

A428 Black Cat to Caxton Gibbet improvements

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9.89 Appropriate Assessment Note

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Rule 8(1)(k)

Infrastructure Planning (Examination Procedure) Rules
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**The Infrastructure Planning (Examination Procedure)
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9.89 Appropriate Assessment Note

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Table of contents

Chapter	Pages
1 Introduction	1
2 Background	2
3 Legislative requirement for, and process of, Habitats Regulations Assessment	4
4 Whether appropriate assessment is required for the Scheme	6
5 Discussions with Natural England	8
6 Conclusion	9

1 Introduction

1.1.1 At Issue Specific Hearing 4 (ISH4) held on Tuesday 30 November 2021, the Examining Authority recorded Action Point 6 (AP6) which asked the Applicant and Natural England, by Deadline 6, to:

"Discuss the rationale as to whether an Appropriate Assessment is required for Habitats Regulation Assessment irrespective of the additional bat survey work undertaken"

1.1.2 On 29 November 2021, prior to ISH4, the Applicant and Natural England agreed the following position:

"The Applicant has reported to Natural England:

- *the outcomes of the investigations to date on the Barbastelle at Eversden and Wimpole Woods SAC; and*
- *the interim 2021 survey data.*

In discussions with Natural England, it is agreed that these data show no links between these bats and the A428 Scheme and that the data indicate no adverse effect on the integrity of the SAC. Natural England will come to a final decision once data have been collected and analysed for the last weeks of the surveys (the last week is the week commencing 20th December)."

1.1.3 At the meeting on 29th November 2021, Natural England also indicated that Natural England's view was that the Scheme had progressed beyond the screening stage for likely significant effects (LSE) and required Appropriate Assessment. Following ISH4, a further meeting was held with Natural England on 10 December 2021 to discuss Natural England's request for Appropriate Assessment and consider whether this was justified given that the evidence presented to date showed no functional link between the Scheme and the Eversden and Wimpole Woods Special Area of Conservation (the SAC).

1.1.4 This note records the Applicant's current position on Habitats Regulations Assessment, including whether it is necessary to proceed to Appropriate Assessment to determine whether the Scheme will give rise to an adverse effect on the integrity of the SAC, or whether LSE on the SAC can be ruled out at the screening stage. It also records the Applicant's understanding of Natural England's position in relation to the need for Appropriate Assessment following discussions at the meeting on 10 December 2021. Given time constraints it has not been possible to share this note with Natural England prior to submission at Deadline 6; however, Natural England has indicated that it will comment on this note in accordance with the Examination timetable at Deadline 7.

2 Background

- 2.1.1 Work has, and is being, undertaken in the autumn and winter of 2021 to assist Natural England in making a decision as to whether the Scheme would have a likely significant effect on the SAC. This is as a result of:
- The points raised by Natural England in its Relevant Representation **[RR-076]**.
 - Related questions raised by the Examining Authority (ExA) in its First Written Questions **[PD-006]**.
 - The Action Points for Issue Specific Hearing 1 (ISH1) **[EV-016]** held on 18 August 2021 as to whether there are any winter population exchanges of Barbastelle (*Barbastellus barbastellus*) between the Scheme and the SAC; and/or any functional links between the Scheme and the SAC during the autumn/winter period.
- 2.1.2 The scope and methods of the surveys undertaken in the autumn and winter of 2021 were agreed with Natural England, the full details of which are presented in the Eversden and Wimpole Woods SAC Technical Note **[REP1-032]** submitted to the Examination at Deadline 1. It primarily relates to the SAC's Barbastelle population in relation to the Scheme and usage by non-SAC Barbastelle populations across the Scheme. The surveys undertaken comprised:
- Barbastelle trapping and tracking undertaken within the SAC.
 - Bat activity surveys (comprising transect and static surveys) undertaken within the SAC.
 - Bat crossing point surveys at 12 locations along the length of the Scheme, to identify Barbastelle (and other bat species) using the Scheme.
 - Interim results of hibernation suitability inspections and static detector surveys for Barbastelle undertaken at six woodlands adjacent to the Scheme.
- 2.1.3 The survey results concluded that the bats trapped and tagged during the September 2021 trapping and tracking surveys did not roost or spend any time foraging or commuting within or close to the Scheme's Order Limits. The nearest point a Barbastelle was recorded was approximately 6km south-east of the Scheme. Between this and the Scheme is the town of Cambourne, and whilst noting Barbastelle may move across open countryside and not just rely on linear features, there is a lack of connecting habitats from the SAC to the habitats located along the Scheme.
- 2.1.4 There was Barbastelle activity recorded in September and October 2021 on the transects and static detectors deployed in the SAC, indicating Barbastelle are present in the SAC into the autumn and that they are less likely to be dispersing to sites outside the SAC.

