

**By Email and Special Delivery**

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Your Ref: ██████████  
Our Ref: ██████████  
Date: 1 October 2019

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**THIS LETTER REQUIRES YOUR URGENT ATTENTION**

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**Urgent – requires response within 24 hours**

**Re: Chris Packham CBE v Secretary of State for Transport & (IP) High Speed Two (HS2) Limited**

1. We write on an urgent basis and in response to your most recent letter dated Friday 27 September 2019. You will be familiar with the previous correspondence in this matter, including:
  - our letter dated 16 September 2019 (with enclosed PAP letter also of the same date);
  - your initial holding response dated 20 September 2019;
  - our clarification as to the meaning of your holding response dated 23 September 2019; and,
  - your full response dated 27 September 2019.
2. In your response, dated 20 September 2019, you noted that your client:

*“has confirmed that no works will result in the irreversible and irreparable removal and/or destruction of the ancient woodlands set out in the Schedule to your pre-action protocol letter (“Works”) will be carried out until the review of the woodlands clearance programme has been completed and a decision has been made in respect of this. For the avoidance of doubt, no such Works shall commence before we have responded to your letters of 16<sup>th</sup> September 2019. Further details shall be provided in our response to your letters.”* (emphasis added)

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3. We confirmed, on 23 September 2019, our understanding that not only did this mean that no works would commence before the GLD has responded to our letter dated 16 September 2019, but that, in any event, the Government would “give reasonable notice of any decision it takes following its review of the woodlands clearance programme prior to any of the Works being carried out.” We received no response disputing that understanding.
4. On Friday 27 September 2019, we requested an update as to when we could expect a substantive response to our letter (at 2:21pm) and were subsequently informed that a letter would be sent to us shortly (at 4:42pm). That letter only reached us at 5:10pm on Friday 27 September 2019.
5. In that letter, you informed us that (para 5):

*“Alongside his announcement on 16<sup>th</sup> September 2019, the Secretary of State has instructed HS2 Ltd to scrutinise carefully all forthcoming ancient woodland clearance works and reconsider, on a case-by-case basis, whether it is absolutely necessary for those works to proceed during the course of the Oakervee review and before the future direction of the HS2 project is known. The Secretary of State has also instructed officials within the Department of Transport to work with HS2 Ltd on this issue with a view to achieving a sensible balance between maintaining cost and programme, whilst avoiding irreversible impacts as far as possible.”*

6. You further clarified that each of the Unnecessary Works (works that will result in the irreversible and irreparable removal and/or destruction of the ancient woodlands set out in the schedule to the PAP letter, which you refer to as the “Clearance Works”) will be considered on a case-by-case basis and “a decision taken in respect of each” (para 7). Moreover, you confirmed that (para 8, emphasis added):

*“The Clearance Works have now ceased pending the case-by-case review of each affected ancient woodland as directed by the Secretary of State. I confirm that you will be notified in advance of the resumption of the Clearance Works to any of the affected ancient woodlands.”*

## **South Cubbington Clearance Works Attempt – Monday 30 September 2019**

7. We have been informed by a witness to events that early on Monday 30 September 2019 sub-contractors for HS2, Five Rivers Environmental Contracting Ltd (‘Five Rivers’), arrived on site at the South Cubbington wood, apparently with the intention of commencing removal of the ancient woodland.

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8. In stark contrast to your assurances, we were not notified in advance of this resumption of the Unnecessary Works. Nor did we receive any reasonable notice of any “decision” taken in respect of such works and the justification for it. In fact, there is no evidence that any such case-specific determination has yet been made by HS2 in relation to these works (as you expressly stated would occur in your letter).
9. Further, we are gravely concerned by reports from the witness to these events that he was informed by the Five Rivers employees that they had not been made aware of the Secretary of State’s order that a case-by-case review is currently underway. That suggests a breakdown of communication to such a degree that the Secretary of State’s order for a case-by-case review is, in practice, undermined. It would not, in these circumstances, be an adequate response to refer again merely to the Secretary of State’s instruction to HS2 Ltd referred to at paragraph 8 of your letter dated 27 September 2019: that instruction has clearly been ineffective.
10. We are not, at present, aware of whether similar attempts to commence the Unnecessary Works have been made at other affected sites, but clearly we cannot rely on your assurance that we will be notified in advance of the resumption of the Unnecessary Works at any of the sites.
11. Please urgently confirm that the Secretary of State has directly informed (or will today inform if he has not already) all relevant stakeholders of his order for HS2 Ltd to assess the Unnecessary Works on a case-by-case basis, including but not limited to HS2 Ltd, CS JV, Fusion JV, LM JV, and Five Rivers. Please provide copies of the relevant communications, instructions, meeting minutes or other documents to confirm this, including the dates and times when the stakeholders received notice of the Secretary of State’s order.

