

A303 Amesbury to Berwick Down

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Deadline 9

8.63 Applicant's Response to Rule 17 Letter [PD-017]

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The Infrastructure Planning (Examination Procedure) Rules 2010

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The Infrastructure Planning (Examination Procedure)**Rules 2010****A303 Amesbury to Berwick Down****Development Consent Order 20[**]**

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1 Applicant's Response to Rule 17 Letter

- 1.1.1 This document sets out the Applicant's response to the letter issued by the Examining Authority ("ExA") under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 on 3 September 2019 (the "Rule 17 Letter").
- 1.1.2 The Rule 17 Letter asks two questions, the first of which is addressed to Natural England and the Applicant is also invited to respond and the second of which is addressed to the Applicant. The Applicant's response to both questions is set out below.

1.2 Question 1

- 1.2.1 For convenience, the text of the ExA's first question is repeated below:

To Natural England

- 1.2.2 *Rulings by the European Court of Justice (cases C-521/12 and C-164/17) suggest that provision of replacement habitat within a European site should be viewed as a compensatory measure rather than mitigation.*
- 1.2.3 *In the light of these rulings, and notwithstanding the information presented in [REP2-120] and [REP7-011], could Natural England confirm that they view the stone curlew replacement plot within Parsonage Down as mitigation rather than compensatory measures, and explain why this is the case in the context of the above case law?*
- 1.2.4 *The Applicant is also invited to respond on these points.*

Highways England response

- 1.2.5 The Applicant notes that Natural England has responded to the Rule 17 Letter, by email to the Planning Inspectorate dated 6 September 2019 at 14:18. In this response, Natural England confirmed its view that the proposed stone curlew replacement plot within Parsonage Down is mitigation rather than compensation further to Article 6 of the Habitats Directive (Council Directive 92/43/EEC).
- 1.2.6 The Applicant agrees with Natural England's view. The reasons for this position are set out below:
- Background**
- 1.2.7 As part of the Scheme, one existing breeding plot at Parsonage Down (the "**Existing Plot**") that is currently utilised by the Annex 1 species, Stone Curlew, will be lost due to land take for the Winterbourne Stoke bypass. A substitute plot (the "**Replacement Plot**") is to be provided for use by Stone Curlew, which shall conform to a specification as agreed with RSPB and Natural England. The Replacement Plot thus ensures that there is no net loss of breeding plots for Stone Curlew compared to that which exists at present by converting an area of land that is not currently suitable for use as a breeding plot into one that may be utilised by the species. Appropriate measures for the long term protection of that plot will also be put in place.
- 1.2.8 The Replacement plot will be located within the Parsonage Down National Nature Reserve (on Natural England's land) and the delivery and maintenance of it will be secured via a requirement contained in Schedule 2 to the DCO (see further explanation on this in the Applicant's response to the second question contained in the Rule 17 Letter below). Agreement in principle between the Applicant and Natural England has been reached and a legal agreement is being progressed between the parties to ensure the proposed requirement can be discharged in a timely manner.
- 1.2.9 It is important to note that both the Existing Plot and the Replacement Plot lie out with the Salisbury Plain Special Protection Area (SPA). There is no direct effect on habitats within the SPA. The proposed scheme for Stone Curlew is thus geographically separated from the SPA and relates to breeding habitats which lie outside the European site.
- 1.2.10 The Salisbury Plain SPA was classified in 1993 and supports seven species listed in Annex 1 of the Birds Directive (2009/147/EC), including Stone Curlew, which are a Qualifying Feature of the SPA. The conservation objectives¹ for the Salisbury Plain SPA are to, by reference to the Qualifying Feature for which the site has been classified, and subject to natural change:

¹ European Site Conservation Objectives for Salisbury Plain Special Protection Area Site Code UK9011102, Natural England, Version 3 dated 21 February 2019

