



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES
2010

WHITE ROSE CARBON CAPTURE AND STORAGE (CCS) APPLICATION

Planning Inspectorate Reference: EN010048

**WRITTEN REPRESENTATIONS OF NATURAL ENGLAND AND ANSWERS TO
THE EXAMINING AUTHORITY'S WRITTEN QUESTIONS**

Dated 20 May 2015

1. INTRODUCTION

1.1. Purpose and structure of these representations

- 1.1.1.** These Written Representations are submitted in pursuance of rule 10(1) of the Infrastructure Planning (Examination Procedure) Rules 2010 ('ExPR') in relation to an application under the Planning Act 2008 for a Development Consent Order ('DCO') for the White Rose Carbon Capture and Storage (CCS) Project ('the Project') submitted by Capture Power Limited ('the Applicant') to the Secretary of State.
- 1.1.2.** Natural England has already provided a summary of its principal concerns in its Relevant Representations, submitted to the Planning Inspectorate on 12 February 2015. This document comprises a detailed statement of Natural England's views, as they have developed in view of the common ground discussions that have taken place with the Applicant to date. These are structured as follows:
- a. Section 2 introduces the status and functions of Natural England.
 - b. Section 3 is an account of the legislative framework.
 - c. Section 4 is an account of the policy framework.
 - d. Section 5 describes the conservation designations, features and interests that may be affected by the Project and need to be considered.
 - e. Section 6 comprises Natural England's submissions in respect of the issues that concern it. This submission cross-refers to, and is supported by, the evidence contained in the Annexes.
 - f. Section 7 provides a summary of Natural England's case.
 - g. The Annexes contain evidence referred to in the main body of these Representations and the answers to the Examining Authority's written questions which were asked on 25th November 2014.

2. STATUS AND FUNCTIONS OF NATURAL ENGLAND

- 2.1. Natural England is a statutory body established under the Natural Environment and Rural Communities Act 2006 ('NERC Act'). Natural England is the statutory advisor to Government on nature conservation in England and promotes the conservation of England's wildlife and natural features. It is financed by the Department for Environment, Food and Rural Affairs ('Defra') but is a Non-Departmental Public Body, which forms its own views based on the best scientific evidence available.
- 2.2. Natural England works for people, places and nature, to enhance biodiversity, landscapes and wildlife in rural, urban, coastal and marine areas; promoting access, recreation and public well-being, and contributing to the way natural resources are managed so that they can be enjoyed now and by future generations.
- 2.3. Section 2 of the NERC Act provides that Natural England's general statutory purpose is: '... to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.'
- 2.4. Section 2(2) states that Natural England's general purpose includes
- a. promoting nature conservation and protecting biodiversity;
 - b. conserving and enhancing the landscape;
 - c. securing the provision and improvement of facilities for the study, understanding and enjoyment of the natural environment;
 - d. promoting access to the countryside and open spaces and encouraging open-air recreation; and
 - e. contributing, in other ways, to social and economic well-being through management of the natural environment.
- 2.5. Natural England is required to keep under review all matters relating to its general purpose,¹ and to provide public authorities with advice where they request this.² Natural England's remit extends to the territorial sea adjacent to England, up to the 12 nautical mile limit from the coastline.³
- 2.6. Natural England is a statutory consultee in respect of (amongst other matters):
- a. all applications for consent for Nationally Significant Infrastructure Projects which are likely to affect land in England;⁴ and
 - b. the environmental information submitted pursuant to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ('the EIA Regs').⁵
 - c. plans or projects that are subject to the requirements of the Conservation of Habitats and Species Regulations 2010 ('the Habitats Regs') or the Offshore Marine Conservation (Natural Habitats etc) Regulations 2007 ('Offshore Regs')

¹ NERC Act, s.3(1).

² NERC Act, s.4(1).

³ NERC Act, s.1(3).

⁴ Planning Act s.42; Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, reg. 3 and sched.1.