## **Urgent Request for Response within 24 hours**

12. As you know, our client’s concern is the unlawful and irreversible loss of ancient woodlands during the Interim Period. Following today’s events, there is a very real risk that over the coming days HS2 and/or its sub-contractors will continue to carry out the Unnecessary Works, in flagrant disregard of the assurances you gave that we would be notified in advance of this.
13. For the reasons given below, we remain of the view that there are strong grounds for judicial review of the Secretary of State’s direction and announcement on 16 September 2019 and his instruction to HS2 Ltd.
14. We, therefore, consider that unless you can provide the following assurances as a matter of extreme urgency, we have grounds to pursue an urgent interim injunction

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from the High Court in relation to this judicial review and are instructed by our client to do so. We ask that you provide the following assurances within the **next 24 hours, that is by 9am on Wednesday 2 October 2019 at the latest:**

- A. That the attempted works at South Cubbington will immediately halt and will not re-commence unless and until the following has occurred:
- (i) We have been provided with written notification of any decision that has been made as to whether those works will resume and the reasons for that decision; and,
  - (ii) We have been given a reasonable notice period of no less than 1 month in which to consider that decision (those works not to be commenced until that notice period has expired).
- B. That none of the Unnecessary Works will be carried out unless and until the following has occurred:
- (i) We have been provided with written notification of any decision that has been made as to whether those works will resume and the reasons for that decision; and,
  - (ii) We have been given a reasonable notice period of 1 month in which to consider that decision (those works not to be commenced until that notice period has expired).
- C. We will be notified of *any* decision on whether or not to proceed with *any* of the Unnecessary Works, including the reasons for that decision (even if the decision is to halt those works pending the further decision expected on the future direction of the HS2 project).
15. We consider that the notice period of 1 month is reasonable and sufficient in the circumstances. If you consider that a shorter notice period is necessary, please explain why and we will consider that.
16. We see no good reason why those assurances cannot now be given. As such, we provide advance notice that in the event you do not provide the above assurances within the next 24 hours, we may immediately thereafter file a claim alongside an application for an urgent interim injunction to prevent any further attempts to carry out the Unnecessary Works prior to the court considering the substance of the claim.

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## **Grounds for Judicial Review**

17. We have seen your response to our PAP letter in relation to each of the grounds for judicial review. In light of the urgency of this matter, we have not had the opportunity to fully consider your response and what we say below must not be taken to impliedly admit or accept any of the statements set out in your letter dated 27 September 2019. However, we seek to put the Secretary of State on notice of our position in relation to Grounds 1 and 2 as follows:

### **Ground 1 – Irrationality**

18. You have stated that the Unnecessary Works will not be carried out unless they are found to be “*absolutely necessary having regard to the cost and programme impacts of delaying them*”. However, the “*cost and programme impacts*” of delay relate back to the HS2 project which, for reasons set out in our PAP letter, it can no longer be assumed will be carried out. As we have stated, there currently exists a real possibility that HS2 will happen only in part, or in a different way, or not at all. In circumstances where HS2 may not occur at all, any predicted cost and programme impacts caused by delay to the project will not arise.

19. We reiterate that it is clearly irrational in these circumstances to authorise the Unnecessary Works. To do so will result in irreversible impacts on ancient woodlands for what must at this juncture properly be assumed to be no benefit.

### **Ground 2 – Unlawful failure to give effect to Government Policy**

20. Your response notes that the Secretary of State has given effect to government policy “*for the strong protection of ancient woodland*” by his announcement on 16 September 2019. However, the NPPF does not just provide “*strong protection*” for ancient woodland. It expressly states that the loss or deterioration of irreplaceable habitats should not be allowed to take place unless there are “*wholly exceptional reasons*”.

21. You have provided no evidence of how the case-by-case review, expected to be carried out in relation to each of the Unnecessary Works, will apply this policy test and the criteria it will apply. On the basis of the very limited information you have provided, it cannot be said that the Secretary of State’s approach to the process of authorisation for the Unnecessary Works during the Interim Period will comply with national policy.

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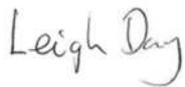
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## Reiterated request for disclosure

22. You state that the Secretary of State's announcement of 16 September 2019 supersedes our request for documents. We do not agree. We maintain our request for all of the documents and information sought by our original PAP letter. The documents are clearly relevant to our consideration of the grounds of challenge set out in our PAP letter (and are necessary for any consideration of ground 5).
23. Given the developments at South Cubbington today and the likelihood is of an application for interim relief that arises, it is essential that the Secretary of State immediately disclose both a dated schedule of works that may affect ancient woodlands, and a timetable for the case-by-case decision-making process he announced on 16 September 2019.
24. In addition, please provide copies of the information sought at paragraph 11 above.

We look forward to your urgent response.

Yours sincerely,



**Leigh Day**

cc: Natural England

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