- 1.2.11 *"Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:*
- *The extent and distribution of the habitats of the qualifying features*
 - *The structure and function of the habitats of the qualifying features*
 - *The supporting processes on which the habitats of the qualifying features rely*
 - *The population of each of the qualifying features, and,*
 - *The distribution of the qualifying features within the site"*
- 1.2.12 These conservation objectives are supplemented by an advice document², which sets out, inter alia, a target for the SPA to maintain the size of the breeding stone curlew population at or above a mean of 15 pairs.
- 1.2.13 Existing stone curlew nesting plots in the area are provided by local landowners, predominantly under the Countryside Stewardship scheme, who agree to manage parts of their land to a required specification in exchange for payment. Thus, the stone curlew nesting plots are, to a degree, manufactured, and subject to the terms of contracts that can be of a relatively short duration and include termination provisions. The purpose of the existing plots is to seek to improve the breeding success of Stone Curlew in the area beyond the SPA boundary.

1.3 Briels (C-521/12) and Grace (C-164/17) and Recent CJEU Case Law

- 1.3.1 The Rule 17 Letter asks for confirmation that the Replacement Plot is to be classified as mitigation under Article 6 of the Habitats Directive (92/43/EC), in light of the judgments in two cases of the European Court of Justice (**CJEU**) – (i) *Briels v Minister van Infrastructuur en Milieu (C-521/12)* and (ii) *Grace and another v An Bord Pleanála (C-164/17)*.
- 1.3.2 The cases concerned proposed projects that, as a direct result of the scheme in question, would result in habitats within areas of land designated as Special Areas of Conservation ("**SACs**") or as Special Protection Areas ("**SPAs**") being lost. In the *Briels* case, a proposed scheme to widen a Dutch motorway would have resulted in the loss of a part of land designated as a SAC for the protected habitat of Molinia meadows. It was proposed that new Molinia meadows would be created elsewhere within the SAC as replacement habitat.

² European Site Conservation Objectives: Supplementary Advice on Conserving and Restoring Site Features, SPA Site Code UK9011102, Natural England, dated 27 October 2017

- 1.3.3 In *Grace*, the facts related to a proposal for a wind farm in a SPA that had been designated because it hosted blanket bog, the natural habitat of hen harrier (an Annex 1 species). As part of the proposed scheme there would be both temporary and permanent loss of the protected habitat (i.e. that within the SPA). It was proposed that the scheme would be operated in accordance with a management plan which sought to address the loss of habitat by, among other measures, restoring three areas within the SPA to the blanket bog habitat as replacement habitat.
- 1.3.4 The courts had to consider whether the proposals were to be treated as mitigation under Article 6(3) of the Habitats Directive, or as compensation under Article 6(4). In order to be considered as mitigation under Article 6(3) the developers would have to show that the schemes would not “*adversely affect the integrity of the [designated sites] concerned*”.
- 1.3.5 In both cases, it was held that the replacement habitat proposed did not avoid the fact that parts of the protected habitats within the designated sites concerned would be lost as a result of the proposed schemes – i.e. notwithstanding that replacement habitat would be provided elsewhere, it was the case that as a direct result of the proposals, the integrity of areas of the designated sites would be adversely affected. Consequently, in cases where a scheme adversely affects the integrity of a designated site through loss of protected habitat, *any* measures that seek to off-set that adverse effect with the provision of different positive effects cannot be considered as mitigation under Article 6 (3) and instead should be treated as compensation under Article 6 (4).
- 1.3.6 Another judgment of the CJEU has expanded on the reasoning provided in the cases, distinguishing between mitigation and compensation as follows (People Over Wind v Sweetman & Teoranta (C-323/17):
- Mitigation: protective measures that are intended to avoid or reduce any adverse effects on the integrity of a SPA or SAC; and
 - Compensation: compensatory measures that compensate for or offset the adverse effects of a plan or project on the integrity of a SPA or SAC.

1.4 Why the Replacement Plot is mitigation

- 1.4.1 As stated above, the Applicant agrees with Natural England that the Replacement Plot is mitigation and not compensation. It does not share any of the key characteristics of the above two cases as it is a protective measure that avoids an adverse effect on the integrity of the Salisbury Plain SPA. The detail is analysed below.

