

Southampton to London Pipeline Project

Deadline 4

Applicant's Response to Deadline 3 Legal Comments
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SOUTHAMPTON TO LONDON PIPELINE PROJECT
APPLICANT'S RESPONSE TO DEADLINE 3 LEGAL COMMENTS

1 Introduction

This note comprises a response to certain legal issues raised in the document submitted by Rushmoor Borough Council (“**RBC**”) at Deadline 3 in the examination timetable entitled ‘*Outline Legal Submissions*’ ([REP3-040](#)).

2 Rushmoor Borough Council Outline Legal Submissions

Paragraph 2

- 2.1 The summary of the legal position in this paragraph is agreed. So too is the reference to principles confirmed by the court in Grace in the final sentence of the paragraph (albeit the relevant paragraph of that decision is 39 not 29). The Applicant considers that its assessment is entirely consistent with those principles.
- 2.2 Natural England has also confirmed that it agrees with the Applicant’s assessment. So too has the Surrey Wildlife Trust.
- 2.3 Further however, it is important to note that the nature of, and effects generated by, the project considered in Grace are wholly different to the project under consideration in this application. Grace concerned the construction of a wind farm, which included the erection of 16 permanent wind turbines, occupying 832 hectares of the European site in question. 41.7 hectares of trees were to be felled in connection with that project. As a whole, the project would have the potential to result in the complete loss of 162.7 hectares of foraging habitat.
- 2.4 In this case, no part of the Thames Basin Heaths Special Protection Area (“the **TBH SPA**”) habitat would be permanently lost as a result of the project. The only permanent infrastructure to be constructed in the TBH SPA would be the pipe itself, located below ground level. Only 36.2 hectares of the TBH SPA, which accounts for just 0.4% of its total area, is located within the Order limits and, even then, the implementation of measures within the TBH SPA such as narrow working techniques and trenchless crossings (which are secured by the code of construction practice) and the presence of embedded design measures and existing hardstanding within that area, mean that the total area of heathland habitat likely to be *directly* impacted by construction activity would be 9 hectares, which accounts for just 0.1% of the total TBH SPA. Any habitat loss would be temporary, to be restored on completion of the works.
- 2.5 Similarly, any interaction between the project and Sites of Alternative Natural Greenspace (“**SANGs**”) is temporary and limited in spatial extent. It is only those parts of the SANGs within which works are undertaken which would not be accessible and this is, in most cases, only a very small proportion of the overall area of those SANGs; the remaining parts of the SANGs would remain accessible throughout the works. To the extent that displacement of any recreational activities from SANGs has the potential to arise during the construction phase of the project, any displacement to the TBH SPA is expected to be very low and certainly not of a level that would result in adverse effects on the integrity of the TBH SPA.

- 2.6 It is also important to note that *Grace* was a case concerned with effects which could not be screened out from appropriate assessment. In this context, the Examining Authority will be aware that an appropriate assessment of the implications of a plan or project for a European site is only concerned with *significant* effects (see regulation 63(1) Conservation of Species and Habitats Regulations 2017). It is therefore permissible to screen out from appropriate assessment effects which do not meet this threshold. This is of relevance to RBC's first substantive contention regarding the decision to screen out direct habitat loss from appropriate assessment (see further below).

Paragraph 3

- 2.7 It is of course correct that the decision maker is not required to follow the views of Natural England. However, given the role of Natural England as a statutory nature conservation body, where a decision maker elects to depart from the view expressed by Natural England, there must be very good reasons for doing so. No such reasons are advanced in RBC's Outline Legal Submissions.
- 2.8 The Applicant considers that RBC greatly underestimate the weight which should be given to the views of Natural England in respect of these matters. In this regard RBC suggest that "...*the views of the statutory nature conservation bodies can be given significant weight*" (emphasis added). In *R (Akester and Anor) v DEFRA and Wightlink Ferries* [2010] EWHC 232 (Admin), the court found that "... *given Natural England's role as the national conservation body*" the defendant was "... **bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it.**" (emphasis added, para 112).
- 2.9 Natural England has consistently confirmed that it is in agreement with the assessment and conclusions reached in the Applicant's HRA, including the screening out of matters including direct habitat loss and impacts on aquatic environment from run off. This is in circumstances where, as set out in the Statement of Common Ground between Natural England and the Applicant, the engagement between the parties has been comprehensive and extensive. In these circumstances the Applicant is entitled to attach considerable weight to Natural England's support, and the decision maker should attach considerable weight to Natural England's position. RBC has failed to provide any cogent and compelling reason for departing from Natural England's expert view.

