

M25 junction 10/A3 Wisley interchange TR010030

9.154 Applicant's comments in response to the submissions of the Royal Horticultural Society on Habitats Regulations Assessment matters

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

Volume 9

February 2021

Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

M25 junction 10/A3 Wisley interchange

Development Consent Order 202[x]

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Planning Inspectorate Scheme Reference	TR010030
Application Document Reference	TR010030/9.154
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Version	Date	Status of Version
0	03 February 2021	Response to SoS Letter dated 20 January 2021

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1. Introduction

- 1.1.1 This document sets out Highways England's response to the Secretary of State's (SoS) letter received on 20 January 2021.
- 1.1.2 This document should be read in conjunction with the following:
- 9.155 Other information in respect of environmental effects requested by the Secretary of State in relation to his Replacement Land proposals;
 - 9.156 Other environmental information requested by the Secretary of State in respect of his Replacement Land proposals to inform the Appropriate Assessment;
 - 9.157 the legal opinion written by Michael Humphries QC and Caroline Daly, both of Francis Taylor Building; and
 - 9.158 Figure showing Highway's England's interpretation of the Secretary of State's Replacement Land proposals.
- 1.1.3 Where issues raised within the submission have been dealt with previously by Highways England, a cross reference to that response or document is provided to avoid unnecessary duplication. The information provided in this document should, therefore, be read in conjunction with the material to which cross references are provided.
- 1.1.4 Matters related to SoS Bullet 1 - Request for information in relation to proposals for reductions in replacement land are set out in documents 9.155, 9.156, 9.157 and 9.158.

2. SoS Bullet 2 – Request for comments from the Applicant to the comments from the Royal Horticultural Society (“RHS”) on Habitats Regulations Assessment matters, including the opinion of David Forsdick QC

Secretary of State's comment

The Secretary of State requests comments from the Applicant on the submissions of the Royal Horticultural Society (“RHS”) relating to the Habitats Regulations Assessment as contained in RHS' Response to the Secretary of State's letter dated 4 November 2020 (RHS/RMCo/13) and its Response to the Secretary of State's letter dated 27 November 2020 (RHS/RMCo/14). In particular, the Secretary of State invites comments on the Opinion from David Forsdick QC that was appended to the response.

- 2.1.1 This technical response has been written by Paul Watts BSc (hons), MSc, CEcol. It is made in response to the submissions made by Freeths LLP on behalf of the RHS in its responses to the Secretary of State's consultation letters (RHS/RMCo/13 and RHS/RMCo/14), and also to the ecological information and conclusions in the legal opinion of David Forsdick QC ('the DFQC opinion'), as submitted in response to the Secretary of State's letter dated 27 November 2020. On matters of law, this response has relied on the legal opinions of Michael Humphries QC and Caroline Daly set out in document 9.157 and as appended to HE's response of 19 November 2020 [9.150 Applicant's Response to Secretary of State's Consultation Letter, dated 19 November 2020].
- 2.1.2 Mr Watts has been the lead ecologist on the M25 junction 10 A3/Wisley interchange Scheme for over four years. He has undertaken every single species-specific breeding bird survey for all three of the SPA qualifying species (Dartford warbler, nightjar and woodlark) every year since the first surveys in 2016. Through his long-term involvement with the project throughout the assessment stage and DCO examination, Mr Watts has had the opportunity to study in great detail the habitat and feeding requirements of all three SPA qualifying species, and has formed a strong understanding, with particular reference to this site.
- 2.1.3 In addition, Mr Watts has had over three years' of consultation with Surrey Wildlife Trust (the custodians of the Ockham and Wisley Commons SSSI component of the SPA) and Natural England (the designators of the SPA and authors of the SPA citation and Conservation Objectives), as well as heathland specialists at the RSPB.