- 2.1.5 The bat crossing point surveys and statics results within the Scheme are consistent with the findings of baseline report Appendix 8.5, Bats **[APP-192]** of the Environmental Statement with the highest bat activity at BCP1 (River Great Ouse) and BCP2 (and East-West hedge between Sir Johns Wood and Boys Wood). One Barbastelle pass was recorded during the 36 manned surveys undertaken.
- 2.1.6 High suitability for Barbastelle hibernation was recorded at Site 1: Boys Wood and Site 6: Elsworth Wood. Moderate suitability for hibernation was recorded at Site 3: The Gorse. Low suitability for hibernation was recorded at Site 2: Fox Holes, Site 4: North Lodge Plantation and Site 5: Pillar Plantation.
- 2.1.7 Foraging Barbastelle were present in Site 3: The Gorse with Moderate suitability and Site 6: Elsworth Wood with High suitability, with likely Barbastelle winter roost(s) at Site 6: Elsworth Wood.
- 2.1.8 None of these woodlands will be directly or indirectly impacted by the Scheme.
- 2.1.9 These results do not change the conclusions of Chapter 8, Biodiversity **[APP-077]** of the Environmental Statement or the conclusions of the Habitats Regulations Assessment: No Significant Effects Report **[APP-233]**. None of these woodlands will be directly or indirectly impacted by the Scheme. A final assessment of the woodland hibernation suitability surveys will be provided in the next update to the Barbastelle Bat Surveys and Mitigation Technical Note **[TR010044/EXAM/9.54v3]**, which is expected to be reported at Deadline 7. Pending collection of the data from Site 5: Pillar Plantation, this is unlikely to change the assessment.
- 2.1.10 Based on the findings of the surveys in combination with previous data presented in Appendix 8.5, Bats **[APP-192]** of the Environmental Statement and the Habitats Regulations Assessment: No Significant Effects Report **[APP-233]**, there is no indication that Barbastelle from the SAC are using habitats along the Scheme for roosting, foraging or commuting. The nearest point a Barbastelle bat from the SAC was recorded was approximately 6km south-east of the Scheme and no Barbastelle activity was recorded in the habitat between the Scheme's Order Limits and this record. The bat crossing point surveys and woodland hibernation suitability results indicate low usage of the Scheme and adjacent woodlands by local Barbastelle populations.
- 2.1.11 The 2021 survey data collected to date reinforce the conclusions presented in the Habitats Regulations Assessment: No Significant Effects Report **[APP-233]** and provide additional evidence that there are no LSE on the SAC designation as a result of the Scheme. The final survey data will be collected in the week commencing 20 December 2021.
- 2.1.12 The details of these surveys will be presented in an updated Habitats Regulations Assessment at Deadline 8 on 14 January 2022, the form of which will be discussed and, if possible, agreed with Natural England prior to its submission into the Examination.