Both the Existing Plot and the Replacement plot are outside the SPA. Therefore unlike in the above two cases, it is not the case in the present Scheme that an area of the Salisbury Plain SPA is to be temporarily or

permanently lost. The starting point is therefore that the extent of habitats within the SPA is unaffected. The only potential issue relates to the impact on Stone Curlew which provide a supporting population to the SPA population. The focus is thus on the impacts on the bird species, not the impact on the habitat (which was the issue in *Grace* and *Briels*).

- 1.4.2 It should be noted that the Applicant's Statement to Inform Appropriate Assessment ("**SIAA**") [APP-266] states that the Existing Plot is, despite being out-with the SPA, used by the same population of Stone Curlew that nest within the SPA and that a net reduction in the number of successful plots will result in a net reduction in breeding opportunities for the species, which could affect the ability of the Salisbury Plain SPA to achieve its conservation objectives (please see paragraph 5.1.2 of the SIAA). However, this possible identified adverse effect is mitigated by the provision of the Replacement Plot. Rather than off-setting or counterbalancing a loss in SPA habitat that leads to a failure to protect the integrity of the Salisbury Plain SPA, the Replacement Plot completely avoids a net reduction in breeding opportunities for Stone Curlew. The supporting population of Stone Curlew is thus maintained and consequently the integrity of the SPA is not affected. In those circumstances there is no adverse effect on integrity to "compensate".
- 1.4.3 In this regard, two domestic cases, which both concerned the loss and provision of replacement land that were outside designated sites, are more relevant to the present circumstances than the CJEU cases referred to above.
- 1.4.4 In *Lee Valley Regional Park Authority v Epping Forest District Council [2015] EWHC 1471 (Admin)*, a High Court of Justice³ case, the facts concerned an application to construct a large glasshouse within 2km of a SPA. A small lake on the development site provided habitat that supported 2 SPA citation species (2 species of duck). The lake was not part of the SPA but was nearby to it. As part of the scheme, it was proposed to remodel the lake and create a new additional storage pond to the north.
- 1.4.5 The Court also noted that it was not a particular protected habitat type, but instead the species which was the basis for the designation of the SPA.
- 1.4.6 The Court held that the correct approach to determining the Article 6(3)/ 6(4) question is to start with the protected nature conservation interest and the source of the anticipated possible effect, and, in doing so, distinguished the case from *Briels*. The following short but important paragraph from the Judgment should be noted:
- 1.4.7 *[80] In this case, the SPA interest concerned was the Gadwall and Shoveler ducks. It was not a particular protected habitat type but, rather, the species which were the basis of the designation. The works (and the conditions*

³ It should be noted that this case did go to the Court of Appeal on a different point, where this conclusion was endorsed.

related to timing) were designed to reduce and avoid harm to the interests of those birds. This was to be achieved by undertaking works when, as a result of the birds' migration, they were far less abundant, and implementing a scheme "providing an adequate extent and continuity of supporting habitat" to eliminate, avoid or reduce the likely significant effects. This was, in my view, clearly mitigation, not compensation.