2.2 Technical response to Freeths LLP submission on behalf of RHS

- 2.2.1 In paragraphs 11-21 of the Freeths response to Michael Humphries QC and Caroline Daly's submission dated 19 November 2020, the issue with regards to the Surrey Wildlife Trust management plan overlapping with the suite of compensatory measures, as previously raised by RHS in their deadline 12 submission [REP12-56] is raised again. This response is Mr Watts's expert opinion on this matter, having led on the consultation and design of the suite of compensatory measures, and having detailed knowledge of the site.
- 2.2.2 With regards to the issues raised by Freeths on this matter, Highways England has already provided an explanation in 3.2 of Highways England's comments on RHS's deadline 11 response [REP12-024]. However, in order to assist the Secretary of State, Mr Watts will provide a further, detailed response clarifying the process that Highways England correctly followed when designing the suite of compensatory measures.
- 2.2.3 As set out in the HRA Annex B [REP4-016] and the HRA Annex C [REP4-017], the compensatory measures were designed in consultation with Natural England, Surrey Wildlife Trust, RSPB, Surrey County Council and Forestry Commission.
- 2.2.4 As part of this process, Highways England was very clear (as reiterated by our HRA specialist at DTA Ecology) that any enhancement measures within the suite of compensatory measures must be in addition to 'normal practice' and would not have taken place anyway. This was minuted in item 4.0 of the minutes from a meeting on 16 March 2018 (page 50 of the HRA Annex B: consultation report [REP4-016]), where this point was acknowledged and agreed by Surrey Wildlife Trust and Natural England. It was again confirmed by Natural England in a meeting on 9 October 2018 when details of the suite of compensatory measures were being discussed, as minuted in item 2.0 on page 64 of the HRA Annex B: consultation report [REP4-016]).
- 2.2.5 Having made clear that the suite of compensatory measures must be in addition to 'normal practice', Highways England then ensured that the suite of compensatory measures were designed, under these clear terms, in consultation with Surrey Wildlife Trust (the custodians of the site) and Natural England (the authors of the SPA's Conservation Objectives, and the assessors of the condition of the Ockham and Wisley Commons SSSI).
- 2.2.6 The consultation with Natural England on this matter was also confirmed by Natural England in item 3.2.17 of Highways England's SOCG with Natural England [REP8-022]: "*Natural England were consulted on and agreed with the suite of compensatory measures as contained in the HRA Stages 3-5 (APP-044). This included the appropriate ratios for the permanent and temporary land take, and agreement on the SPA compensation land parcels and SPA enhancement areas, and their proposed management*".
- 2.2.7 Natural England confirmed this in their response to question 1.4.9 on pages 1-2 of Natural England's response to ExQ1 [REP2-034], where they state "*The compensation measures and the enhancement measures set out in the application are certainly outside the scope of existing management plans and legal agreements*".

- 2.2.8 In their response to question 1.4.9 on page 2 of Natural England's response to ExQ1 [REP2-034], Natural England goes on to confirm that "*management obligations in the agreement relate to existing areas of open heathland and three discrete grassland areas only, and place no obligation on the agreement holder to expand the area of heathland through tree felling or other works. There are no legal requirements on Surrey County Council or Surrey Wildlife Trust to carry out the works proposed as compensation and enhancement measures arising out of the designation of the land as SSSI or SPA. The maintenance of the integrity of the SPA and the maintenance of the SSSI in favourable condition is achieved to a satisfactory level through management of the existing areas of open heathland and open water - this has consistently been the basis of our advice to Surrey Wildlife Trust*".
- 2.2.9 This also aligns with the SPA's Conservation Objectives and definitions of favourable condition for designated features of interest for the Ockham and Wisley Commons SSSI (found in Appendix 6 on pages 85-122 of the Surrey Wildlife Trust 2010-2020 Wisley and Ockham management plan [REP10-019]). The Conservation Objectives for this SSSI state that "*The Conservation Objectives for this site are, subject to natural change, to maintain the following habitats and geological features in favourable condition*". The habitats listed are 1) dwarf shrub heath and 2) open standing water and canals. Clearly the focus of the Conservation Objective is on maintaining the existing heathland, rather than increasing it.
- 2.2.10 Surrey Wildlife Trust have also confirmed that the suite of compensatory measures are outside of the works that would be undertaken as part of their management, as explained in bullets 1-4 on page 2 of their final comments [REP12-043].
- 2.2.11 This is further supported by RHS's own consultants' (Baker Consultants Limited) Figure 1 [REP11-042], which shows the general areas proposed for woodland clearance, as set out in the Surrey Wildlife Trust 2010-2020 Wisley and Ockham management plan [REP10-019]). Being extremely familiar with the site, Mr Watts's evidence is that large areas of woodland clearance have indeed taken place within all of these proposed locations for woodland clearance (3a, 3b, 3d, 5c, 9b, 9c and 9d) in recent years (i.e. as a result of this management plan). It is very obvious when out on site that Surrey Wildlife Trust have indeed completed the felling works that they intended for these general locations, as they have stated in their final comments [REP12-043].
- 2.2.12 Highways England's position is clear on this matter: it has followed the correct processes, consulted with the correct organisations and have clearly documented the evidence of this consultation and decision-making process, in order to design an appropriate suit of compensatory measures.
- 2.2.13 Highways England suggests that considerable weight should be placed on the advice provided by the custodians of the site (Surrey Wildlife Trust), and the assessors of the condition of the site and authors of the Conservation Objectives (Natural England). Highways England is certain that the suite of compensatory measures were designed appropriately and fall outside 'normal practice'.