3 Legislative requirement for, and process of, Habitats Regulations Assessment

- 3.1.1 The SAC is a European site which is protected by the Conservation of Habitats and Species Regulations 2017 (as amended) (the 'Habitats Regulations').
- 3.1.2 Under Regulation 63(1) of the Habitats Regulations, before deciding whether consent should be granted for the Scheme, the Secretary of State (as the competent authority) must undertake an assessment to determine whether the Scheme is likely to have a significant effect on the interest features of any European site and, if it does, the Secretary of State must undertake an Appropriate Assessment of the implications of the Scheme on that European site in view of its conservation objectives.
- 3.1.3 Subject to following the derogation process set out at Regulation 64 of the Habitats Regulations, the Secretary of State may agree to the Scheme proceeding only after having ascertained that it will not adversely affect the integrity of the European site (Regulation 63(5) of the Habitats Regulations).
- 3.1.4 As set out in the Planning Inspectorate's Advice Note 10 'Habitats Regulations Assessment relevant to nationally significant infrastructure projects' (AN10), the process of Habitats Regulations Assessment can be seen to fall into four distinct stages:
- a. Screening for Likely Significant Effect on the interest features of a European site.
 - b. Appropriate Assessment to determine whether an Adverse Effect on Integrity (AEol) of the European site arises.
 - c. Consideration of Alternatives, to demonstrate that there is no alternative to deliver the objectives of the project without AEol.
 - d. Derogation to establish whether the project must proceed due to Imperative Reasons of Overriding Public Interest (IROPI) notwithstanding any AEol. Where a project proceeds on this basis, the Secretary of State must also secure that any necessary compensatory measures are taken to ensure that the overall coherence of the Natura 2000 network is protected in accordance with Regulation 68 of the Habitats Regulations.
- 3.1.5 When conducting Habitats Regulations Assessment, the precautionary principle applies¹ such that if LSE cannot be ruled out at the screening stage, it is necessary to progress to the Appropriate Assessment stage, and if an AEol cannot be ruled out beyond reasonable scientific doubt and there are no alternatives to it, then it is necessary to progress to the Derogation stage. The counter also follows such that if the risk of LSE can be ruled out, it is not necessary to proceed to the Appropriate Assessment stage. This was confirmed

¹ *Landelijke Vereniging tot Behoud Van de Waddenzee, Nederlandse v Vereniging tot Bescherming von Vogels v Straatssecretaris Van Landbouw, Natuurbeheer en Visserij* (C-127/02: [2005] Env. LR14), para 10.

by Waddensee² which states at paragraph 40 that, "*The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site*". Similarly, if the risk of AEol can be ruled out at the Appropriate Assessment stage it is not then necessary to proceed to consider alternatives or progress to the Derogation stage.

3.1.6 The case of *People over wind and Sweetman v. Coillte Teoranta*³ has confirmed that mitigation measures should not be taken into account at the screening stage, albeit mitigation measures can be taken into account at the Appropriate Assessment stage. Similarly, the case of *Grace and Sweetman v An Bord Pleanala*⁴ (C-164/17) has confirmed that compensatory measures cannot be taken into account at the Appropriate Assessment stage (i.e. to avoid a finding of AEol) and should only be secured if it is necessary to proceed to the Derogation stage.

3.1.7 At the Screening and Appropriate Assessment stage it is also necessary to consider whether LSE or AEol could occur in-combination with other projects (Regulation 63(1)(a) of the Habitats Regulations). This may apply where there is judged to be an alone effect even if it is assessed not to give rise to LSE or an AEol itself. However, where it is demonstrated that there is 'no effect', this cannot combine with the effect of another project and there can be no in-combination effect.

² Ibid, para 40.

³ *People Over Wind, Peter Sweetman v Coillte Teoranta* (C-323/17: [2018] ECR I-244).

⁴ *Grace and Sweetman v An Bord Pleanala* (C-164/17 [2018]).