- 1.4.8 *[81] Once one starts with an understanding of the protected nature conservation interest and the source of the anticipated potential effect, the distinction between the present case and that of, of [sic] instance, the case of Briels is clear. In Briels, the protected interest was a type of habitat which would be adversely affected, and the proposal was to create new areas of that habitat type. In that case, the new areas of habitat were not mitigation but were compensation for the impact on the habitat type, which was the nature conservation interest concerned. It was not, like the present case, a measure designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place.*
- 1.4.9 A similar approach was taken in a 2017 Northern Ireland appeal matter, *Re Murphy's Application for Judicial Review, 2017 WL 04865887*. In this case, the facts concerned a proposal to build a trunk road adjacent to (and out with) a SPA. The land on which the scheme was to be built was considered to be linked to the SPA for the protected species of whooper swan. Land take for the trunk road was proposed, which would result in a loss of grazing habitat for the swans as well as other aspects of disturbance. Mitigation measures were incorporated into the design, including entering into land management agreements and field size adjustment and amalgamation measures.
- 1.4.10 Again, the Court distinguished the *Briels* judgment. The following brief but salient passage (our emphasis added) is worth noting:
- 1.4.11 *38. In paragraph [28] of Briels the court concluded that a mitigation or protective measure is one which lessens the negative effects of a plan or project with the aim of ensuring that the integrity of the site is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project but seeks to counterbalance the failure to do so through different, positive effects in order to avoid a net negative effect.*
- 1.4.12 *39. That analysis requires one, therefore, to identify the selection feature at risk. In Briels the selection feature was purple moor grass. That feature was to be a direct casualty of the project. The suggestion that a net overall benefit could be achieved by the creation of a new habitat could not be guaranteed and that offended the precautionary principle.*
- 1.4.13 *40. In this case the protected feature is the Whooper Swan. There is no direct impact on the protected feature. The foraging lands are not themselves a protected feature. The appropriate assessment and the*

Statement indicate that with the field amalgamation measures there will be no adverse impact on the protected feature. The measures in this case are aimed at avoiding or reducing any significant adverse effects on the protected feature. They are plainly mitigating measures.

- 1.4.14 In *Lee Valley* and *Re Murphy's Application*, the cases involved projects such as the present Scheme, where mitigation measures are proposed on land out with SPAs, in circumstances where a possible indirect effect on species (and not a habitat) within nearby SPAs had been identified. The effect is 'indirect' because no direct loss of a protected habitat is proposed. The focus is thus on the species rather than the habitat.
- 1.4.15 These cases provide the correct interpretation of the law relating to Article 6 (3) and Article 6 (4) for schemes that are different from the *Briels* and *Grace* cases because:
- The areas of land to be both lost and gained are out-with the designated site.
 - No protected habitat is to be lost.
 - The possible adverse effect relates to a species as opposed to a protected habitat.
 - The possible adverse effect is that of an indirect one on land linked to the designated site.
- 1.4.16 The decisions of the two courts in *Lee Valley* and *RE Murphy's Application* are unqualified, clear and unequivocal. The striking similarity between the facts of these two cases and the present Scheme unquestionably mean their position should be applied to the Scheme. Moreover, the position in the cases cited in the Rule 17 Letter does not conflict with the position of the domestic courts in *Lee Valley* and *RE Murphy's Application*.

1.5 Certainty of the Replacement Plot

- 1.5.1 The Applicant also notes that other CJEU cases (notably *Waddenzee* (C-127/02) and *Sweetman* (C-258/11)) have held that in order to show that there will not be an adverse effect on the integrity of the designated site, it is necessary to show this "beyond reasonable scientific doubt". The question asked by these cases is whether it can be said with sufficient certainty that the measure will make an effective contribution to avoiding harm.
- 1.5.2 In respect of the present Scheme, there is no reasonable scientific doubt that the Replacement Plot will maintain the integrity of both the Salisbury Plain SPA and SAC (in respect of the SAC in particular, please see section 6 below).
- 1.5.3 Whether such reasonable scientific certainty exists is necessarily a fact-specific exercise depending on the case before the decision-maker at the relevant time. So, with regard to the specific question of the effectiveness of

replacement plots for Stone Curlew in the vicinity of the Scheme, we note that the practice of providing nesting plots in the Wessex area RSPB in accordance with an agreed specification is a well established and very successful one.