Paragraph 4

- 2.10 The general summary of *People Over Wind* is agreed. However, the Applicant questions the relevance of the principles cited in the context of this application. There is no suggestion that the Applicant has sought to rely upon mitigation measures in order to "screen out" from appropriate assessment, in a manner which would be contrary to the principle confirmed in *People Over Wind*. The decision to screen out direct habitat loss and impacts on the aquatic environment from runoff from appropriate assessment was based upon an assessment of significance and does not seek to rely upon mitigation measures in order to avoid or reduce effects. Natural England is content with and endorse those screening decisions.

Paragraph 5

- 2.11 Grace does refer to temporary loss but in that case the temporary loss was 1.7 hectares and the potential permanent loss was 162.7 hectares; the latter was clearly the major consideration.
- 2.12 That notwithstanding, the Applicant's assessment concludes that adverse effects to the integrity of the TBH SPA would not result from the project due to displacement of recreational activities from SANGs. As noted, the effects of direct habitat loss were screened out from appropriate assessment altogether following an assessment of significance. The Applicant was entitled to reach these conclusions, for the reasons explained further below.
- 2.13 The Applicant also contests that any meaningful comparison can be drawn between Grace and this application. As the Examining Authority is of course aware, the principal issue of dispute in Grace was whether the application of mitigation measures could be taken into account at the appropriate assessment stage, in determining whether the project would give rise to adverse effects to the integrity of a European site, or instead fell to be considered as compensatory measures under article 6(4) of the Habitats Directive.
- 2.14 In this case, the application of mitigation did not inform the decision to screen out from appropriate assessment the effects of direct habitat loss, nor was the conclusion that adverse effects to the integrity of the SPA would not result from the project due to displacement of recreational activities from SANGs based upon the application mitigation measures.

Paragraph 6

- 2.15 The Applicant agrees RBC's summary of the principle confirmed in Holohan. However, the Applicant considers that in making the development consent order sought, the Secretary of State will be in a position to impose controls which will be strict enough to ensure that there will be no adverse effect on the integrity of the TBH SPA. In particular, the use of Order limits and limits of deviation (including narrow working within four of the five SANGs which are crossed by the replacement pipeline) for the project constrain the area within which construction activity may be carried out and the final location and alignment of any permanent and temporary works.
- 2.16 The Applicant has also confirmed that construction works within the SANGs would be limited to two years, to reflect the assumptions of the HRA.
- 2.17 The Applicant considers that these requirements will provide sufficient certainty that any powers to determine later parameters relating to the construction phase of the project, such as the location and timing of the works, are subject to controls which would guarantee that the exercise of those powers will not adversely affect the integrity of the TBH SPA.

Paragraph 8

- 2.18 The first of the three contentions asserted by RBC is that '*... applicant has "screened out" the effects of direct habitat loss*'. The substantive point here is, RBC argue, that '*The applicant's assessment has failed to identify the simple point that the extent and distribution of relevant habitats will be reduced during the course of construction, and for upwards of 15 years afterwards during natural regeneration*'.
- 2.19 The Applicant does not accept this criticism. First, the Applicant notes that the HRA ([APP-130](#)) does acknowledge that there could be temporary loss of habitat, e.g. on page 104 of APP-130

where it says *'The route would affect habitat within the SPA' and 'The qualifying species of the SPA could potentially use any of the heathland habitats to be affected by the works, either for breeding, roosting or foraging and could suffer the effects of habitat loss.'*

