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# Legal Submissions in Respect of Ecological Mitigation

**The Yorkshire and Humber (CCS Cross Country  
Pipeline) Development Consent Order**

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# 1 Introduction

- 1.1.1 On 10 September 2014 the Environment Agency (“EA”) submitted a Relevant Representation in respect of the application, raising concerns with the ecological enhancement proposed by the applicant. In particular, the EA suggested that the level of enhancement should reflect the scale and value of the project. The EA’s position appears to be that the larger the scale of a project or the greater its value, the more enhancement measures should be provided, regardless of the impacts of the particular project or the precise nature of the proposed works.
- 1.1.2 The same or a similar position has been adopted in the Relevant Representation made on behalf of Natural England (“NE”) and the Yorkshire Wildlife Trust (“YWT”).
- 1.1.3 The approach suggested by the EA, NE and YWT does not accord with policy for the reasons set out below.

## 2 The Relevant Representations

2.1.1 The EA's Relevant Representation states, *inter alia*, that

*"5.3.4 of EN-1 states that 'the applicant should show how the project has taken advantage of opportunities to conserve and enhance biodiversity and geological conservation interests'. It does not make any reference to a link between required mitigation and the level of enhancement needed. Opportunities for enhancement are likely to grow with the scale and value of schemes, therefore it seems reasonable to suggest that the level of enhancement provided should be commensurate with the large-scale nature of this project.*

[...]

*Significant weight should be afforded to these local policies which are clearly supportive of the overarching EN-1 requirement that applicants should take advantage of opportunities to conserve and enhance biodiversity.*

*In order to resolve this issue, the applicant should provide a clear schedule of enhancement measures which reflect the scale of the proposals, and clearly demonstrates that they have taken opportunities to provide meaningful enhancements through the scheme. New requirements should be included in the DCO to secure these enhancement measures, once they have been refined" (emphasis added).*

2.1.2 NE's Relevant Representation is expressed in similar terms, but in addition to paragraph 3.5.4 of the NPS it also makes reference to section 40 of the Natural Environment and Rural Communities Act 2006, and paragraph 118 of the National Planning Policy Framework ("NPPF").

2.1.3 YWT similarly seeks significant biodiversity gains commensurate to "the scale of the proposal", and refers to paragraphs 109 and 114 of the NPPF.

## 3 Legislative and policy framework

### 3.1 NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

- 3.1.1 Section 40(1) of the Natural Environment and Rural Communities Act 2006 provides that

*“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.”*

- 3.1.2 Pursuant to subsection (3), "conserving" biodiversity is defined as including, in relation to a living organism or habitat, restoring or enhancing a population or habitat.

### 3.2 OVERARCHING NATIONAL POLICY STATEMENT FOR ENERGY (EN-1)

- 3.2.1 Paragraphs 5.3.3 and 5.3.4 of EN-1 address matters of biodiversity and geological conservation. Those paragraphs fall under the sub-heading 'Applicant's assessment', and paragraph 5.3.4 states

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

- 3.2.2 Paragraph 5.3.8 falls under the heading 'IPC Decision Making', and provides that

*“In taking decisions, the IPC should ensure that appropriate weight is attached to designated sites of international, national and local importance; protected species; habitats and other species of principal importance for the conservation of biodiversity; and to biodiversity and geological interests within the wider environment”.*

3.2.3 Paragraph 5.3.15 addresses biodiversity within development, and says

*“Development proposals provide many opportunities for building-in beneficial biodiversity or geological features as part of good design. When considering proposals, the IPC should maximize such opportunities in and around developments, using requirements or planning obligations where appropriate”* (emphasis added).

3.2.4 As to when requirements will be appropriate, paragraph 4.1.7 of EN-1 provides that

*“The IPC should only impose requirements in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. The IPC should take into account the guidance in Circular 11/95, as revised, on ‘The Use of Conditions in Planning Permissions’ or any successor to it”* (emphasis added).

3.2.5 Paragraph 4.1.8 deals with obligations, and provides that:

*“The IPC may take into account any development consent obligations that an applicant agrees with local authorities. These must be relevant to planning, necessary to make the proposed development acceptable in planning terms, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects”* (emphasis added).