⁵ Regs. 2(1), 8(6), 9(1), 13(2)(b), 17(3)(g), 18(3)(f), 19(3)(e) of the EIA Regs.

which are likely to have a significant effect on European protected sites – that is, sites designated as Special Areas of Conservation ('SACs') and Special Protection Areas ('SPAs') for the purposes of the EU Habitats and Birds Directives – in England;⁶

- d. proposals likely to damage any of the flora, fauna or geological or physiographical features for which a Site of Special Scientific Interest ("SSSI") has been notified pursuant to the Wildlife and Countryside Act 1981 (as amended) ('WCA 1981');⁷
- e. proposals relating to the English territorial sea capable of affecting, other than insignificantly, any of the protected features of a Marine Conservation Zone ('MCZ') or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent, where the Examining Authority believes that there is or may be a significant risk of the act hindering the achievement of the conservation objectives stated for the MCZ.⁸

2.7. It is also the Government's policy to consult Natural England in respect of sites listed for the purposes of the Convention on Wetlands of International Importance especially as Waterfowl Habitat signed at Ramsar on 2 February 1971 ('Ramsar sites'), as if they were European protected sites.⁹

2.8. In addition, Natural England performs duties relating to SSSIs under the WCA 1981, and in relation to European protected sites and species under the Habitats Regulations.

⁶ Regulation 61 of the Habitats Regs; regulations 24(1) and (3) and 25(3)(b) of the Offshore Regs.

⁷ Section 28I of the 1981 Act.

⁸ Marine and Coastal Access Act 2009, ss.126(2) and 147(1). The first MCZs are anticipated to be designated in the course of 2013. It is submitted that where an expanse of sea is under consideration for designation as an MCZ this is a material consideration.

⁹ National Planning Policy Framework (March 2012), para 118; PINS Advice Note 10: Habitats Regulation Assessment for nationally significant infrastructure projects, p.4.

3. LEGISLATIVE FRAMEWORK

3.1. Environmental Impact Assessment

3.1.1. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ('EIA Regs') transposed Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended). That directive and its amending instruments have since been repealed and replaced by consolidated Council Directive 2011/92/EU ('the EIAD'). Development consent cannot lawfully be granted for EIA development unless there has been substantial compliance with the EIA Regs.¹⁰

3.2. Duty to conserve biodiversity

3.2.1. Section 40 of the NERC Act imposes a '*duty to conserve biodiversity*' on public authorities, including members of the Examining Authority and the Secretary of State. In pursuance of this, section 40(1) states:

'Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.'

For the purposes of the NERC Act, conservation includes restoring or enhancing a habitat or population of organisms.¹¹ The Secretary of State must in particular have regard to the Convention on Biological Diversity when performing his duty.¹²

3.2.2. Section 41 of the NERC Act requires the Secretary of State to publish a list of the living organisms and types of habitat which in the Secretary of State's opinion are of principal importance for the purpose of conserving biodiversity in England. Section 41(3) states:

'the Secretary of State must—

(a) take such steps as appear to the Secretary of State to be reasonably practicable to further the conservation of the living organisms and types of habitat included in any list published under this section, or

(b) promote the taking by others of such steps.'

3.3. European Sites

3.3.1. The Secretary of State and the individual members of the Examining Authority are each a 'competent authority' for the purposes of the Habitats Regulations, with a duty to have regard to the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') and Directive 2009/147/EC of the European Parliament and of the Council on the conservation

¹⁰ *Berkeley v SSE* [2001] 2 AC 603, HL which also concerned the materially identical Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999..

¹¹ NERC Act, s.40(3).

¹² NERC Act, s.40(2).

of wild birds ('Wild Birds Directive').¹³ So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds.¹⁴

- 3.3.2.** The Secretary of State is also the 'appropriate authority' for the purposes of the Habitats Regulations.¹⁵ He must accordingly exercise his functions which are relevant to nature conservation so as to secure compliance with the requirements of the Habitats Directive and Wild Birds Directive.¹⁶ He must furthermore take such steps as he considers appropriate to secure the objective of the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of article 2 of the Wild Birds Directive.¹⁷
- 3.3.3.** The Wild Birds Directive applies to all species of naturally occurring birds in the wild state in the European territory of the UK, including their nests, eggs and habitats.¹⁸ Article 2 of the Wild Birds Directive requires populations of wild birds to be maintained 'at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements'.¹⁹ Article 3 requires Member States, in the light of Article 2, to 'take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats'. Article 5 requires Member States to take the requisite measures to establish a general system of protection for all their wild birds, prohibiting the deliberate killing or capture, deliberate destruction or removal of nests and eggs, and deliberate disturbance of the birds insofar as this is significant having regard to the objectives of the Directive. Article 4 requires SPAs to be established in respect of particular species, in order to ensure the survival and reproduction of these species in their area of distribution. In respect of SPAs, Article 4 requires that the Member States 'shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article'. It requires that '[o]utside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.' Article 13 provides that application of measures taken pursuant to the Directive may not lead to a deterioration in the present situation as regards the conservation of wild birds.
- 3.3.4.** The Habitats Directive aims to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. It provides that measures taken pursuant to the Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest.²⁰ Member States, in consultation with the European Commission, must select