2.3 Technical response to the opinion of David Forsdick QC

- 2.3.1 This response is based on Mr Watts's extensive knowledge of the Scheme, the site, and the habitat and feeding requirements of the SPA qualifying species.
- 2.3.2 As set out above, Mr Forsdick's argument that the air quality target (as set out in the Supplementary Advice on the Conservation Objectives [REP5-034]) applies to the woodland buffer is based on a number of steps, some of which require expert judgement on the ecological evidence. Highways England retains its view that the air quality objective in the Supplementary Advice on the Conservation Objectives [REP5-034] does not refer to the woodland buffer.
- 2.3.3 In paragraphs 7, 33 and 34, Mr Forsdick states that the SPA is in unfavourable condition, and that the QFs are not in favourable condition. This is an unfounded statement, presumably based on the air quality objective in the Supplementary Advice on the Conservation Objectives with regards to the site [REP5-034], rather than a knowledge of the state of the QF population within the site. Highways England would like to clarify that the population of QFs for all three species within the Ockham and Wisley Commons SSSI component of the SPA are higher now than they were at SPA designation in 2005, and therefore the QFs of the SPA are most certainly in favourable condition within this site.
- 2.3.4 As set out in the Conservation Objectives and definitions of favourable condition for designated features of interest for the Ockham and Wisley Commons SSSI component of the SPA (found in the table in Appendix 6 on pages 94-96 of the Surrey Wildlife Trust 2010-2020 Wisley and Ockham management plan [REP10-019]), at the time of SPA designation (in 2005), Ockham and Wisley Commons SSSI supported two individuals of nightjar, no woodlark and no Dartford warbler (refer to the comments column for details). These Conservation Objectives and definitions of favourable condition for designated features of interest set a discretionary target for the Ockham and Wisley Commons SSSI component of the SPA of two individuals of nightjar, one individual of woodlark and two individuals of Dartford warbler.
- 2.3.5 As set on in paragraph 4.5.4 of the SiAA [RE4-018] during the baseline assessment for the Scheme, the Ockham and Wisley Commons SSSI component of the SPA was found to support seven nightjar territories, two woodlark territories and seven Dartford warbler territories.
- 2.3.6 This is clearly an increase from the numbers recorded at designation, and exceeds the discretionary targets set for this SSSI component of the SPA. Therefore, the QF populations are in favourable condition. As stated by the Surrey wildlife Trust in their response to ExQ2 [REP5-044], these increases are due to an increase in heathland within the Ockham and Wisley Commons SSSI component of the SPA.
- 2.3.7 As Mr Forsdick states at paragraph 1, his opinion is "*focussed on the correct legal approach rather than how that approach is to be applied to the specific facts*". However, each and every SPA is different, and in order to fully understand the application of the Conservation Objectives for an SPA, it is important to have

a strong grasp of the ecological requirements of the SPA qualifying species (e.g. feeding, nesting and roosting requirements) and the site habitats.

2.3.8 This will not be an exhaustive response to every paragraph of the DFQC opinion, but instead, will identify the key steps and provide an ecological explanation of why some of these key steps are based on incorrect information or judgements on that information, and thus in turn, the conclusions of the DFQC opinion are incorrect.

2.3.9 In the legal note from Michael Humphries QC and Caroline Daly (Document reference 9.157) they comment on the key steps in David Forsdick QC's argument. I wish to comment on the ecological aspects of some of those steps under the following headings:

1. In order to assess whether there is an impact on the 'integrity' of an SPA it is necessary to focus on the site's "Conservation Objectives" ('COs');
2. The woodland buffer falls under Conservation Objective 3: the supporting processes on which the habitats of the qualifying species (QFs) rely;
3. Consideration of the Supplementary Advice for the Conservation Objectives;
4. The application of critical loads to the woodland buffer;
5. David Forsdick QC's argument that HE's submission is wrong in law, and;
6. Implications.

2.4 In order to assess whether there is an impact on the 'integrity' of an SPA it is necessary to focus on the site's "Conservation Objectives" ('COs');

2.4.1 The SiAA [REP4-018] did indeed focus on the SPA's Conservation Objectives (and Highways England consulted with Natural England on the SiAA approach and findings).

2.4.2 In paragraph 6, Mr Forsdick states that as a general rule, areas within an SPA are only included if they contribute to the conservation of the SPA qualifying species (QFs). In footnote 6 he states that "*I have seen no evidence here that the SPA boundaries were wrongly drawn or that somehow the woodland was included by mistake and without regard to the functions it provided for the QFs*".

2.4.3 Mr Forsdick is correct inasmuch as the SPA boundary was not 'wrongly drawn'. However, Natural England have clearly set out the reasoning for inclusion of the woodland buffer within the SPA in response 4.4.11 of their response to ExQ4 [REP10-016] where they state that "*Any woodland immediately adjacent to the M25 and A3 is likely to have an important 'buffering' function in respect to the maintenance of the SPA, that is it may help to ameliorate the potential effects of raised nutrient levels from vehicle emissions (by helping to disperse emissions),*

it helps to provide a barrier against litter arising from the road reaching open heathland and may help to reduce the risk of fires spreading from the roadside and into open heath. These would not be considered to be critical functions by Natural England but they are important in this location”.

2.4.4 It is clear that the established woodland buffer at Ockham and Wisley Commons SSSI has been included in the SPA boundary as a result of it playing an important buffering role in protecting the important heathland habitats from the adjacent A3 and M25. This reason for its inclusion in the SPA is further supported when considering the wider SSSI components of the Thames Basin Heaths SPA. For example, Chobham Common SSSI, Horsell Common SSSI, Ash to Brookwood Heaths SSSI, Bourley and Long Valley SSSI, Whitmore Common SSSI are all bounded by substantial areas of woodland that do not fall within the SPA boundary. These adjacent woodland areas will contribute a potential invertebrate resource for nightjars in exactly the same way as the established woodland buffer at Ockham and Wisley Commons SSSI, and yet they do not form part of the SPA boundary. This is because they do not provide a physical buffer between the SPA and a major road.

