

Reply to the applicant's Legal Case in Respect of the Thames Basin Heaths SPA

**Application by ESSO Petroleum Company Ltd
for an Order Granting Development Consent
for the Southampton to London Pipeline
Project**

Application Reference EN070005

Interested Party Reference 20022787

Internal Reference 19/00432/PINS

SOUTHAMPTON TO LONDON PIPELINE
HABITATS REGULATIONS ASSESSMENT

REPLY TO APPLICANT'S DEADLINE 4 SUBMISSIONS

1. At Deadline 4, the Applicant responded to Rushmoor Borough Council's (RBC) legal submissions filed at Deadline 3 in respect of the legal adequacy of the Habitats Regulations Assessment. This is a short reply to that response.

Paragraph 2 (2.1-2.6)

2. *Grace* was referred to for the legal principles, and not solely for the facts of the case. The point remains that up to 36.2 Ha of the TBHSPA could be affected in the sense of being unsuitable for bird breeding and foraging during the course of the construction of the project. Even if the Applicant's measures are able to reduce that temporary loss to 9 Ha, that is a significant area of the SPA. The fact that the SPA is very large, and thus only a small percentage is affected, is no answer to RBC's concerns. The question is whether the impacts have the potential to impinge on the conservation objectives of the SPA. In this case, those are maintaining or restoring¹:
 - a. The extent and distribution of the habitats of the qualifying features
 - b. The structure and function of the habitats of the qualifying features
 - c. The supporting processes on which the habitats of the qualifying features rely
 - d. The population of each of the qualifying features, and,
 - e. The distribution of the qualifying features within the site.
3. A proposal which directly affects at least 9 Ha and up to 36.2 Ha of the SPA, at least some of which is relevant bird habitat, clearly affects the "extent and distribution of the habitats of the qualifying features", and the function of those habitats. Since it

¹ <http://publications.naturalengland.org.uk/publication/4952859267301376>

appears to be accepted that the qualifying bird species will be displaced from the area of temporary land take, there is also an effect on the “distribution of the qualifying features within the site”. There may be effects on other conservation objectives. The short point is that the potential for adverse effects cannot be excluded simply on the basis that there are other unaffected habitats elsewhere in the SPA.

4. The Applicant relies also on the temporary nature of the interference. It is accepted that the interference is temporary, but for a prolonged period (up to 2 years). Once the works are completed, the habitat is assumed to naturally regenerate which means that the effect on the “extent and distribution of the habitats” and their “structure and function” will endure after the cessation of works. One key point from *Grace* (and indeed many other cases) is that temporary impacts cannot be excluded from assessment solely because they are temporary. Consideration needs to be given to the nature of the likely effects, by reference to the conservation objectives of the site.
5. The same points in respect of temporary impacts apply to SANGs. The Applicant further maintains that any displacement “is expect to be very low and certainly not of a level that would result in adverse effects on the integrity of the TBH SPA”. This remains puzzling given the wide acceptance that any increase in recreational pressure has the potential to cause adverse effects on integrity. It is now well-established that any increase in recreational pressure, in-combination with other developments which increase such pressure, has the potential for adverse effects. Indeed that has been the position for many years (see e.g. *Millgate v SSCLG* [2008] EWHC1906 (Admin)). The particular point about SANGs is that they are specifically created to avoid adverse effects on integrity of the SPA. Thus, as a matter of logic, if they are not available for use then the adverse effect may eventuate.

Paragraph 3 (2.7-2.9)

6. RBC has given reasons to depart from NE’s views. Its own submission throughout the Examination have been prepared by an expert ecologist. Those views should themselves be given significant weight by the competent authority, particularly on the question of screening since the approach must be a precautionary one. In other words, if there is divergence of professional judgment on question, appropriate assessment is called for.

7. There is no principle of law that NE's view must be accorded considerable weight, and *Akester* is not authority for that proposition, as is made clear in *RWE Innogy UK Limited v SSCLG* [2014] EWHC 4136 (Admin) at [32]-[35]. Weight is a matter for the decision-maker. Plainly a decision-maker may rationally conclude that NE's view should be given considerable weight, but it is not bound to do so, nor is it bound to follow that view, particularly where a more precautionary approach would be not to do so.

Paragraph 4 (2.10)

8. The relevant principles from *People Over Wind* appear to be agreed.

Paragraph 5 (2.11-2.14)

9. See paragraph 4 above in respect of the temporary nature of the impacts, and in particular the relevance of the conservation objectives for the SPA.

Paragraph 6 (2.15-2.17)

10. It is not accepted that the later construction controls provide sufficient control over the project for reasons previously given. The competent authority will have to apply the (agreed) *Holohan* principles in assessing the adequacy of the proposed measures.