¹³ Habitats Regs, regs 7(1)(a), 3(1), and 9(3). Directive 2009/147/EC has replaced Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

¹⁴ Habitats Regs, reg.9A(8).

¹⁵ Habitats Regs, reg.3(1).

¹⁶ Habitats Regulations, reg. 9(1) and (2).

¹⁷ Habitats Regs, reg 9A(1), (3)

¹⁸ Wild Birds Directive, art.1.

¹⁹ Wild Birds Directive, article 2.

²⁰ Habitats Directive, art.2.

and designate areas for protection as SACs pursuant to articles 3 and 4 of the Habitats Directive. Together with SPAs, these sites make up the Natura 2000 ecological network, which is supposed to be a coherent ecological European network that enables 'the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'²¹.

- 3.3.5.** Article 6 of the Habitats Directive applies both to SACs and to SPAs.²² Article 6(2) requires that Member States shall take appropriate steps to avoid, in the European sites, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive. Article 6(3) requires that any project not directly connected with or necessary to the management of the European site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site the competent national authorities shall agree to the project only after having ascertained that it will not adversely affect the integrity of the site concerned, unless it meets the enumerated criteria for derogation.
- 3.3.6.** If an adverse effect on the integrity of the site cannot be ruled out, then the effect of Article 6(4) is that the project may only be carried out where (i) there are no alternative solutions, (ii) it must go ahead for imperative reasons of overriding public interest, including reasons of a social or economic nature; and (iii) all compensatory measures necessary to protect the overall coherence of the Natura 2000' network are taken. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised as 'imperative reasons of overriding public importance' are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or such other matters contained in an opinion of the European Commission.²³
- 3.3.7.** SACs and SPAs are protected as European sites in inshore waters off England (up to 12 nautical miles) by the Habitats Regs and in offshore waters (i.e. outside 12 nautical miles) by the Offshore Regs, which transpose the relevant parts of the Habitats Directive into domestic law. The provisions of Article 6 of the Habitats Directive which are noted above are found at regulations 61, 62 and 66 of the Habitats Regs and regulations 25, 26 and 30 of the Offshore Regs. In determining these applications, the Secretary of State will be acting as a competent authority for the purposes of those Regulations.
- 3.3.8.** The Regulations describe a sequence of steps to be taken by the competent authority in respect of a European site (including SPAs of relevance with regards these applications) when deciding whether to authorise a project. Those steps are:

²¹ Habitats Directive, art.3(1).

²² **Habitats Directive, art. 6 applies to SACs and art.7 applies it to SPAs designated under the Wild Birds Directive.**

²³ Regulations 62 and 66 of the Habitats Regulations, transposing Article 6(4) of the Habitats Directive.

Step 1 Consider whether the project is directly connected with or necessary to the management of the site?²⁴ If not—

Step 2 Consider²⁵ whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects. If such an effect cannot be excluded –

Step 3 Make an appropriate assessment of the implications for the site in view of its current conservation objectives.²⁶ In so doing, it is mandatory to consult Natural England²⁷ and have regard to its representations, and optional to obtain the opinion of the general public.²⁸ The competent authority is empowered to require the Applicant to provide information for the purposes of the appropriate assessment, or to enable the authority to determine whether such an assessment is required.²⁹

Step 4 Consider³⁰ whether the project will adversely affect the integrity of the site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (the ‘Integrity Test’).

Step 5 Reject the project, unless it is ascertained that the project will not adversely affect the integrity of the site.³¹

Step 6 If the project fails the Integrity Test in respect of the site, consider, whether one is satisfied that there is no alternative solution.³² If not so satisfied, reject the project; but if so satisfied, proceed to steps 7 and 8.

Step 7 Consider whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.³³ If not, reject the application. If so, proceed to Step 8.