2.4.5 Mr Forsdick is indeed correct to stress in paragraph 9 that Conservation Objectives must be read “*in a common sense way, and in context*”. This is the approach that Highways England has taken, in consultation with Natural England, who were the authors of the Conservation Objectives and who have direct knowledge of the context in which they were written and intended to be applied.

2.5 The woodland buffer falls under Conservation Objective 3: the supporting processes on which the habitats of the qualifying features (QFs) rely

2.5.1 In paragraph 11 of the DFQC opinion the five SPA Conservation Objectives are set out. These consist of:

1. the extent and distribution of the habitats of the QFs;
2. the structure and function of the habitats of the QFs;
3. the supporting processes on which the habitats of the QFs rely;
4. the population of each of the QFs, and;
5. the distribution of the QFs within the site.

2.5.2 Mr Forsdick then goes on to say in paragraph 12 that bullets 1, 2 and 5 are primarily focused on heathland, but also include woodland for nightjar and woodlark. As I shall explain shortly, ‘woodland’ actually only refers to one specific type of woodland: rotationally managed coniferous plantation woodland.

2.5.3 The DFQC opinion then says that bullet 3 is concerned with the supporting processes on which the habitats of the QFs rely, and that “*the supporting processes for the habitats of the QFs may, and (as here) often do, extend beyond the physical extent of those habitats alone*”. Concluding that “*Here the*

physical extent of the supporting processes plainly extends to the woodlands and to processes in those woodlands which secure the food resource (see HE Submission para 22). The woodland thus provides "a supporting process" on which the "habitats of the QFs rely" (as appears to be acknowledged by HE)". This is not correct, and Highways England disputes this claim.

2.5.4 In order to deal with this step in Mr Forsdick's legal opinion, it is important to consider three points:

1. The habitat requirements of each of the QFs;
2. The role that the woodland buffer plays within the SPA;
3. Does Conservation Objective 3 apply to the woodland buffer?

The habitat requirements of each of the QFs

2.5.5 This has been tackled in great detail in previous submissions, but will be covered here again for clarity and to assist the logic being presented.

2.5.6 The following habitat and food requirements of each QF is set out below, based on information provided in the SiAA [REP4-018], the Supplementary Advice on the Conservation Objectives [REP5-034], and professional opinions provided by Surrey Wildlife Trust (the custodians of the site) [REP10-017] and Natural England (the designators of the SPA and authors of the SPA citation and Conservation Objectives) [REP10-016].

Nightjar

2.5.7 Nightjars breed within open heathland habitats and within recently felled (and restocked) areas of coniferous plantation woodland younger than 10 years of age.

2.5.8 As explained in the conservation measures on the first page of Table 1 of the Supplementary Advice on the Conservation Objectives [REP5-034], felled areas of coniferous plantation woodland that are restocked can provide suitable breeding habitat for up to 10 years after being felled. Once a woodland has passed this stage of regrowth, it becomes unsuitable for nightjars and is no longer used. As a result, nightjars that breed within rotationally managed coniferous plantation woodlands will change their territory in response to the rotational clearance, utilising the early years of re-planted areas of clearance. Nightjars do not breed within established woodland areas (such as the established woodland buffer within the Ockham and Wisley Common SSSI component of the Thames Basin Heaths SPA).

2.5.9 The vegetation characteristics section of Table 1 of the Supplementary Advice on the Conservation Objectives [REP5-034] supports this assessment, describing optimal conditions for nightjar as "*vegetation mostly of 20-60 cm with frequent bare patches of >2 m², 10-20% bare ground and <50% tree/scrub cover overall; trees <2 m in height*". Again, this is describing open heathland and the young growth in a freshly restocked area of recently felled woodland, rather than an established mature woodland.

