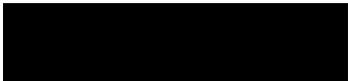


BY EMAIL AND SPECIAL DELIVERY

Rt Hon Grant Shapps MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR

shappsg@parliament.uk / dft@dft.gov.uk

Direct Dial: 020 7650 1102

Email: 

Your Ref:

Our Ref: TGY/TWS/00186983/3

Date: 16 September 2019

Pre-action Protocol Letter - Requires your Urgent Attention

Dear Secretary of State,

Re: Pre-Action Protocol Letter: HS2 – Authorisation of Enabling Works Pending Review

We are instructed on behalf of Mr Chris Packham CBE who is well known for being an individual with a particular concern for the natural environment including in the UK.

This is a pre-action letter under the Judicial Review Pre-Action Protocol.

This letter has been drafted following the Government's announcement, on Tuesday 3 September 2019, that it had authorised HS2 Ltd to continue with unnecessary (as explained below) enabling works on the HS2 project during the period pending the outcome of the independent cross-party review into whether and how HS2 should proceed.

A. Proposed claim for judicial review to:

Rt Hon Grant Shapps MP
Secretary of State for Transport
Department for Transport
Great Minster House

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B. The Claimant

The proposed Claimant is Mr Chris Packham CBE. Please address all correspondence to the Claimant's legal advisors at the address given below.

C. The Defendant's reference details

The Claimant is unaware of any reference details of this claim for the Defendant.

D. The Claimant's legal advisors

Leigh Day
Priory House
25 St John's Lane
London EC1M 4LB

E. Details of the matter being challenged

The Secretary of State's decision (by way of a written statement to Parliament published on the Government's website on 3 September 2019) that pending the conclusions of the independent review HS2 Ltd, can still continue the current works that are taking place on the project.

F. The details of any Interested Party

High Speed Two (HS2) Limited
Two Snowhill
Snow Hill Queensway
Birmingham B4 6GA
Email: HS2enquiries@hs2.org.uk

G. The Issue

Background Facts

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- 1) On Wednesday 21 August 2019, the Government announced that there would be an independent cross-party review of the HS2 programme, chaired by Douglas Oakervee (the “Review”). As stated on the Government’s website, the Review’s terms of reference are to consider, by Autumn 2019, “whether and how HS2 should proceed” ahead of the Government’s decision whether to issue the ‘Notice to Proceed’ for Phase 1 (London-West Midlands), expected at the end of 2019.
- 2) The Review is considering both (i) whether to continue the HS2 project at all and (ii) whether to change the scope of the HS2 project. Mr Packham assumes (but please correct him if he is wrong) that this will be a genuinely open-minded review of all aspects of the proposal. In other words, it should not be assumed that any previous conclusions as to claimed benefits of HS2 will be maintained. If that is not so and things can nonetheless be assumed, please be clear what and why.
- 3) On Tuesday 3 September 2019, the Government provided an “HS2 update”, by way of a written statement to Parliament. The Secretary of State announced a decision taken by him personally that “[d]uring the short period in which the independent review completes its work I have authorised HS2 Ltd to continue the current works that are taking place on the project” (the “Decision”).
- 4) The “current works that are taking place on the project” include various “enabling works” which will result in the irreversible and irreparable removal and/or destruction of a number of designated ancient woodlands (“the Unnecessary Works”), as well as potentially cause significant harm to species living within them.

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- 5) The Claimant understands that there are 13 such ancient woodlands (the “Ancient Woodlands”) that will be so affected by the Unnecessary Works as set out in the Schedule to this letter; also that for some of those sites, the Unnecessary Works are expected to commence as soon as 7 October 2019 (such as, for example, the ancient woodland in South Cubbington).

- 6) The Ancient Woodlands have been designated because of their significant historic, ecological and environmental value. As can be seen in the Schedule, they also provide habitats for many rare and protected species. They took many hundreds of years to establish and are defined by the Government as an irreplaceable habitat.

- 7) The NPPF 2019 sets out national policy on planning and related matters. At paragraph 175(c) it states:

“development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists...”