Step 8 Consider whether one can secure that compensatory measures are taken which would be necessary to secure that the overall coherence of Natura 2000 is protected. If not, reject the application; if so, accept the application subject to requirements securing that the necessary compensatory measures will be implemented in the appropriate timeframe.³⁴

²⁴ Under regulation 61(1)(b) of the Habitats Regs or reg. 25(1)(c) of the Offshore Regs.

²⁵ Under regulation 61(1)(a) of the Habitats Regs or reg.25(1)(b) of the Offshore Regs.

²⁶ Under regulations 61(1) of the Habitats Regs.or 25(1) of the Offshore Regs.

²⁷ under regulations 61(3) of the Habitats Regs or 25(3)(b) of the Offshore Regs.

²⁸ under regulation 61(4) of the Habitats Regs or 25(3)(f) of the Offshore Regs.

²⁹ By regulation 61(2) of the Habitats Regs or 25(2) of the Offshore Regs.

³⁰ Pursuant to regulation 61(5) and (6) of the Habitats Regs or 25(4) and (5) of the Offshore Regs.

³¹ Applying regulation 61(5) of the Habitats Regs, subject to regulation 62, or reg 25(4) of the Offshore Regs subject to reg.26.

³² in accordance with regulation 62(1) of the Habitats Regs or 26(1) of the Offshore Regs.

³³ in accordance with regulation 62(1) of the Habitats Regs or 26(1) of the Offshore Regs.

³⁴ As required by regulation 66 of the Habitats Regs or 30 of the Offshore Regs.

3.3.9. The Directives are both to be construed purposively in the light of Article 191 of the Treaty on the Functioning of the European Union ('TFEU'). Article 191(1) TFEU provides that 'Union policy on the environment shall contribute to the pursuit of the...objectives [of] preserving, protecting and improving the quality of the environment'; and Article 191(2) provides that Union policy on the environment shall aim at a high level of protection, and shall be based on the precautionary principle and on the principle that preventive action should be taken.

3.3.10. The case law of the Court of Justice of the European Union has established the following points:

- a. Articles 6(2) and 6(3) are aimed at achieving the same level of protection. The Habitats Directive therefore requires that Member States take systematic and effective measures pursuant to Article 6(3) which guarantee the avoidance in fact of significant deterioration of the habitats or disturbance of the species for which SPAs and SACs have been designated.³⁵
- b. 'Article 6(3) of [the] Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned... It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned'.³⁶
- c. Under Article 6(3) of the Habitats Directive, 'an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field'.³⁷
- d. 'An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned'.³⁸

³⁵ CJEU, Case C-241/08 *Commission v France* at paras 30-36; Case C-535/07 *Commission v Austria* at paras 57-58.

³⁶ CJEU Case C-418/04 *Commission v Ireland* at paras 226 to 227; Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij* at paras 43-45

³⁷ CJEU Case C-127/02 *Waddenzee* at para 61.

³⁸ CJEU Case C-404/09 *Commission v Spain* at para 100; cf case C-304/05 *Commission v Italy* [2007] ECR I-7495, paras 58-59, 67-70.

3.4. Ramsar Convention

3.4.1. The UK is a party to the 1971 Convention on Wetlands of International Importance, done at Ramsar, Iran ('the Ramsar Convention').

3.4.2. Article 2(1) of the Convention provides that 'Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance'.

3.4.3. Article 4 of the Convention provides:

1. Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.

2. Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

3. The Contracting Parties shall encourage research and the exchange of data and publications regarding wetlands and their flora and fauna.

4. The Contracting Parties shall endeavour through management to increase waterfowl populations on appropriate wetlands.'

3.4.4. The Government designates Ramsar sites in accordance with the criteria set out in the Convention, in recognition of the international importance of these sites as a wetland wildlife habitat.

3.4.5. In accordance with *Government Circular: Biodiversity and Geological Conservation Statutory Obligations and their Impact within the Planning System* (ODPM 06/2005), and the *National Planning Policy Framework* (2012), paragraph 118, Ramsar sites are subject to the same procedures described in the preceding section (in relation to European sites) as a matter of UK Government Policy, in order to assist the Government in fully meeting its obligations under the Ramsar Convention.

3.5. Sites of Special Scientific Interest (SSSIs)

3.5.1. SSSIs are designated as such by Natural England under section 28 of the WCA 1981, where we are of the opinion that land is of special interest by reason of any of its flora, fauna, or geological or physiographical features.