- 2.20 Further, and as already noted, RBC fail to acknowledge that an appropriate assessment is only required to be made in respect of a plan or project which is likely to have a *significant* effect on the conservation objectives of a site and is not directly connected with or necessary to the management of that site.
- 2.21 In this case, the maximum area of the TBH SPA within the Order limits accounts for only 0.4% of the SPA's total area, and the areas which would be directly affected by construction works reduces to 0.1% with the implementation of narrow working techniques and trenchless crossings (which are secured by the code of construction practice) and the presence of embedded design measures and areas of existing hardstanding. Further, the effect would be a temporary one, during construction only. The Applicant's desk study of breeding sites of the qualifying species within the TBH SPA also confirms that the species use or have used in the recent past a much larger area than that which would be affected by the project.
- 2.22 The approach taken by the Applicant to the assessment of significance accords with the European Commission's methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (see [here](#)). That guidance notes as follows:
- 2.22.1 *"The significance test may require little more than consultation with the relevant nature conservation agency"* (para 3.1.5). In this case, the relevant nature conservation agency is Natural England, who have confirmed that they are content with all aspects of the Applicant's HRA.
- 2.22.2 *"In most cases, [the assessment of significance] is essentially a judgement, built up from a number of factors."* (Annex 1, p. 62)
- 2.22.3 *"A common means of determining the significance of effects is through the use of key indicators."* (para 3.1.5) Examples of the key significance indicators referred to are set out in Box 4 and Annex A of the guidance. One of these key indicators is percentage / magnitude of habitat loss. As noted, the area of the TBH SPA which would be temporarily affected during construction amounts to just 0.1% of the TBH SPA's total area. Qualifying species use or have used a much larger area of the TBH SPA. The duration of fragmentation and disturbance is also a key significance indicator. In this case, the works will only give rise to a temporary impact in respect of what is a very small part of the TBH SPA. Further, there would be no actual disturbance to qualifying features of the TBH SPA at all, since construction works within the TBH SPA would be limited to the period of 1 October to 31 January (inclusive). There would be no permanent impact on this part of the TBH SPA and land affected would be restored to a condition appropriate to its previous use. During regeneration of the land, habitat disturbed by the project would not be completely unsuitable for the qualifying species during the regeneration period (see p. 104 of the HRA). It is also relevant to note that qualifying bird species have been recorded in patches of bare earth. Therefore, whilst heathland may not have regenerated fully, qualifying species are still capable of utilising bare or developing substrate.

- 2.23 The Applicant was therefore entitled to screen out from assessment impacts which, on the basis of objective information and indicators, would not have a significant effect on the TBH SPA.

Paragraph 9

- 2.24 The impacts are not mitigated because the HRA concludes that no likely significant effects on the TBH SPA would arise. In particular, the HRA finds that:

2.24.1 *'The area of supporting habitat that would be lost as a result of construction is expected to be small compared to the total area of the site (8,275ha). All loss of habitat suitable for the qualifying species of the SPA would be temporary ... In summary, given the small scale and temporary nature of habitat loss resulting from the project, any effects to the SPA are considered to be insignificant' (p. 38).*

2.24.2 *'Effects to the SPA via the pathway of loss of habitat supporting the qualifying species are considered not to be significant. The total area of the SPA is 8,274.7ha. The total area of habitat with the Order Limits is approximately 36.20ha and accounts for approximately 0.4% of the SPA's total area. It is not anticipated that the entire Order Limits area would be given over to construction activity. Even in a hypothetical scenario during which the total 36.20ha area of SPA within the Order Limits were temporarily destroyed during construction, it is not anticipated that LSE would arise given the small area of the total SPA resource that would be affected ... The results of the desk study of breeding sites of the qualifying species within the SPA confirm that the species use or have used in the recent past a much larger area than that which would be affected by the project. This would indicate that there is ample available habitat elsewhere in the SPA for qualifying species to relocate to, while restored habitat develops. In summary, the loss of habitat suitable for the qualifying species of the SPA is of small scale and temporary. Any effects to the SPA via the pathway of habitat loss are therefore considered to be de minimis' (p104).*

- 2.25 These are conclusions that the Applicant was entitled to reach, conclusions which Natural England endorses, and conclusions which are legally sound.