- 2.5.10 Nightjars are insectivorous, feeding primarily on flying insects, such as moths and beetles.
- Woodlark*
- 2.5.11 Woodlark breed within open heathland habitats and within recently felled areas of plantation coniferous woodland.
- 2.5.12 Woodlark require open areas with sparse, short grassy or heathy turf, together with bare ground.
- 2.5.13 The conservation measures in Table 2 of the Supplementary Advice on the Conservation Objectives [REP5-034] state that felled areas of plantation woodland that are restocked can provide suitable breeding habitat for up to 10 years after being felled. Therefore, the rotational felling of areas of a plantation woodland, providing permanent areas of open space with restocked growth of less than ten years of age can support populations of woodlark.
- 2.5.14 The landscape section of Table 2 of the Supplementary Advice on the Conservation Objectives [REP5-034] describes supporting habitat (within and outside the SPA) as “*open and unobstructed terrain, typically within at least 0.2 km of nesting areas, with no increases in tall (>0.2 m) vegetation cover to >50% of the site overall*”. The vegetation characteristics goes on to describe optimal conditions for woodlark as “*vegetation which is predominantly short (<5 cm) or medium (10-20cm) in height, with frequent patches of bare or sparsely-vegetated ground and scattered clumps of shrubs and trees*”. Again, this is describing open heathland and the young growth in a freshly restocked area of recently felled woodland, rather than an established mature woodland.
- 2.5.15 Woodlark forage for all of their food on the ground, feeding on invertebrate species such as spiders, weevils and caterpillars.
- Dartford warbler*
- 2.5.16 Dartford warbler are exclusively found in heathland habitat, favouring areas with tall, dense gorse and tall, mature heather for nesting. The availability of shorter but structurally diverse vegetation nearby is important in providing a year-round supply of prey, such as beetles, caterpillars, spiders and bugs. This year-round reliance on invertebrates ensures that Dartford warbler have a strong affinity to heathland with mature gorse, and are negatively associated with woodland.
- 2.5.17 The conservation measures in Table 3 of the Supplementary Advice on the Conservation Objectives [REP5-034] states that “*Dartford Warbler particularly favour areas of tall, dense gorse and tall, mature heather for nesting. The availability of areas of shorter but structurally diverse vegetation nearby are important in providing invertebrate prey such as spiders and weevils*”.
- 2.5.18 The vegetation characteristics in Table 3 of the Supplementary Advice on the Conservation Objectives [REP5-034] states that the Conservation Objective is to “*Maintain or restore an optimal mix of vegetation (>50% cover of heather and/or*

gorse, <25 trees/ha and of 0.5-3 m height) in nesting areas with areas of structurally diverse vegetation”.

The role that the woodland buffer plays within the SPA

- 2.5.19 As explained in paragraphs 6.1.35 and 6.1.36 of Highways England's response to deadline 10 submissions [REP11-007], the Supplementary Advice on conserving and restoring site features [REP5-034] explains that the principal habitats supporting the SPA qualifying species are “*lowland heathland and rotationally managed coniferous plantation woodland*”, of which the coniferous plantation woodland “*should continue to be managed by providing permanent open space and by rotational clear-fell and re-stocking, which can temporarily create suitable breeding habitat for up to 10 years*” (taken from the introductory text on page 4 of [REP5-034] and the explanatory notes for the supporting habitat attribute for nightjar in Table 1, page 2 and the supporting habitat attribute description for woodlark in Table 2, page 81). It should be noted that rotationally managed coniferous plantation woodland is not identified as a supporting habitat for Dartford warbler.
- 2.5.20 This is further clarified in the air quality explanatory notes for the supporting habitat attribute for nightjar (Table 1, page 2 of [REP5-034]) which describes the supporting habitats as “nesting, feeding or roosting habitats” (this description is also referred to for woodlark and Dartford warbler).
- 2.5.21 As explained above, the reason rotationally managed coniferous plantation woodland is included as a principal habitat for nightjar and woodlark, is that when it has been recently felled, it can provide open habitat during the early stages of regrowth that can support nightjar and woodlark.
- 2.5.22 Within the Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA there are no areas of rotationally felled and replanted woodland. The woodland buffer is not rotationally managed, but instead consists entirely of mature woodland containing established trees of several decades in age. Therefore, this woodland does not contain the rotationally felled young regrowth referred to in the Supplementary Advice on the Conservation Objectives [REP5-034]. As demonstrated in section 4.7 of the SiAA [REP4-018], the qualifying species only occur within the open heathland habitats of the Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA and do not utilise the established woodland buffer.
- 2.5.23 It is clear from these descriptions that the established woodland buffer, which does not form nesting, feeding or roosting habitat for any of the SPA qualifying species, and is formed of trees of several decades in age (and therefore does not fall into the category of lowland heathland or rotationally managed coniferous plantation woodland of up to 10 years in age), does not form a supporting habitat in the context of the Conservation Objectives. Therefore, the woodland buffer is not a habitat of the QF.
- 2.5.24 Instead the SiAA has simply acknowledged that this established woodland buffer may contribute to the invertebrate resource within the open heathland (as

indeed, any adjacent habitat that contained any form of vegetation could: for example adjacent road verges contain grasses and scrub that may support invertebrates, but that does not necessarily make them a supporting habitat).

- 2.5.25 This potential contribution to the invertebrate resource is because some flying invertebrates could potentially fly out from the woodland and into the open heathland habitat, forming a small element of a nightjar's food resource. This was a precautionary assessment, and it is more than likely that the open heathland provides all the invertebrate resource that nightjars require (see bullet 11 on page 13 of Highways England's response to RHS's deadline 11 submission [REP12-024]). Due to their feeding preferences, this invertebrate resource does not benefit woodlarks or Dartford warblers.

Does Conservation Objective 3 apply to the woodland buffer?