3.5.2. Section 28G of the WCA 1981 places legal obligations on public authorities in relation to SSSIs. These authorities are known as 'section 28G authorities', and the definition given at s.28G(3) embraces all public office-holders including the Secretary of State and the Examining Authority.

3.5.3. An authority to whom section 28G applies has a duty in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest to:

'take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.'

3.5.4. In addition, where the permission of a section 28G authority is needed before proposed operations may be carried out, the section 28G authority must, in accordance with section 28I(5) of the WCA 1981, take any advice received from Natural England into account:

- (a) in deciding whether or not to permit the proposed operations; and
- (b) if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.

3.5.5. 'Permission' is defined so as to include any kind of consent or authorisation.³⁹ As the Applicant requires development consent from the Secretary of State in order to proceed with its proposals, and as the Secretary of State is a section 28G authority, the duties under section 28I(5) apply to the Secretary of State.⁴⁰

3.5.6. Section 35 of the WCA 1981 empowers Natural England to declare as a 'National Nature Reserve' ('NNR') any land which is managed as a nature reserve and is of national importance. There is no additional protection for these over and above SSSI, European or Ramsar site status.

3.6. European Protected Species

3.6.1. Regulation 9(5) of the Habitats Regs, headed 'Exercise of functions in accordance with the Habitats Directive', stipulates that:

'a competent authority, in the exercising of any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions'.

The Examining Authority and Secretary of State are both 'competent authorities' by virtue of reg.7(1), which includes any person holding a public office.

3.6.2. In relation to species of animals and plants listed in Annex IV of the Habitats Directive, article 12 of the Directive provides that the UK must take the requisite measures to ensure that they are subject to a system of strict protection.

3.6.3. In relation to the animal species, the system must in particular prevent the deliberate capture or killing of specimens of these species in the wild; deliberate disturbance of these species; deliberate destruction or taking of eggs from the wild; and deterioration or

³⁹ WCA 1981, s.28I(7).

⁴⁰ Natural England accepts that the notice requirements of section 28I(2) to (4) have been satisfied for the purposes of the Secretary of State's determination of the planning applications at issue here.

destruction of breeding sites or resting places. Disturbance or destruction may be indirect, for instance through noise or light pollution, or loss of habitat.⁴¹

- 3.6.4.** The plant species must be protected in particular from deliberate picking, collecting, cutting, uprooting or destruction in their natural range in the wild.
- 3.6.5.** Article 16 of the Habitats Directive provides that this strict protection may be derogated from only where (i) there is no satisfactory alternative, (ii) the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, and (iii) the purpose is (a) protecting wild fauna and flora and conserving natural habitats; (b) preventing serious damage to crops, livestock, forests, fisheries and water and other types of property; (c) public health and safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment; (d) research, education, and repopulating and re-introducing these species; or (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.
- 3.6.6.** Regulation 41 of the Habitats Regs and the provisions of the WCA 1981 make it a criminal offence to engage in the behaviour prohibited by the Habitats Directive. However, prohibitions enforced by penalties for infractions are not in themselves adequate to implement the Directive if they will not prevent significant destruction or disturbance taking place in fact: 'such protection requires that individuals be prevented in advance from engaging in potentially harmful activities'.⁴²
- 3.6.7.** The Court of Justice of the European Union has accordingly ruled that Member States must not only adopt a comprehensive legislative framework but also to implement concrete and specific protection measures that are coherent, co-ordinated and preventive in nature.⁴³ Such a system of strict protection must enable the effective avoidance of deterioration or destruction of breeding sites or resting places caused by development.⁴⁴ Strict protection must be enforced even if the population of the species is not declining.⁴⁵
- 3.6.8.** The Secretary of State should follow the guidance in paragraphs 99 and 116 of Circular 06/2005, and take care to ensure that any disturbance of protected species, including harm to their habitats, food-sources, resting-places or breeding sites, is avoided unless he

⁴¹ CJEU Case C-103/00, *Commission v Greece*, judgment para 34 and Opinion of Léger AG delivered on 25 October 2001, paras 46, 56 and 57; *R(Morge) v Hampshire CC* [2010] EWCA Civ 608 at [49]. [2011] UKSC 2 at [19].