Paragraph 11

- 2.26 The second of RBC's three contentions relates to SANGs.
- 2.27 The Applicant does not seek, and has never sought, to deny that construction works within SANGs could result in the displacement of recreational activities to the TBH SPA. However, the HRA concludes that the potential for increased disturbance to the qualifying feature of the TBH SPA (i.e. breeding birds) is very low (para 5.8.26).
- 2.28 RBC say that professional judgement to estimate the likely level of visitor displacement from SANGs to the TBH SPA has already been made by the competent authorities. That is not correct. The judgement made by competent authorities is whether there is a need for SANG provision in order to provide mitigation for the potential impact of residential development on the TBH SPA by providing alternative recreational facility and thus preventing an increase in visitor pressure on the TBH SPA.
- 2.29 RBC also say that "without the SANGs in question the recreational activity will be displaced to the SPA" (underlining added). This reasoning is flawed. The assessment confirms that

“construction activity would not require the total closure of any SANG. All SANGs would still be accessible during the period of construction works, with only specific access points and footpaths being temporarily closed or diverted.” Thus it is not a question of local communities being *“without the SANGS in question”* as RBC suggest; indeed the representation of RBC is positively misleading.

2.30 To be clear, the SANGs in question are:

2.30.1 Crookham Park (Queen Elizabeth Barracks) SANG. This SANG is located at its closest point approximately 550m from the boundary of Bourley and Long Valley SSSI (which is a component of the TBH SPA), in the borough of Hart. Crookham Park SANG has a total area of 71.55ha and comprises 14 interconnected areas. The area of the SANG within the Order limits is approximately 4.75ha (that is to say just 6.6% of the total SANG area) however only 2.82ha (or 3.9% of the total SANG area) would be directly affected by construction works. The Order limits intersect 8 of the 14 interconnected areas. Given the limited extent of the SANG which would be affected, the HRA concludes that the 6 unaffected adjacent areas within the SANG would absorb any displaced recreational activity for the short duration of construction (para 5.8.20). The Statement of Common Ground agreed with Hart District Council confirms that the Council is satisfied that the HRA assesses potential impacts on the TBH SPA;

2.30.2 Southwood Golf Course proposed SANG. This proposed SANG is located 2.4km from the Bourley and Long Valley SSSI component of the TBH SPA, in the borough of Rushmoor, and would amount to an extension to the existing Southwood Woodland SANG comprising four new areas. Combined, the existing and proposed SANG has an area of approximately 98.5ha. The Order limits would intersect all four areas of the proposed SANG, however the area of the proposed SANG which is actually within the Order limits is only 7.1ha, that is to say 7.2% of the total SANG area. The area which would be directly affected by construction works is 5.9ha, or 6% of the total proposed SANG area. The HRA concludes that the existing Southwood Woodland SANG, which is located approximately 350 metres to the west of the Order limits and is already well-established for walkers, and unaffected parts of the Southwood Golf Course proposed SANG, would act as a receptor for any displaced recreational activity for the short duration of construction;

2.30.3 St Catherine’s Road SANG. This SANG is a small site located approximately 2km from the TBH SPA. The Applicant understands from planning application records (application reference 10/0219) that the SANG occupies a triangular parcel of grassland approximately 1.4ha in area between St Catherine’s Road and Frith Hill Road. From the planning application records for the SANG (see application reference 10/0219), the area of the SANG within the Order limits is approximately 0.7ha, that is to say 50% of the total SANG area. The area which would be directly affected during construction is 0.4ha, or 28.6% of the total SANG area. Directly adjacent to the SANG is open-access woodland at Frimley Fuel Allotments and Frith Hill. The HRA concludes that these extensive areas of woodland would likely be suitable alternative locations for any small amount of recreational displacement from the SANG for the short duration of construction;