- 2.5.26 It is clear from the information provided above that the established woodland buffer does not form a nesting, feeding or roosting habitat for any of the SPA qualifying species. Therefore, it is not a habitat of the QFs.
- 2.5.27 Conservation Objective 3 is to maintain or restore the "supporting processes" on which the habitats of the QFs (i.e. the heathland and, where relevant, rotationally managed coniferous woodland) rely.
- 2.5.28 In bullet E of paragraph 12, Mr Forsdick points out that the supporting processes for habitats of QFs may extend beyond the physical extent of those habitats alone. Mr Forsdick gives an example of natural irrigation or drainage within a habitat directly used by a QF being dependent on processes, land and measures that fall beyond the habitat directly used by a QF. This is a clear example of a physical supporting process on which the habitats of the QF rely. However, this example bears absolutely no relevance or resemblance to the relationship between the woodland buffer and the heathland within the Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA.
- 2.5.29 In the case of the Ockham and Wisley SSSI component of the Thames Basin Heaths SPA, the woodland buffer potentially contributes to the invertebrate resource of one of the QFs (nightjar). This invertebrate resource is not relied on by the heathland (the habitat of the QFs) in order for the heathland to function, and therefore is not a "supporting process on which the habitats of the QFs rely" (underlining added).
- 2.5.30 In summary, Mr Forsdick's suggestion that the "*woodland thus provides 'a supporting process' on which the 'habitats of the QFs rely'*" (underlining added) is simply incorrect. The established woodland buffer and its associated invertebrate resource has no bearing on the Conservation Objective to maintain or restore the supporting processes on which the habitats of the QFs rely.

2.6 Consideration of the Supplementary Advice for the Conservation Objectives

- 2.6.1 In paragraph 15, Mr Forsdick incorrectly states that the “*the AQ/ND objective in the woodland (and on the heathland) is nowhere near being met*”.
- 2.6.2 This is wrong because the air quality (AQ) objective in the Supplementary Advice on the Conservation Objectives [REP5-034] does not refer to the woodland buffer.
- 2.6.3 As explained in the separate legal opinion by Mr Humphries and Ms Daly (Doc 9.157), the Conservation Objectives of a SPA do not apply equally to all parts of that SPA.
- 2.6.4 Natural England's NEA001 guidance [REP3-021] is clear that a site's Conservation Objectives are unlikely to apply equally to all parts of a site: “*Many sites are designated for several different qualifying features. Not all features are present within a given location within a site*”.
- 2.6.5 The Supplementary Advice for air quality is extremely clear : “*Restore as necessary the concentrations and deposition of air pollutants to at or below the site-relevant Critical Load or Level values given for this feature of the site on the Air Pollution Information System*” (underlining added).
- 2.6.6 The reference to “this feature” refers to the QFs within their principal habitats, as set out in the Supplementary Advice on the Conservation Objectives [REP5-034] and also on the Air Pollution Information System (APIS). As explained above, these principal habitats are heathland and rotationally managed coniferous plantation woodland for nightjar and woodlark, and heathland only for Dartford warbler.
- 2.6.7 The Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA contains areas of heathland, but there are no areas of rotationally managed coniferous plantation woodland. Therefore, the Supplementary Advice for air quality only refers to heathland within this particular SSSI component of the Thames Basin Heaths SPA (which is made up of 13 different SSSI components).
- 2.6.8 The Supplementary Advice for air quality does not refer to the established woodland buffer of the Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA, which is not rotationally managed and instead consists of mature woodland containing trees of several decades in age. As explained above, this habitat does not physically support the QFs.
- 2.6.9 The Supplementary Advice has been misunderstood by Mr Forsdick, based on a lack of understanding of the ecology of the QFs and an absence of knowledge of the habitat composition of the site. This is abundantly clear in paragraph 16, where Mr Forsdick makes two fundamental misinterpretations.

- 2.6.10 Firstly, Mr Forsdick states that “*the SPA including woodland is described at page 4 of the Supplementary Advice*”. The actual text he is referring to says, “*Within this SPA the principal habitats supporting these qualifying species are lowland heathland and rotationally managed coniferous plantation woodland*”. Mr Forsdick’s more general statement fails to understand the vast range of habitats that the term ‘woodland’ covers and has missed the point that the QFs (nightjar and woodlark only) only occur in a very specific woodland habitat; recently felled areas of rotationally managed coniferous plantation woodland, that has been replanted and has regrowth of less than 10 years in age.
- 2.6.11 Secondly, Mr Forsdick then goes on to say in the very same paragraph that with regards to rotationally managed coniferous plantation woodland, “*I do not know if there is any such woodland but if there is, this sentence alone seems to be me to be (at the lowest) a clear indication that the AQ/ND targets apply to it*”. Highways England agrees insofar that rotationally managed coniferous plantation woodland that supported QFs would count as a feature of the Supplementary Advice for air quality. However, no such habitat exists within this SSSI component of the SPA and this is why the Supplementary Advice for air quality only refers to the heathland habitat and not the established woodland buffer.
- 2.6.12 This is a crucial point. Mr Forsdick accepts that he does not know the habitats of the site, but his reliance on the assumed presence of this particular woodland type is crucial to his chain of key steps that lead to his conclusions. Mr Forsdick is simply incorrect in this assumption, whereas Highways England’s assessment was carried out based on knowledge of the site, the QFs and in consultation with Natural England, the Surrey Wildlife Trust and RSPB. Thus, the DFQC opinion is factually flawed and therefore proceeds to an incorrect conclusion.
- 2.6.13 Paragraph 18 refers to Conservation Objective 3 (to maintain or restore the supporting processes on which the habitats of the QFs rely). However, as set out in point 2 above, the established woodland buffer and its associated invertebrate resource has no bearing on the Conservation Objective to maintain or restore the supporting processes on which the habitats of the QFs rely.
- 2.6.14 Paragraphs 19 and 20 refer to APIS critical loads for coniferous woodland, but as already explained, this only refers to rotationally managed coniferous plantation woodland, as this is the only type of woodland habitat that the QFs utilise.
- 2.6.15 Based on the evidence set out above, it is clear that the chain of logic at paragraph 21 of the DFQC opinion is broken and, as stated above, his conclusions are therefore rendered incorrect. Whilst Mr Forsdick has sought to take a legal approach to the Conservation Objectives, his limited knowledge of the ecology of the QFs, their use of the site and the habitats present within the site is apparent.
- 2.6.16 In paragraphs 23-25 Mr Forsdick states that he “*cannot read*” the air quality description in the Supplementary Advice as somehow limiting the ambit of the target to just the nesting, feeding or roosting habitats themselves.