Paragraph 8 (2.18-2.23)

11. The oblique references in the HRA to an effect on habitat within the SPA does not amount to grappling with the scale and nature of the interference proposed as required under the Habitats Regulations.
12. Contrary to 2.20, there is no failure on RBC's parts to understand the "screening" test; rather, the Applicant misunderstands the test. The screening question sets a low bar: "likely" means no more than the possibility of an effect and "significant" means anything more than *de minimis*; indeed the test has been characterised as "should we bother to check?": *Sweetman v An Bord Pleanala* [2014] PTSR 1092, per AG Sharpston at [AG45-50]. If the answer to this question is yes, the authority must proceed to undertake the second stage: an appropriate assessment.

13. When conducting a screening assessment, the competent authority must adopt an approach which is no less stringent than that adopted for an appropriate assessment and should, accordingly, apply the “*precautionary principle*”: *R (An Taisce) (the National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2015] PTSR 189 per Sullivan LJ at [18]. The essence of the precautionary principle is that measures should be taken, where there is uncertainty as to the existence of risks, without having to wait until the reality and seriousness of those risks become fully apparent: *Smyth v SSCLG* [2015] PTSR 1417 per Sales LJ at [40].
14. In light of this, a competent authority may only approve a project at the screening stage (without appropriate assessment) if it is certain that there is no risk of significant harm to a Site’s conservation objectives. This judgment must be made on the basis of objective information, using “*the best scientific knowledge in the field*” (*Landelijke Vereniging tot Behoud van de Waddenzee and Another v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2005] 2 CMLR 31 at [44]).
15. As set out above, and contrary to 2.21, neither the spatial nor temporal limits to a project provide a straightforward answer at screening stage.
16. The Applicant explains at 2.22 the lengths it has gone to in reaching a negative screening decision. However, that serves primarily to confirm that the competent authority should “*bother to check*” and carry out an appropriate assessment.

Paragraph 9 (2.24-5)

17. It is agreed that there is no attempt to mitigate the impacts of the project through direct loss of the habitat of qualifying features.

Paragraph 11 (2.26-2.36)

18. RBC has set out its case on displacement from SANGs in some detail. The fact of displacement to the TBH SPA is not in dispute (2.26). RBC’s case in summary is that:
 - a. The SANGs are only justified (such that they can be funded and delivered through s 106 contributions) on the basis that they are *necessary* to avoid adverse effects on the SPA;

- b. The SANGs have an established capacity based on methodologies supported by NE;
- c. The reduction in capacity from the project can be quantified by reference to those methodologies. The Applicant has failed to do that, instead asserting that the impacts would be very low. When the decrease in capacity is properly considered, that conclusion cannot stand up to scrutiny. RBC have calculated those impacts in respect of the area of temporary land take (excluding effects other areas which would become less attractive to visitors) and identified that the potential displacement across from Southwood Country Park would amount to 875 visitors. That is the equivalent effect of granting permission for c 300 new dwellings within 5km of the SPA. On the figures in 2.30, which RBC suggests are not sufficiently precautionary, the Applicant concedes a temporary loss of 12.45 Ha of SANG capacity, equivalent to capacity for 1,556 residents;
- d. It is well-established that any development which increases recreational pressure on the SPA will, when considered in-combination with other plans and projects, cannot be excluded from having an adverse effect on integrity. Since the Applicant concedes an increase in recreational pressure from its project, the conclusion must be the same.

19. The assertion at 2.35 that at SANG which is viewed as being at capacity can nonetheless accommodate further recreational pressure is unevidenced and contrary to well-established practice. RBC is not making a novel point on this issue. It is applying the principles with respect to the avoidance of recreational pressure on the TBH SPA which have been established for over a decade.

Paragraph 12 (2.37-2.38)

20. The competent authority will have to consider whether the Applicant's approach is sufficient to dispel all reasonable scientific doubt in light of the expert criticisms by RBC's ecologist and others as to the approach taken.

Paragraph 13 (2.39)

21. The Applicant appears to accept the point that the combined effects have not been expressly considered, but seeks to justify that position by reference to its conclusions on each point that the effects are too small to warrant attention. RBC's position is that those conclusions are not tenable, but in any event it is still incumbent on the competent authority to consider whether any effect from direct habitat loss combined with any effect from recreational pressure gives rise to likely significant effects. That is true even if the Applicant's assessments on those issues taken individually are accepted, which they should not be.

Paragraph 14 (2.40-2.43)

22. RBC notes that the Applicant does not rely on mitigation measures in respect of the impacts on the SPA from construction run off, and on that basis it does not appear that the issue in *People Over Wind* arises. RBC's concerns in respect of the risk from such run-off remain in any event.

Paragraph 15 (2.44-2.47)

23. For the reasons explained above, RBC maintains its concerns about the legal adequacy of the HRA and requests that these issues are taken into account in preparing the REIS.

Richard Turney

Landmark Chambers

12 February 2020