⁴² CJEU, Case C-418/04 *Commission v Ireland* at para 208.

⁴³ CJEU Case C-183/05, *Commission v Ireland*, paras 29-30.

⁴⁴ CJEU Case C-383/09 *Commission v France*, opinion of Advocate-General Kokott at para 89; judgment at paras 21, 35, 37.

⁴⁵ CJEU Case C-103/00 *Commission v Greece* para 31; CJEU Case C-518/04 *Commission v Greece*, para 21.

considers that the derogation criteria are likely to be met, in which case he should require any necessary licence to be obtained before development commences.⁴⁶

⁴⁶ That was the approach endorsed by the High Court in *R(Woolley) v East Cheshire DC* [2010] Env. L.R. 5 at [27]-[28]. In *Morge v Hampshire CC*, the Supreme Court appears to have thought that it would not be unlawful to grant permission for a development unconditionally, unless it were thought unlikely that the criteria would be met. This was on the premise that it was sufficient for the prohibited conduct to be subject to criminal penalties if no species licence were obtained. However, the CJEU authorities cited above - which the Supreme Court did not consider in that case - make it clear that a preventive approach must be taken by the planning authority. It would be unsafe for the Secretary of State to grant consent without ensuring, so far as he can, that the requirements of the Directive would be met.

4. POLICY FRAMEWORK

Natural England's approach to addressing issues such as 'integrity', 'coherence', and 'disturbance' is informed by relevant national and European policy and guidance documents. Significant passages from these documents have been summarised or set out verbatim below.

The documents referred to below are statements of overarching policy which are central and applicable to planning decisions affecting biodiversity, such that it is presumed that the Examining Authority has copies of them, and it has not been thought necessary to include them as Annexes to these Written Representations. However, should the Examining Authority require copies of the documents referred to, Natural England would be pleased to provide them.

4.1. National Policy Statements

The Overarching National Policy Statement for Energy (EN1) states in Section 5.3.4:

The applicant should show how the project has taken advantage of opportunities to conserve and enhance biodiversity and geological conservation interests.

4.2. National planning policy and guidance on protected sites and species

4.2.1. Paragraph 118 of the National Planning Policy Framework states:

opportunities to incorporate biodiversity in and around developments should be encouraged

4.2.2. Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System (ODPM 06/2005) is relevant here and provides administrative guidance on the application of the law relating to planning and nature conservation as it applies in England.

4.2.3. The Examination Authority is also reminded of the Planning Inspectorate's own **Advice note ten: Habitat Regulations Assessment** (April 2012).

4.3. European Commission guidance

4.3.1. The European Commission has produced guidance on the protected sites and species regimes. This includes the following relevant guidance:

- a. *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (2000);*
- b. *EC (2001) Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6 (3) and (4) of the Habitats Directive 92/43/EEC (November 2001)*
- c. *Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC (2007);*

- d. *The implementation of the Birds and Habitats Directives in estuaries and coastal zones (2011)*

5. CONSERVATION DESIGNATIONS, FEATURES AND INTERESTS THAT COULD BE AFFECTED BY THE PROPOSED PROJECT

The following is a brief summary of the features of interest in this matter.

5.1. Nationally protected species

5.1.1. Badger. The Eurasian badger (badger) uses a variety of habitats. They are found in urban, suburban and rural areas and will use woodland, pasture, other farmland, parks and gardens for foraging and to excavate their setts. They are a widespread and frequently occurring species in England. Conflict often occurs where development affects areas traditionally used by badgers. The Protection of Badgers Act 1992 was introduced in recognition of the additional threats that badgers face from illegal badger digging and baiting. Under the Act, it is an offence inter alia to:

- Wilfully kill, injure or take a badger, or to attempt to do so;
- Cruelly ill-treat a badger; or
- Intentionally or recklessly interfere with a badger sett by:
 - (a) damaging a sett or any part of one;
 - (b) destroying a sett;
 - (c) obstructing access to or any entrance of a sett;
 - (d) causing a dog to enter a sett; or
 - (e) disturbing a badger when it is occupying a sett.

6. NATURAL ENGLAND'S CONCERNS AND ADVICE

- 6.1. As stated in our relevant representations, Natural England awaits further information to be submitted by the developer with regard to mitigation measures to avoid impacts on badgers, which is required in order to determine whether a badger licence will be required.
- 6.2. Natural England has no further outstanding issues or concerns regarding this application.