- 1.5.4 As set out throughout the Examination, the practice of replacement plots has been employed in the area for many years, as a result of which Natural England and their partners have developed effective specifications for the creation of stone curlew plots. These methods have been so successful that the Wessex stone curlew population has recovered from 30 pairs in the 1980s to 130 pairs by 2015. The plot development and management methods developed by RSPB and its partners have been subject to experimental testing via plot management trials to enable the procurement of robust data. These trials have tested different management techniques designed to encourage nesting and the results have informed the published guidance on stone curlew plot creation; as well as the advice RSPB and Natural England have provided to the Applicant, which has informed the specification to be used at the Replacement Plot. The specification is therefore based upon the best scientific research available in the field and informed by techniques of proven and demonstrable success in increasing the Wessex stone curlew breeding population. There is thus no reasonable scientific doubt that these plots will provide a net benefit to the Wessex stone curlew population.

1.6 Views of the Scientific Advisor

- 1.6.1 Decision makers are obliged to take into account the views of appropriate nature conservation bodies in coming to their decision. This is further to Regulation 63 (3) of the Conservation of Habitat and Species Regulations 2017, and was noted in the *Lee Valley* case, which held that (in respect of the 2010 version of the Regulations, the text of which for this provision is unchanged in the 2017 version) “*the local planning authority are obliged to consult with Natural England and take their views into account in reaching a decision in cases of this sort*”.
- 1.6.2 This point has been reiterated in more recent cases, including in *R (ota Mynnyd Y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231, where it was held that “*The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions: [...] (8). It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) at [49].*” (our emphasis added).

- 1.6.3 As stated at the beginning of this note, Natural England has provided its response to the Rule 17 Letter, confirming its view that the Replacement Plot is mitigation and not compensation.

1.7 Integrity of the SAC

- 1.7.1 Finally, it should be noted that the replacement plot at Parsonage Down will not affect the integrity of the Salisbury Plain SAC, as stated in the SIAA. The plot is to be situated on a part of the SAC that is classified as mesotrophic grassland, not on the calcareous grassland feature for which the Salisbury Plain SAC was designated, which further reinforces the conclusion of the SIAA on this issue. As such, its integrity is not adversely affected by the Scheme.

1.8 Question 2

1.8.1 For convenience, the text of the ExA's second question is repeated below:

To Highways England

1.8.2 *In the absence of binding legal agreements and certainty regarding the provision of four stone curlew plots [REP6-024 and REP7-011], the Examining Authority (ExA) is unclear as to how it can be satisfied, beyond reasonable scientific doubt, that there would be no adverse effect on the integrity of the Salisbury Plain Special Protection Area (SPA).*

1.8.3 *Can the Applicant explain to what extent it considers that the necessary certainty regarding the delivery of such measures has been secured? The explanation should address the legal requirements in respect to Habitats Regulations Assessment and a conclusion of no adverse effects on integrity (AEol).*

Highways England response

1.8.4 As the Applicant has reported in various submissions into the examination and at the latest round of hearings, following discussions with RSPB and Natural England, the Applicant proposes to provide a total of four stone curlew breeding plots as part of the Scheme. One is a direct replacement of a stone curlew breeding plot to be lost as a result of the Scheme (and considered under question 1 of this response) ("the Replacement Plot") and the other three are to be provided as a package of mitigation (in relation to potential in-combination recreational disturbance effects during operation of the Scheme) and enhancement ("the Additional Plots"). RSPB and Natural England have confirmed they agree with this proposal and that this will ensure no adverse effect on the integrity of the Salisbury Plain SPA.

1.8.5 The location of the Replacement Plot has been identified and agreed with Natural England as regulator and landowner and discussions are at an advanced stage as to the terms of a binding legal agreement. In terms of the Additional Plots, one plot is proposed to be provided at Winterbourne Down on RSPB land. As with Natural England, discussions are at an advanced stage as to the terms of a binding legal agreement in respect of that plot. In terms of the remaining two plots, a number of potential locations have been identified (and approved by RSPB as being suitable) on third party land and good progress is being made in discussions with three landowners (whereby drafts of agreements have been circulated). In addition, the Applicant has identified a potential plot location within the Order limits which can be provided if required under the powers contained in the DCO. The process the Applicant has gone through to identify potential plot locations has confirmed RSPB and Natural England's position that there are a variety of suitable plot locations that meet the required criteria agreed with those bodies (and as set out in Appendix 1 of Appendix A to the Statement of Common Ground with Natural England [AS-106]). The Applicant therefore