- 2.30.4 Windlemere SANG. This is a strategic SANG within the borough of Surrey Heath. Surrey Heath Borough Council has not raised an objection to the pipeline crossing through this SANG. The SANG has a total area of approximately 15ha. The area of the SANG within the Order limits is approximately 1.5ha, that is to say 10% of the total area of the SANG. The Turf Hill area of the TBH SPA is approximately 100m to the west of Windlemere SANG, albeit on the opposite side of the A322 dual carriageway. In addition, a Surrey Wildlife Trust car park allowing access to the Brentmoor Heath area of the TBH SPA is located approximately 300m to the west of Windlemere SANG. The HRA acknowledges that a measure of displacement could therefore result from Windlemere SANG to the TBH SPA via Brentmoor Heath. However, the Applicant concluded that the unaffected area of SANG, which accounts for 90% of the total area of the SANG, would be sufficient to absorb any displaced recreational activity. In addition, the HRA notes that the 5.5ha West End Recreation Ground is an area of common land approximately 410m from Windlemere SANG that is also capable of acting as a receptor for any displaced recreational activity for the short duration of construction; and
- 2.30.5 Chertsey Meads SANG. This SANG is located within the Borough of Runnymede. Runnymede Borough Council have expressed no concerns with regard to the impact on this SANG during discussions with the Applicant. The SANG has a total area of approximately 73ha. The area of the SANG which is within the Order limits is approximately 6.3ha, that is to say 9% of the total area of the SANG. However, the area which would be directly affected during construction is only 1.83ha, or 2.5% of the total area of the SANG. Chertsey Meads SANG is located some 7km from the TBH SPA at Chobham Common SSSI. The HRA notes that to travel to the TBH SPA's closest car park from the SANG would entail an 18-minute car journey. In addition, there are ten alternative SANG sites within 5km of Chertsey Meads, all of which are closer to the SANG than to the nearest component of the TBH SPA. Given those factors, the HRA concludes that it is extremely unlikely that any significant recreational displacement would occur due to construction activity within Chertsey Meads SANG.
- 2.31 In circumstances where only a proportion of the total area each SANG is proposed to be affected, temporarily, by construction activity, which in the case of four of the five SANGs amounts to 10% or less of the total area of those SANGs, it was entirely appropriate for the Applicant to conclude that recreational pressure was capable of being absorbed by alternative green space outside the TBH SPA.
- 2.32 RBC seek to characterise its concerns regarding the effect of construction works within SANGs in general, non-specific terms. This approach is unhelpful. As noted, in respect of three of the five SANGs affected by the project, there have been no concerns raised in relation to the basis for and conclusions of the Applicant's assessment. In addition, significantly, Natural England has raised no concerns regarding the Applicant's approach to the assessment of SANGs.
- 2.33 The Applicant's conclusion that adverse effects to the integrity of the TBH SPA would not result from the project is based upon the fact that the impacts on the SANGs are small scale (indeed smaller scale than the direct impacts on the TBH SPA) and temporary in nature. The extent of SANGs within the Order limits is 20.35ha in total (HRA paras 5.8.20-5.8.24), which amounts to 0.2% of the area of the TBH SPA (i.e. half of that area of the TBH SPA which is within the Order limits). The Applicant has also confirmed that construction works in the SANGs would be limited

to a maximum of two years, which is in line with the assumptions of the HRA assessment. This commitment is secured by the code of construction (Document Reference).

- 2.34 RBC's representation suffers from a lack of focussed engagement with the impacts of construction activity at each SANG. The Applicant's assessment is in contrast based upon an analysis of each SANG affected by construction activity specifically, in terms of the extent of SANG affected as a proportion of the site as a whole, the proximity of the area affected to alternative unaffected green space and the proximity of the area affected to the TBH SPA. In each case, the Applicant's findings indicate that construction activity would be temporary in nature, limited in geographic scope and that any displacement of recreational activity to the TBH SPA is expected to be very low. In the majority of cases, the Applicant finds that any displacement of recreational activity is capable of being accommodated by those parts of the respective SANG which would remain accessible during the construction period and by existing green space local to the respective SANG but located outside the TBH SPA.
- 2.35 The Applicant does not accept RBC's case that recreational activity would inevitably be displaced to the TBH SPA. This appears to rely upon an assumption that the SANGs affected are "at capacity" and are therefore not capable of accommodating any further displaced recreational activity. However, the fact that a SANG is "at capacity", in the sense that no more new housing can be permitted in reliance on that SANG as mitigation for the potential effects of population growth, does not bear on the question of whether that SANG is capable, on a temporary basis, of accommodating recreational activity which may be temporarily displaced as a result of this project.
- 2.36 The analysis undertaken by the Applicant provides a robust basis for the conclusions ultimately reached and is, as noted, supported by Natural England.

