

Specific Issue Hearing on the compensation site, main site and associated HRA matters (Tuesday, 11 and Wednesday, 12 September 2012)

Specific Issue Hearing on marine issues (Thursday, 13 September 2012)

Written summary of oral representations by Natural England

1. This summary is presented by topic; while it is broadly sequential it has aggregated some of the matters that were raised over the course of the three days where they are related.

Compensation site

Cherry Cobb Sands Wet Grassland

2. Natural England has been aware of the plans for compensatory wet grassland at Cherry Cobb Sands (CCS Wet Grassland) since it received an email from the Applicant on 3 September 2012; this email contained a brief description and attached the two plans that were displayed for the benefit of the Panel on 11 September. Only at the hearing did it become apparent that the Applicant was abandoning its original plans for compensatory wet grassland at Old Little Humber Farm. While the Applicant provided a little more detail of the CCS Wet Grassland proposals, Natural England is not in a position to make a definitive assessment until more details are available.
3. In selecting the CCS Wet Grassland site, the Applicant has followed the advice of Natural England that the wet grassland site be as close as possible to the main compensation site (CCS). This will help in terms of feeding and roosting: the existing roost at North Killingholme Haven Pits is adjacent to the mudflat at Killingholme Marshes foreshore. The location is therefore very promising. The size (approximately 38 ha) is also adequate and is similar to what was initially proposed at Old Little Humber Farm.
4. Some other aspects of the CCS Wet Grassland site outlined at the hearing are also promising: it has a drain nearby for fresh water supply and it appears to be unencumbered by the underground utility pipes as is the site at Old Little Humber Farm (see Natural England's Written Representations, para.8.19).
5. It is appropriate at this stage for Natural England to make the following comments:
 - It will be necessary for the site to be secured at least potentially in perpetuity, Natural England will therefore be interested to see more details of the

contractual arrangements between the Applicant and the landowner, the Crown Estate.

- There will need to be further surveys of the condition of the site, including a topographical survey, which Natural England will want to review. The site needs to provide 38 ha of *high quality* wet grassland. If it is of sufficiently high quality then it will be capable of providing both a potential feeding and roosting resource for Black Tailed Godwits. Should this be provided there is no reason to doubt that Black Tailed Godwit will locate it.
 - Natural England's advice to the Applicant is that the site should be functionally effective before the loss of mudflat occurs at Killingholme Marshes foreshore. The key period for Black Tailed Godwit is the autumn, so the site should be effective before then. Ideally, and for other birds, it should be effective sooner. In any event, it needs to be ready as soon as possible. There may be a time lag of up to 2-3 years. Natural England doubts Mr Hatton's assessment that the site will be effective from the day that it is brought into operation. Natural England is concerned, therefore, given the proposed timetable for development whether adequate compensation would be available in the short-term.
6. Natural England does not consider that the nearby footpaths are likely to be problematic to the effectiveness of CCS Wet Grassland, provided they are not frequently used. However this should be investigated further. If necessary, the burden will fall on the Applicant to re-route the footpaths and/or to build hides to reduce the impact of walkers on the feeding or roosting birds (see paragraph 9.1, bullet point 4, of Natural England's Written Representations).

Regulated Tidal Exchange

7. Natural England's position on the Applicant's proposals for Regulated Tidal Exchange (RTE) are outlined in its responses to the Panel's second questions (7 September 2012, paras.64-68 and 74-78, see also paras.6-13). Natural England's main current concerns with the scheme outlined in Black & Veatch's second report are:
- (i) it does not create sustainable mudflat; the report acknowledges that between 20 and 30 years *all* of the mudflat will accrete into saltmarsh; and
 - (ii) it is an outline concept only, which is lacking in detail; in fact at the hearing, the Applicant preferred a design using four cells, rather than three, which has not been modelled. It is clear, therefore, that further work, including further modelling, will be needed.