7. ANSWERS TO THE EXAMINING AUTHORITY'S WRITTEN QUESTIONS

7.1. The questions received

7.1.1. In its Rule 8 letter dated 29th April 2015, the Examining Authority asked Natural England a number of questions. These are set out, along with the answers, in Table 1 below.

Table 1 Answers to the examining authority's written questions

Question	Answer
3.0 Air Quality	
<p>3.3 <i>Are there any outstanding concerns with the air quality modelling methodology from stakeholders? Has the use of the wind rose at Church Fenton been agreed with consultees?</i></p>	<p>Natural England is satisfied that an appropriate methodology has been used to assess the air quality impacts on the designated features of European sites. We do not have any comments to make on the use of the wind rose; however, the Environment Agency may wish to make comments.</p>
6.0 Ecology	
<p>6.1 <i>Has the amount of baseline information, for example North and East Yorkshire Ecological Data Centre (NEYEDC) ecological records, the level of survey effort and data and the level of detail of the assessment been sufficient to ensure that the impact on protected species and habitats has been fully assessed against relevant criteria? Is any further information required?</i></p>	<p>Natural England is satisfied with the amount of baseline information presented, the level of survey effort and the detail of the assessment of impacts on protected species. We await further information on protection of badgers as specified in question 6.8 below.</p>
<p>6.2 <i>What would be the impact of increasing the 200m survey buffer for the GCN survey to the standard zone of 250m, recommended in recent NE guidance? Would further surveys be required? The habitat suitability index data for ponds appears to be incomplete. Is further information available to justify not carrying out any further Great Crested newt surveys?</i></p>	<p>ES Volume 2 Chapter I (Ecology Technical Report) states that all ponds within 500m of the site were surveyed, in accordance with standard methodology. A habitat suitability index for all ponds surveyed is presented in Table 3.7 of the chapter. Natural England does not consider that further great crested newt surveys are required.</p>
<p>6.3 <i>Is the EA content that, with the information so far supplied, that any adverse effect on aquatic ecology/biodiversity as a result of process discharges through the permit and works at the jetty have been assessed? Has there been sufficient survey effort for the effect of works at the jetty on Great Crested Newt, given the non-standard survey threshold, otter and water vole?</i></p>	<p>Natural England does not have any comments to make on the effects on aquatic ecology, however, the Environment Agency may wish to make comments. Natural England is satisfied that there has been sufficient survey effort for protected species at the jetty site.</p>
<p>6.5 <i>Justify the approach to the bat roost surveys, which do not appear to have been carried out with a standard methodology. Is there potential for the surveys to have underestimated bat presence?</i></p>	<p>Natural England is satisfied that the methodology that has been used for bat roost surveys is appropriate given the habitats present on the site.</p>
<p>6.8 <i>Has information on the protection of badgers been produced and does this now satisfy NE's concerns, in particular, how buffer zones of 30m would be maintained around setts 3 and 25?</i></p>	<p>Natural England awaits further information on mitigation measures to avoid impacts on badgers. We do not yet have sufficient information to satisfy our concerns as to how buffer zones will be maintained around the setts.</p>
<p>6.9 <i>Updated matrices are being produced by the applicant for the Habitat Regulation Assessment for</i></p>	<p>Natural England is satisfied that an appropriate rationale has been used to produce the screening</p>

<p><i>3 European sites for Deadline 1. Does NE have any comments on these matrices?</i></p>	<p>and integrity matrices in the Habitats Regulations Assessment Report (ES Volume 3 Section L). We do not have any further comments to make on the matrices.</p>
<p><i>6.10 Further clarity and certainty about significant effects and mitigation has been sought in question GEN5, with a table to be produced. How will the ecological measures in this table be linked to the measures in the biodiversity management plan in R16?</i></p>	<p>Natural England does not have any comments to make.</p>
<p><i>6.11 Should YWT also be a consultee on the biodiversity management plan in R16?</i></p>	<p>Natural England does not have any comments to make.</p>
<p><i>6.12 A period of maintenance for the mitigation and enhancement works needs to be specified in R16 2(b). Can the applicant comment on a suitable maintenance period eg aligned with the landscaping maintenance proposals.</i></p>	<p>Natural England does not have any comments to make?</p>