- 8) This reflects the Government’s recognised position on how it will consider development that would result in the loss or deterioration of irreplaceable habitats such as ancient woodlands. It reflects similar government policy in the standing advice produced by Natural England and the Forestry Commission, *‘Ancient woodland, ancient trees and veteran trees: protecting them from development’*.

- 9) The Claimant understands that a number of European Protected Species (“EPS”) are also present within the Ancient Woodlands, including for example various species of bats. There appears to the Claimant to be a real risk that these EPS will

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be disturbed, and (or in the alternative) their breeding sites or resting places will suffer deterioration or destruction by the Unnecessary Works.

10) Although this letter (and this part in particular) is focused on those aspects of the Unnecessary Works impacting on the Ancient Woodlands and any EPS within them, the Claimant wishes to stress that this should not be taken to imply a lack of concern for the environmental and other impacts of other parts of the Unnecessary Works. However, the Claimant's priority here is to avert the potentially unnecessary and irreversible loss of, or damage to, established and important wildlife habitats.

11) And, even if, which Mr Packham does not accept but which is not the focus of this letter, there might be no particular objection generally to continuing with the Unnecessary Works in the interim Period, the same cannot be said of those aspects which impact on the Ancient Woodlands.

Ground 1 – Irrational to allow for irreversible impacts for no benefit

12) The Unnecessary Works – which (among other things) will cause the loss of, and destruction to, the Ancient Woodlands – were originally authorised as part of the overall HS2 project. In other words, the alleged public benefits associated with the outcome of the overall HS2 project were determined to outweigh these significant adverse effects of the proposed scheme.

13) Following the Government's decision to fully review whether and, if so, to what extent it will continue with the HS2 project, those wider benefits can (for now at least) no longer be assumed not least because there currently exists a real possibility that HS2 will happen only in part, or in a different way, or not at all.

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- 14) Consequently, there is a real possibility that if the Unnecessary Works continue to go ahead during the interim period between now and any decision by the Government as to the next steps on the project (the “Interim Period”), irreversible loss to the Ancient Woodlands will be caused for no reason whatsoever (either because HS2 will be cancelled or changed in a way that no longer requires the loss of/destruction to the Ancient Woodlands).
- 15) Indeed, given that, as above, none of the previously claimed benefits can be relied on during the period of the review (and unless and until reinstated by that review process) undertaking the Unnecessary Works in that period (in particular insofar as it impacts on the Ancient Woodlands) leads to irreversible impacts for what must be assumed to be no benefit.
- 16) In this context, it was simply irrational for the Defendant to make the Decision, at least insofar as it permits works which may impact on the Ancient Woodlands. By authorising the Unnecessary Works to continue during the Interim Period, the Defendant has authorised the premature and (what must be assumed in the circumstances to be unnecessary) destruction of the Ancient Woodlands, prior to any determination as to whether this will achieve any public benefit.
- 17) This irrationality is heightened by the relevant timescales involved. The Review is expected to produce its report within the next few months. The Government’s decision as to whether or not to proceed on the HS2 project is expected in December 2019. It is unreasonable for the Defendant not to delay such irreparable damage to the Ancient Woodlands during this short Interim Period.

Ground 2 – Unlawful failure to give effect to Government Policy

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18) The Defendant further failed to have regard to relevant national policy on the protection of ancient woodlands in relation to those aspects of the Unnecessary Works which will impact on Ancient Woodland. More specifically, the Defendant should have had regard to the Government's position, as reflected in paragraph 175(c) of the NPPF 2019, that the loss or deterioration of irreplaceable habitats (such as ancient woodlands and ancient or veteran trees) should not be allowed to take place unless there are "*wholly exceptional reasons*".