4 Whether appropriate assessment is required for the Scheme

- 4.1.1 As explained above, the Habitats Regulations Assessment: No Significant Effects Report [APP-233] was submitted with the DCO application for the Scheme. This concluded that the distance between the SAC and the Scheme meant that no functional relationship existed and enabled a conclusion of no likely significant effects.
- 4.1.2 Whilst Natural England has requested the Applicant to undertake supplemental surveys to support the Applicant's conclusion, to date these have confirmed the Applicant's initial findings that there is no functional relationship between the SAC and the Scheme's Order Limits. This finding is also supported by surveys undertaken by, for example, the Cambridgeshire Bat Group [APP-233] and the East West Rail Company (Deadline 6 submission document 9.90: East West Rail 2020 Bat Survey [TR010044/EXAM/9.90]).
- 4.1.3 The Applicant does not consider it necessary to proceed to Appropriate Assessment on the basis that:
- A finding of no LSE can be reached in relation to the SAC for the Scheme.
 - Objective information has been provided which enables this conclusion to be reached in the light of the best scientific knowledge available.
 - Following the provision of the supplemental surveys, there can be no reasonable scientific doubt that there will be no LSE on the SAC.
- 4.1.4 The Planning Inspectorate's AN10 in the Table below paragraph 4.5 states that in circumstances where no likely significant effects are identified *"the report is likely to take the form of a NSER and HRA stages 2-4 will not be required"*.
- 4.1.5 Whilst it is acknowledged that paragraph 4.15 of AN10 states *"...if a large amount of information gathering and data collection is required in order to identify the LSE of the project, these probably exist and an AA is likely to be required (meaning a NSER cannot be produced)"*, this is expressed to be a *"general guide"* and does not apply in this particular case. Additional survey work was carried out during the autumn and winter of 2021 only to supplement existing third party survey work carried out during the rest of the year which had been relied on to conclude that there were no LSE. It confirms the original conclusion that there is no functional relationship between the Order Limits for the Scheme and the SAC, which supports a conclusion of no LSE.

- 4.1.6 Given that a finding of no LSE can be reached on the basis of the evidence submitted, it is not necessary to proceed to the Appropriate Assessment stage to consider whether AEoI can be ruled out. As is made clear in AN10, paragraph 4.18, there is no ratchet effect to the stages of Habitats Regulation Assessment. If additional evidence is required to enable a finding of no LSE to properly be made, this can be provided at any time during the Habitats Regulations Assessment process.
- 4.1.7 The process undertaken by the Applicant to assess LSE with respect to the SAC has also followed guidance provided in the National Highways Design Manual for Roads and Bridges standard 'LA 115 – Habitats Regulations assessment', as summarised in 'Figure 2.3 Generic HRA process' within that document.

5 Discussions with Natural England

- 5.1.1 On 10 December 2021, the Applicant and Natural England discussed the requirement for Appropriate Assessment and whether it was necessary to move beyond the screening stage. Natural England reasoned that it was necessary to move to the Appropriate Assessment stage on two main grounds:
- a. That the window for screening out no LSE had passed and that Natural England and National Highways guidance dictates that a sequential process is to be followed whereby once one stage has been completed, it is not possible to go back with further clarifying information.
 - b. That the volume of survey work being presented goes above and beyond what would be appropriate at the no significant effects screening stage (which is only intended as a broad filter) and, therefore, it is necessary to carry out an Appropriate Assessment of this more substantive and detailed material.
- 5.1.2 The Applicant presented its position, as set out above, that:
- a. There is no guidance which dictates a defined period for each stage of the Habitats Regulations Assessment process, or which states that you cannot supplement information provided at each stage with further evidence in order to meet the relevant test. The need to progress through the Habitats Regulations Assessment process is dependent only on whether the relevant test can be satisfied, as set out in the Waddenzee judgement and in AN10.
 - b. The additional surveys are intended to support the significant amount of third party survey work already undertaken on the SAC and give Natural England confidence that a finding of no LSE can be reached on the basis of the Scheme's distance from the SAC. Establishing that the Scheme has no functional relationship with the SAC due to distance as based on the outcomes of existing third party investigations, meant that it fell within one of the broad filter types which are traditionally used at the screening stage to screen out LSE.

6 Conclusion

- 6.1.1 To date, no agreement has been reached between the Applicant and Natural England on whether it is necessary to proceed to the Appropriate Assessment stage.
- 6.1.2 However, following receipt of Natural England's comments on this Note, it is intended that a further discussion will be held by the parties to try and reach a consensus on whether either: (a) the Habitats Regulations Assessment: No Significant Effects Report **[APP-233]** should be updated or (b) an Appropriate Assessment should be submitted to confirm what is understood to be Natural England's recently expressed position, which is that there should be a finding of no AEoI as a result of the Scheme. There has been no suggestion from Natural England that any further information is now required from the Applicant in order to reach this finding.
- 6.1.3 The updated Habitats Regulations Assessment: No Significant Effects Report **[APP-233]** or Appropriate Assessment will be submitted at Deadline 8 on 14 January 2022 to enable the recent and ongoing surveys to be reported within it.