- has full confidence that agreements will be put in place in short order to secure the provision and maintenance of the Replacement Plot and the Additional Plots (and that there are no impediments that will prevent this).
- 1.8.6 However, the Applicant recognises that in the context of the Habitats Regulations Assessment regime, the Examining Authority and Secretary of State, to discharge their respective duties, require more certainty as to the provision of the Replacement Plot and the Additional Plots than the current position provides, by reference to a legally binding mechanism.
- 1.8.7 For this reason, the Applicant has inserted a new requirement into the latest draft of the DCO (Requirement 12) which it considers provides sufficient certainty as to the provision and maintenance of the Replacement Plot and the Additional Plots and, given the clear availability of plots in the area, is able to be discharged. It is split into two limbs, and the operation of each limb is described below:
- 1.8.8 The Replacement Plot: the Applicant is required to provide, prior to the start of the preliminary works (as defined in the DCO), details to the Secretary of State demonstrating that land and a regime of maintenance measures has been secured to provide and maintain the Replacement Plot. The Secretary of State must then certify that they are satisfied with the details provided. The Applicant must then provide and maintain the Replacement Plot in accordance with the details certified as satisfactory by the Secretary of State prior to the start of any works that remove the existing plot that is to be lost.
- 1.8.9 The Additional Plots: the Applicant is required to provide, prior to the commencement of the authorised development (as defined in the DCO), details to the Secretary of State demonstrating that land and a regime of maintenance measures have been secured to provide and maintain the Additional Plots. The Secretary of State must then certify that they are satisfied with the details provided. The Applicant must then provide and maintain the Additional Plots in accordance with the details and timetable certified as satisfactory by the Secretary of State.
- 1.8.10 The details provided to the Secretary of State under the requirement in respect of both the provision of the plots and their maintenance must be substantially in accordance with the 'stone curlew breeding plot specification' which is to be a certified document and has been submitted at Deadline 9 alongside this response. The specification reflects the details provided in Appendix 1 of Appendix A to the Statement of Common Ground with Natural England [AS-106], although given the purpose of the specification the drafting has been amended in places to ensure it is more precise, to meet the tests for requirements – the minimum parameters have not changed.
- 1.8.11 It is the Applicant's view that the provision of the Replacement Plot and Additional Plots in accordance with the specification would, beyond reasonable scientific doubt, ensure that there is no adverse effect on the integrity of the Salisbury Plain SPA, due to no net loss in breeding

opportunities for stone curlew. This is through the parameters set out in the specification that are secured through the proposed DCO requirement. Through many years of managing habitat for stone curlew in the Wessex area (i.e. around the Salisbury Plain SPA) RSPB, Natural England and their partners have developed effective specifications for the creation of stone curlew plots. As mentioned above, these methods have been so successful that the Wessex stone curlew population had recovered from 30 pairs in the 1980's to 130 pairs by 2015. The plot development and management methods developed by RSPB and its partners has been subject to experimental testing via plot management trials to enable the procurement of robust data. These trials have tested different management techniques designed to encourage nesting and the results have informed the published guidance on stone curlew plot creation and the advice RSPB and Natural England have provided to Highways England, which has informed (and is reflected in) the specification. The specification is therefore based upon the best scientific research available in the field and informed by techniques of proven and demonstrable success in increasing the stone curlew breeding population in and around the Salisbury Plain SPA. There is thus no reasonable scientific doubt that these plots will provide a net benefit to the stone curlew population in and around the Scheme which are linked to the designation of the Salisbury Plain SPA. As such, there is no reasonable scientific doubt that there will be no adverse effects on the integrity of the Salisbury Plain SPA caused by the Scheme.

- 1.8.12 The Applicant has provided the wording of the requirement and the specification to Natural England and RSPB and both bodies have confirmed they are content with the approach the Applicant is proposing.

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