19) In this context, the Defendant should have given effect to the Government's recognition that, in the context of ancient woodlands, "*[e]stablishing new trees and woodlands is not a direct replacement for lost or damaged trees or woodland*" and that:

"You cannot move an ancient woodland ecosystem because:

- it's not possible to replicate the same conditions at another site;
- it's no longer an ancient woodland"

('Ancient woodland, ancient trees and veteran trees: protecting them from development' standing advice)

20) Further, paragraph 175(a) of the NPPF provides for a more general protection against "*significant harm to biodiversity*", stating that where this cannot be avoided, adequately mitigated or (as a last resort) compensated for, planning permission should be refused. Halting the Unnecessary Works during the Interim Period would avoid what will clearly be "*significant harm to biodiversity*".

21) Through the Decision, the Defendant has given a blanket authorisation to the Unnecessary Works during the Interim Period, without any regard to the particular environmental consequences that the Works will cause and whether or

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not this accords with national policy including the very high presumption against the loss of ancient woodland. There is simply no “exceptional circumstance” justifying damage to the Ancient Woodlands in the Interim Period (which of course must be considered separately from whatever happens after the Review, assuming the Review to be open minded). Certainly the Secretary of State has not identified anything which might amount to such a circumstance.

Ground 3 – Unlawful failure to consider whether the destruction of ancient woodlands should proceed, even if the other Unnecessary Works continue

22) Even if (contrary to the analysis set out under Ground 1 above) the Secretary of State considers there still some HS2 benefit to be claimed in the Interim Period (i.e. because the Review is not actually properly open-minded), then that still would not provide a lawful basis to proceed with the Unnecessary Works insofar as they impact on the Ancient Woodlands, particularly given their strong protections as above.

23) In particular, it would still be necessary to show that the impact of pausing that aspect of the Unnecessary Works (even if not the other parts) was justified by the costs of such a pause. That is because, once the review was announced, continuing that aspect of the works cannot in the circumstances be justified as a matter of logic or law by any longer term HS2 benefit which might be assumed in this period. The issue at this point is the impact of pausing, not the benefit of continuing (let alone any final HS2 benefit).

24) In that regard, the Secretary of State plainly needed lawfully to consider that matter: he needed to ask himself the right questions and obtain the necessary evidence to answer them. But he did not do so.

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25) There is no evidence that the Secretary of State considered that matter lawfully or at all or obtained the evidence in question. In particular there is no evidence that the Secretary of State (whose personal decision this was) had evidence before him (what was before officials here, if anything, is not material) of the cost of pausing that aspect of the works, and then balanced that cost against the irreplaceable loss of the Ancient Woodlands so as to reach a lawful decision.

Ground 4: Unlawful failure to appropriately consider impacts of Unnecessary Works on European protected species

26) As has been noted, the Ancient Woodlands are home to a number of EPS (including various species of bats) and have been recorded as providing possible habitats for further EPS (including Dormouse and Otter).

27) EPS are protected under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”), implemented by the Conservation of Habitats and Species Regulations 2017 (the “Habitats Regulations”). The Habitats Directive requires Member States to prohibit *inter alia* any “deliberate disturbance” to EPS or “deterioration or destruction of breeding sites or resting places” (Art. 12(1)). Member States may derogate from these prohibitions, under Art. 16, but only if they can meet one or more of the recognised exceptions – most notably, if it can be shown to be in the interests of “other imperative reasons of overriding public interest, including those of a social or economic nature” (Art. 16(1)(c)) (“IROPI”).

28) The Secretary of State, in making the Decision, needed to consider the extent to which the Unnecessary Works would be prohibited under the Habitats framework, having regard to the fact that it cannot be assumed – during the Interim Period - that any IROPI exist which can justify the disturbance and/or

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deterioration or destruction of EPS or their breeding sites or resting places. For the reasons given above, there is a real possibility that HS2 will happen only in part, or in a different way, or not at all; the Secretary of State needed to consider the impact of the Unnecessary Works on EPS in that context. There is no indication whatsoever that the Secretary of State did so.

29) In the event that the Secretary of State had considered whether the Unnecessary Works would be prohibited under the Habitats framework, and had concluded that they would be so prohibited (at least in part), it would clearly have been irrational for him to have then authorised those Unnecessary Works. Moreover, the Secretary of State would, in those circumstances, have been acting in breach of his duty under Regulation 9(1) of the Habitats Regulations to *“exercise [his] functions which are relevant to nature conservation...so as to secure compliance with the requirements of the [Habitats Directive...]”*.