- 2.6.17 The text being referenced, as taken from the air quality objective in the Supplementary Advice on the Conservation Objectives [REP5-034], is *“Exceeding critical values for air pollutants may result in changes to the chemical status of the habitat substrate, accelerating or damaging plant growth, altering vegetation structure and composition and thereby affecting the quality and availability of nesting, feeding or roosting habitats.”*
- 2.6.18 Mr Forsdick's conclusion again relies incorrectly on the established woodland buffer falling under Conservation Objective 3: to maintain or restore the supporting processes on which the habitats of the QFs rely.
- 2.6.19 In this instance it is very clear that the air quality Supplementary Advice relates to nesting, feeding and roosting habitats (i.e. the heathland habitat of the Ockham and Wisley Commons SSSI component of the Thames Basin Heaths SPA), and should not be interpreted in any other way.
- 2.6.20 It is not surprising that the air quality Supplementary Advice does not apply to the woodland buffer, as Natural England have confirmed in 4.4.11 of their response to ExQ4 [REP10-016] that the key role of the woodland buffer is to play a buffering role to protect the important heathland habitats from raised nutrient levels from vehicle emissions.
- 2.6.21 Mr Forsdick has provided an (incorrect) interpretation of the Conservation Objectives and Supplementary Advice with regards to the woodland buffer. In contrast, Highways England has correctly interpreted the Conservation Objectives and the Supplementary Advice in the SiAA, and did this in consultation with Natural England, who were responsible for writing the Conservation Objectives and the Supplementary Advice and therefore understand how the Conservation Objectives and Supplementary Advice should be interpreted.
- 2.6.22 This was confirmed in Natural England's response to ExQ4 [REP10-016] when they said *“Natural England is satisfied that Highways England properly understands the Conservation Objectives for Thames Basin Heaths SPA, including how those relate to the Ockham and Wisley Commons SSSI component”*.

2.7 The application of critical loads to the woodland buffer

- 2.7.1 At his paragraph 27 Mr Forsdick has turned his attention to the APIS information, challenging the reference by Highways England to the fact that the APIS data for coniferous woodland with regards to nightjar within the Thames Basin Heaths SPA indicates that this habitat is not sensitive to nitrogen (as set out in 4.4.13 of Highways England's response to ExQ4 [REP10-004]). Mr Forsdick states that Highways England relies on this, but that this particular column of the APIS table is not referenced in the air quality Supplementary Advice.
- 2.7.2 As has already been established, the air quality Supplementary Advice does not apply to the woodland buffer. Therefore, Highways England does not 'rely' on column 11 of the APIS table. However, it is useful to note that the APIS

information for nightjar (the only QF that may benefit from the potential invertebrate resource that the woodland buffer provides) states that nightjars are not sensitive to nitrogen impacts on coniferous woodland.

2.8 David Forsdick QC's argument that HE's submission is wrong in law

2.8.1 Mr Forsdick concludes in paragraphs 30 and 31 that he has "*therefore reached the clear conclusion that HE's Submission is wrong in law and has approached the exercise from a wrong understanding of the CO*".

2.8.2 As I have explained above, there are several key flaws to Mr Forsdick's approach, based on a misunderstanding of the ecological requirements of the QFs, and a limited familiarity with the site, the habitats it supports, and the way that the QFs utilise them.

2.8.3 The SiAA was carried out in consultation with Natural England, Surrey Wildlife Trust and RSPB, and the approach and findings were agreed with all parties. Highways England has correctly applied the air quality Supplementary Advice to the habitats of the SPA.

2.9 Implications

2.9.1 In paragraphs 32 to 34, Mr Forsdick refers to his previous conclusions, based on the incorrect conclusion on that the woodland buffer invertebrate resource provides a supporting process on which the heathland relies.

2.9.2 This line of thinking is key to Mr Forsdick's challenge to Highways England's position that the invertebrate resource will not change as a result of the Scheme, the woodland buffer will continue to function in its current form and, therefore, that there will not be an adverse effect on the integrity of the SPA as a result of the air quality impacts of the Scheme.

