being inherently difficult to propagate, but the AGVMP recognises the uncertainties involved in propagation and makes provision for this. In particular a programme of seed collection and propagation has been in place since 2016 to provide sufficient saplings to compensate those lost. Collecting seed across a number of years and using different locations and methods for propagation aims to minimise the risks of failing to achieve

sufficient germination and establishment of sufficient saplings of the rare species. To maximise the stock available for planting, propagation of new stock will continue during the 10 year maintenance and monitoring period. Current contracts with University of Liverpool Ness Botanic Gardens, Bristol Botanical Garden and Paignton Zoo are for propagation to continue until 2023. New contracts will be agreed after this for the 10 year maintenance and monitoring period after initial planting.. The relative proportions of each whitebeam species in the planting proposals will be reviewed at the time of initial planting. Thought has been given and provision made for the situation if there is not enough of the relevant whitebeam species either at initial planting or at any time during the monitoring period for replacement to meet the ratio of 2:1.

51. In terms of how the compensation will be carried out, in respect of replacement planting and grassland/vegetation management on NR land, NR will manage the Main Contractor and NSDC will have an overseeing role to ensure that the plan is implemented. NSDC will be responsible for maintenance of the area of replanted whitebeams on NR land under licence agreed with NR for the ten year duration after initial (year 1) planting. NR will be responsible for those activities required on its operational railway land during the operational phase of the railway once this plan is complete and NDC will no longer be involved. This plan will be complete once the management and monitoring actions have been undertaken for up to ten years. Compensation on FC land will be carried out under and in accordance with the terms of the Agreement between NSDC and the FC, either by FC or by NSDC. An additional layer of protection is afforded by the general duty on NR and FC as public bodies to protect, conserve and restore European Sites which they own, occupy and manage, pursuant to the February 2021 Guidance.
52. In terms of monitoring, the AGVMP makes provision for this both in Annex H on Whitebeam planting and in Annex M on woodland management. Annex H provides for checks on replacement Whitebeams for 10 years after initial planting, with the saplings being checked in March and September to undertake care requirements such as removal of weed growth and removal of surrounding competing vegetation if necessary. Annex M sets out objectives, indicators, assessment methods and frequencies, to ensure that there are objective criteria in respect of woodland management. Where planting is on FC land, FC will undertake monitoring and management with NSDC retaining responsibility under the DCO for ensuring that the AGVMP measures are undertaken and the ability to step-in if necessary. With regard to compensation measures for grassland and rare plants, such as Bristol rock-cress, the AGVMP makes provision for monitoring. The Bristol rock-cress receptor areas will be checked and



monitored twice a year by NSDC in Years 1 and 2 after planting, then annually in Years 3, 4 and 5 and Years 7 and 9. The aim will be to ensure survival of the rock cress and replace dead plants if necessary in years 1-5, and to learn about growth of the rock-cress, which can be used to inform potential future mitigation plantings in the long term.

53. In terms of distance from the affected site, the compensation is either on site or on adjacent land, in accordance with the preference expressed in the Guidance.
54. Provision is made in the AGVMP reflecting the length of time that compensatory measures will take to reach the required quality. A 10-year period is allowed for, the lengthiest period obviously being in respect of planting saplings to replace affected trees.

### **IROPI**

55. Obviously it is ultimately for the Secretary of State, with advice from the Examining Authority, to decide whether an IROPI case is made out, as the HRA recognises. However, the HRA has certainly identified and in my view correctly applied the test, distinguishing between priority and non-priority habitats. The points made on IROPI in relation to public safety and human health in respect of the priority habitat are in my view reasonable and proper arguments, which should carry substantial force, and the specific points made as to the unusual nature of the DCO scheme (para 1.8.1) are in my view also reasonable points for the Secretary of State to take into account. In my view, in addition to the safety and human health arguments, there are additional reasons in support of the derogation for the priority habitat, which can be taken into account if necessary, subject to obtaining the opinion of the Secretary of State for the Environment, Food and Rural Affairs. Specifically, it is relevant that this is a scheme promoted by a consortium of local authorities for public good rather than private profit, resting on economic and social grounds, which will provide long term benefit for the public and the environment and which will contribute to overcoming an increasingly unsustainable situation in terms of highway links, with attendant adverse consequences for social mobility, economic growth, public health and climate change.



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15 March 2020

**In the matter of:**

**Metrowest Phase 1 Project**

**The Avon Gorge Woodlands SAC**

**The Conservation of Habitats and  
Species Regulations 2017**

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**OPINION**

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