Ground 5: Failure to give effect to the biodiversity duty (section 40 of the Natural Environment and Rural Communities Act 2006

30) There is no evidence to suggest that in making the Decision, the Defendant gave effect to the biodiversity duty set out in section 40 of the Natural Environment and Rural Communities Act 2006, which required him to “have regard, so far as is consistent with the proper exercise of [his] functions, to the purpose of conserving biodiversity.”

31) Failure to comply with this duty renders the Decision unlawful.

H. The details of the action that the Defendant is expected to take

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In light of both (i) the irreparable and significant harm that would be caused by the Works to the Ancient Woodlands (as described above) and (ii) the short period of time between now and the Government's decision as to its next steps on the HS2 project, the Claimant requests that the Defendant agrees to halt the Unnecessary Works (or at least that part of them which impacts on the Ancient Woodlands) during the Interim Period. Were the Defendant to do so, the Claimant would not pursue this claim further.

I. ADR proposals

In light of the underlying urgency of this claim and given the nature of the issues, the Claimant does not consider that the claim is readily amenable to ADR.

J. The details of any information sought

The Claimant seeks information as to whether, and if so how and to what extent, the Secretary of State personally considered (in relation to making the Decision):

- (i) the possible environmental effects of the Decision;
- (ii) the extent to which the Decision was consistent/inconsistent with the Government's own policy on Ancient Woodlands, including as set out at paragraph 175(c) of the NPPF 2019;
- (iii) the real possibility that, during the Interim Period, irreparable and significant harm would possibly be caused to Ancient Woodlands, and other protected habitats, and that – were the Government to subsequently decide not to proceed on the project (or to substantially alter the scope of the project) – this environmental destruction would have been carried out for no public benefit;

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- (iv) the cost, if any, of pausing those aspects of the Unnecessary Works which impact on the Ancient Woodlands (even if the other aspects were to proceed);
- (v) the balance of those costs against the loss of the Ancient Woodlands;
- (vi) the extent to which any of the Unnecessary Works would be prohibited under the Habitats Directive and Habitats Regulations; and,
- (vii) the Biodiversity Duty in section 40 of the Natural Environment and Rural Communities Act 2006.

K. The details of any documents that are considered relevant and necessary

- (1) All documents considered by the Secretary of State for the purposes of making this decision.
- (2) All information including all correspondence, meeting notes, drafts, memorandums and telephone conversation notes held by the Department for Transport, as well as all informal and formal communications between the Department and the Interested Party or other interested third parties, relating to the consideration of the Decision and the environmental impacts associated with it.

L. The address for reply and service of court documents

The address of Leigh Day solicitors given in the foot of this letter.

M. Proposed reply date, jurisdiction and timing

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As has been noted above, the Claimant understands that some of the Works are due to take place as early as 7 October 2019. In light of the underlying urgency of this claim, the Claimant requests a reply within a week, by 4pm Monday 23 September.

In the event that the Defendant does not agree to halt the Works during the Interim Period, the Claimant intends to immediately pursue interim injunctive relief in relation pending determination of this claim.

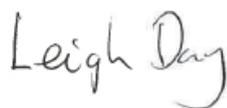
The Claimant considers this claim to fall within the jurisdiction of the Planning Court, most notably under CPR Rule 54.21(2)(a)(i) and (viii).

We assume you agree that any claim should be expedited with time abridged for the various stages of the judicial review. Indeed, we consider that an expedited and rolled-up hearing is likely to be appropriate here.

N. Aarhus Convention claim

The Claimant considers this to be an Aarhus Convention claim for the purposes of CPR45.41 and 45.43. The Claimant qualifies as a member of the public for these purposes and the claim plainly concerns a challenge to an act, or alternatively the omission, of the Defendant on grounds that it contravenes provisions of national law relating to the environment.

Yours faithfully,



Leigh Day

Cc: Natural England

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