2.9.3 Having established that the air quality Supplementary Advice does not apply to the woodland buffer, and that Mr Forsdick's legal opinion is based on an incorrect understanding of the ecological features of the site and its qualifying features, it is appropriate to once again describe the approach taken by Highways England with regards to determining whether the impact of the Scheme on air quality would have an adverse effect on the SPA.

2.9.4 As Highways England has explained, there will not be a discernible effect on nitrogen deposition rates at a distance of 150 m or more from the A3 and M25 as a result of the Scheme (i.e. closest distance where the heathland and SPA qualifying species occur). Therefore, the Scheme will have no discernible air quality impact on the heathland habitat.

2.9.5 Increases in nitrogen deposition of greater than 1% of the lower range of the critical load (as given by APIS for the habitat types of the Ockham and Wisley Commons SSSI component of the SPA) when comparing the operational Scheme against no Scheme, are confined to within 50 m of the road (A3 and

M25). This falls well within the established woodland buffer, which is not a supporting habitat of the SPA qualifying species, and which extends over 150 m from the road at the closest point along any of the transects within the SPA.

- 2.9.6 For every transect point assessed within the SPA, the operational nitrogen deposition rate will fall below current baseline levels. As explained in the response to question 4.4.12 on pages 15-16 of Highways England's comments to Deadline 10 submissions [REP11-007], this would still be the case even if the change in nitrogen deposition rate were to be doubled as a precautionary measure to account for ammonia from road vehicles. Any small change in nitrogen deposition rates with the Scheme would not affect the future downward trend nor would there be any delay to the achievement of the Conservation Objectives on air quality (which, as noted above, relate to the heathland habitat of the SPA in any event).
- 2.9.7 The calculations also demonstrate that when compared against the 'do minimum' scenario, the Scheme actually leads to a decrease in nitrogen deposition rates at the two transects on the A3, as a result of a reduction in congestion on the A3 with the Scheme (therefore, Mr Forsdick's statement at paragraph 4, bullet B is not wholly correct).
- 2.9.8 The heathland is the supporting habitat for the SPA qualifying species. Highways England has demonstrated that none of the SPA qualifying species use the established woodland buffer. The SiAA identified an adverse effect as a result of physical loss of established woodland, based on the precautionary approach that this could reduce the overall invertebrate resource of the SPA. This is based on the assumption that the complete clearance of 14.6 ha of woodland (5.9 ha permanent and 8.7 ha temporary) would result in the complete loss of invertebrates from this area. However, as explained the response to question 4.4.13 on pages 16-18 of Highways England's comments to Deadline 10 submissions [REP11-007], it is considered highly likely that the existing 78 ha of heathland provides sufficient invertebrate resource to support the SPA qualifying species that are currently present. The consideration of the physical loss of established woodland potentially resulting in reduced invertebrate resource for the SPA is purely a precautionary approach.
- 2.9.9 As explained in response to ExQ4 4.4.13 [REP10-004] and also in the response to question 4.4.13 on pages 16-18 of Highways England's comments to Deadline 10 submissions [REP11-007], the invertebrate assemblage of the established woodland buffer has established under existing conditions (and indeed, the APIS website confirms that nitrogen deposition levels were higher than the current baseline when the SPA was designated in 2005).
- 2.9.10 There will be no changes in the invertebrate resource (assemblage or biomass) within the woodland buffer as a result of air quality changes from the Scheme, because the nitrogen deposition rates for all transect points within the established woodland buffer (and heathland) will fall below the current baseline, and therefore the established woodland buffer will continue to function in the same way as it currently does and provide the same invertebrate resource it currently does. It is noted that RHS have agreed with the assessment that all

nitrogen deposition rates for all transect points will fall below the current baseline (paragraph 6 of their response to REP10-003 [REP11-037], where RHS states *“RHS agrees with HE that, based on RHS’s own results Table referred to in paragraph 6 above, which takes into account the “ammonia proxy”, the operational nitrogen deposition rate falls below current baseline levels for every transect point within the SPA”*).

2.9.11 The SiAA excluded the possibility of there being an adverse effect on the integrity of the SPA as a result of air quality changes because:

1. The Scheme will lead to no discernible effects on nitrogen deposition rates within the habitats upon which the SPA qualifying species rely (i.e. the heathland); and
2. The established woodland buffer that separates the heathland from the A3 and M25 will receive lower nitrogen deposition rates than it currently does, and will continue to function in the same way and provide the same contribution to the invertebrate resource as it currently does.

2.9.12 The assessment and findings align with the judgment of the High Court in the Compton case (see the legal opinion on Mr Humphries and Ms Daly – Doc 9.157), which also concerned changes in air quality that were confined to the woodland buffer of the same SPA and the court held that an air quality assessment forming part of an appropriate assessment should focus on the significance of any exceedance in air quality limits on the SPA birds and their habitats.

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Printed on paper from well-managed forests and other controlled sources.

Registered office Bridge House, 1 Walnut Tree Close, Guildford GU1 4LZ
Highways England Company Limited registered in England and Wales number 09346363