Paragraph 12

- 2.37 The Applicant rejects the assertion by RBC that the HRA '*...falls well short of establishing no adverse effect on integrity "beyond reasonable scientific doubt"*'. RBC's contention is not sound. In this regard RBC posits that '*for instance*' there is a reference to a "*reasonable assumption*" at paragraph 5.8.23 of the HRA. Such observation is not a balanced criticism; the cited reference is the only use of the word reasonable other than the conclusion that the absence of effects is beyond reasonable scientific doubt (para 7.1.10). Thus the relevant test is considered and applied in the HRA; the Examining Authority will note that the test of 'beyond reasonable scientific doubt' necessarily involves consideration of reasonableness.
- 2.38 The Applicant considers that the analysis undertaken at section 5.8 of the HRA regarding the effects of construction activity constitute complete, precise and definitive findings which are capable of dispelling all reasonable scientific doubt as to the effects of the project on the TBH SPA.

Paragraph 13

- 2.39 The combined effects of recreational pressure and direct habitat loss do not impact on the conclusions reached in the HRA. As noted, the effects to the TBH SPA of direct habitat loss were assessed to be *de minimis* (Table D.7 at p. 104 of the HRA) and were screened out from appropriate assessment on that basis. Similarly, no likely significant effects are anticipated as a result of displacement of recreational activity (see Table 4.2 at p. 38 of the HRA); such

displacement would in any event be very low (paragraph 5.28 of the HRA) and both temporary and short-term in duration. In those circumstances, there is in the Applicant's view no reasonable basis for finding that the combined effects of recreational pressure and direct habitat loss, which taken individually are very small, would lead to adverse effects on the integrity of the TBH SPA.

Paragraph 14

- 2.40 The decision to screen out effects relating to the contamination of ground and surface water bodies connected to the TBH SPA, of which Eelmoor Marsh SSSI forms a component part, is explained at p. 38 of the HRA:

“The potential for LSE to breeding birds to arise via this pathway is considered extremely remote as the qualifying species or the habitats on which they rely are not vulnerable to this effects pathway.”

- 2.41 Therefore, as regards the Eelmoor Marshes SSSI component of the TBH SPA, the decision to screen out impacts on the aquatic environment from run off was not, as inferred, based upon the application of mitigation measures. It was based upon an assessment of the significance of effects, which was not contingent upon the application of any form of mitigation. For completeness, the Applicant would clarify that Eelmoor Marsh SSSI is not a component of the Thursley Ash Pirbright and Chobham Common SAC, which supports sensitive wetland habitats.
- 2.42 As regards the more general assertion made in this paragraph, it is not correct to say that impacts on the aquatic environment from run off were screened out by assuming the application of measures to prevent such run off from construction sites. This has no basis in the HRA.
- 2.43 In a small number of cases, the Applicant has assessed on the basis that trenchless crossings of surface water features would be used in specific locations, in order to reduce the potential impacts of contamination of surface water bodies within or which are connected to or of importance to a European site. Where that is the case, the Applicant has been careful to clarify that these are embedded design measures and not mitigation to avoid or reduce effects to the European site (see e.g. paragraph 'a' on page 95 of the HRA and paragraph 'd' on page 101 of the HRA).

Paragraph 15

- 2.44 In conclusion, then, on the three points raised and in general the Applicant has provided a legally compliant HRA.
- 2.45 First, direct habitat loss was screened out from appropriate assessment on the basis of objective evidence which showed that such loss, which would be limited both in duration and geographic scope, would not be likely to have a significant effect on the qualifying features of the TBH SPA.
- 2.46 Second, the Applicant was entitled to conclude that adverse impacts on the integrity of the TBH SPA would not arise due to the displacement of recreational activity to the TBH SPA generated by construction works within SANGs. Those works would be limited in duration and would only impact a small proportion of the overall area of each SANG. The Applicant's analysis shows that any displacement of recreational activity could be accommodated by those parts of the respective SANGs which would not be affected by the works, and by other green space in

proximity. Any displacement of recreational activity to the TBH SPA would be limited and not such as to undermine the Applicant's conclusion.

- 2.47 Finally, the decision to screen out from appropriate assessment effects relating to the contamination of ground and surface water bodies connected to the TBH SPA was based upon the Applicant's assessment that the potential for likely significant effects on qualifying features of the TBH SPA was "extremely remote". The decision to screen out from assessment was not based upon the application of mitigation measures, as alleged.