### 3.3 NATIONAL PLANNING POLICY FRAMEWORK

3.3.1 The policy regarding biodiversity enhancement in EN-1 is not dissimilar to that set out in the National Planning Policy Framework. Paragraph 109 of the NPPF provides that

*“The planning system should contribute to and enhance the natural and local environment by [...]*

- *minimising impacts on biodiversity and providing net gains in biodiversity where possible, contributing to the Government’s commitment to halt the overall decline in biodiversity, including by establishing coherent ecological*

*networks that are more resilient to current and future pressures” (emphasis added).*

### 3.3.2 Paragraph 118 of the NPPF states

*“When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:*

*[...]*

- *opportunities to incorporate biodiversity in and around developments should be encouraged” (emphasis added).*

## 3.4 NATIONAL PLANNING POLICY GUIDANCE

### 3.4.1 In response to the question “How should local planning authorities set about planning for biodiversity and geodiversity?” the National Planning Policy Guidance explains that local planning authorities should

*“consider the opportunities that individual development proposals may provide to enhance biodiversity and contribute to wildlife and habitat connectivity in the wider area.”*

## 4 Submissions

- 4.1.1 The purpose of the policy in EN-1 is to encourage applicants to take opportunities to enhance biodiversity, where such opportunities arise as part of the proposed development. As an example, if an applicant proposed to carry out a planting scheme to mitigate the visual impact of a development, this may provide an opportunity to plant particular species which would enhance biodiversity. If an opportunity to enhance biodiversity arose as part of the proposed development, and an applicant failed to take it, then the Secretary of State may consider imposing a requirement on the DCO on the basis that taking such opportunities was a requirement of policy, and thus necessary to make the development acceptable in planning terms. Such an approach would find policy support in paragraph 5.3.15 of EN-1.
- 4.1.2 There is no material distinction between the policy in EN-1 and the policy in the NPPF with respect to ecological enhancement.
- 4.1.3 There is nothing in EN-1, the NPPF or otherwise to suggest that there is a correlation of the sort envisaged by the EA between the 'scale and value' of a project and the enhancement measures which should be provided. The scale of the project would only be relevant to the extent that this related to the number and extent of opportunities created as a result of the proposed works. For example, the more planting schemes required as part of the proposed works, the more opportunities for biodiversity enhancements would be created.
- 4.1.4 The value of the project (either in terms of the cost of implementing it, and/or its economic value to the promoter) does not have any obvious relevance in this respect. If the project is otherwise acceptable in planning terms, has done what is necessary to mitigate and/or compensate for its effects, and has taken advantage of the opportunities that the proposed works create to conserve and enhance biodiversity interests, a requirement or obligation to provide further enhancements could not be said to be "necessary" and would not, therefore comply with paragraphs 4.1.7 and 4.1.8 of EN-1.
- 4.1.5 Furthermore, if the existence or otherwise of "opportunities" was to be decoupled from the nature of the proposed works which comprise the relevant project - and the opportunities that those works themselves create - it would not be possible to form any sensible judgment as to whether the "opportunities" had or had not been "taken advantage of" in accordance with paragraph 5.3.4 of EN-1. For example, if the estimate of the overall cost of the scheme were to increase



during the examination for an unrelated reason, would it be necessary to provide a greater level of enhancement, and if so how would the necessary scale of that additional enhancement be judged? The same issue would arise in relation to physical works which did not themselves create any opportunities for enhancement.

- 4.1.6 It would be a misinterpretation of the policy in EN-1 to suggest that the higher the cost and/or value of the scheme, the greater the enhancement measures must be. So far as we are aware, such an approach to enhancement measures does not find support in general planning decisions decided in accordance with the NPPF, or in other DCOs.
- 4.1.7 NE has sought to derive support for its position from section 40 of the Natural Environment and Communities Act 2006, but that provision does not take the matter any further than the relevant policy. The effect of section 40 is simply to impose an obligation on the Secretary of State to have regard to the purpose of conserving (and thus enhancing) biodiversity. Policy already requires him to do just that.
- 4.1.8 So far as we can discern, none of the Relevant Representations made in respect of NGC's application identify particular opportunities for enhancement which have arisen as a result of the project, and which NGC has failed to take. As such, there is no justification for the EA or other statutory consultees to request further measures of ecological enhancement.

## 5 Conclusion

- 5.1.1 The policy requirement in EN-1 is for the applicant to show how the project has taken advantage of opportunities to conserve and enhance biodiversity and geological conservation interests which arise as a result of the proposed works. The suggestion by EA, NE and the YWT that NGC should provide additional enhancement measures on the basis that doing so would be commensurate with the value of the project is not consistent with policy and nor is it robust. Such an approach would have serious and unwelcome implications for decision-making not only under the Planning Act 2008, but also more widely under the Town and Country Planning Act 1990 where the materially identical NPPF policy applies.