8. In particular, Natural England needs to know more about the design of the proposal, specifically whether the mudflat to be created will be sustainable and of sufficient quality to provide feeding habitat for black tailed godwits (i.e. mudflat with appropriate properties to support abundant prey species as well as providing the right conditions for the feeding behaviour of these birds). It is also important for Natural England to know what is proposed for the RTE creek in terms of ensuring tidal exchange is maintained and not inhibited by siltation. Equally, Natural England needs to know more about what management measures (if any) it is proposed to rely upon. It appears to be common ground that the RTE scheme will only provide an adequate area of mudflat for a maximum of 10-20 years before it becomes saltmarsh, so that management measures will be necessary if the site is to provide effective compensation in the medium to long term. No specific management measures have yet been proposed by the Applicant or assessed by Natural England.
9. Natural England's geomorphological expert, Siobhan Browne, agreed at the hearing that RTE offers a greater certainty of providing mudflat than the previous managed realignment scheme, however it would be necessary for Natural England to review further modelling data. Natural England would seek to ensure that mudflat is provided for as long as the existing mudflat that would be lost at Killingholme Marshes foreshore, the best data on this being the Applicant's calculation (see Natural England's response to the Panel's second questions, para.49). Natural England notes that the Environment Agency provided further clarification on this at the hearing, that is that by 2056 there will be a loss of 4.8ha at the site (+/- 1.8ha) due to the process of natural change.
10. It is important that functionally effective compensation habitat is available at the time of loss of existing mudflat habitat. If neither the wet grassland nor the mudflat habitats to be created at Cherry Cobb Sands will be functionally effective before the loss of mudflat occurs at Killingholme Marshes foreshore then additional measures will need to be provided by the Applicant.

Enforcement of compensatory measures

11. In addition (and in any event) the mechanism by which any proposed compensatory measures will be secured needs to be clear. At present this is still uncertain and is subject to ongoing discussions between the parties. One option is that a binding agreement be worked up between the parties. This would have to contain sufficient detail to provide certainty that the compensatory measures will be effective, it would also contain agreed objectives and triggers for action if those objectives were not met. Such an agreement would be consistent with the approach taken elsewhere on the Humber (see Appendix A to the Applicant's comments on the Relevant Representations). It is also an approach that has been taken elsewhere (for example, in relation to the London Gateway Port Harbour Empowerment Order 2002).

12. Whichever approach is followed, an issue that arises is the time required to set out the details of the compensation scheme in a robust, enforceable and monitorable form. Experience shows that this is not a quick or simple task.
13. Natural England's position is that any agreement ideally should be finalised before the end of the process and bound up with the DCO, so that the DCO would not be granted before the agreement is signed off. Natural England also considers that the agreement would gain strength if parties to it included the MMO, the Environment Agency, the Crown Estate and the RSPB, in addition to the Applicant and Natural England itself.
14. Natural England has not inquired about the Applicant's financial means to deliver the compensatory measures, although it notes the Panel's suggestion that this could be by way of a bond.
15. For the avoidance of doubt, clear provision should be made that the main compensation site be incorporated into the designated site boundary (see Natural England's response to the Panel's second questions, para.63).

Conservation objectives

General

16. Natural England's Senior Adviser on coastal issues, Emma Hawthorne, outlined the conservation objectives for the Humber Estuary SPA/SAC to the Panel. The conservation objectives from May 2012 (two pages) are 'high level' objectives which set out overarching parameters. More detailed advice is found in the December 2009 conservation objectives document and the Regulation 33 advice¹ (dated April 2003). (See also Natural England's Written Representations, paras.7.19-7.21.)
17. Common to all EU sites is a target to achieve favourable condition. The measurement of favourable condition for the SPA is taken from survey data and this includes the WeBS (Wetland Bird Survey) data (see Natural England's response to the Panel's second questions, para.47).
18. In the 2012 document, the conservation objectives include:

"Subject to natural change, to maintain or restore:

- The extent and distribution of the habitats of the qualifying features;

¹ While this advice is entitled "interim" as the Humber designations were under review when it was produced this does not affect the area at Killingholme as the site boundary and features were unchanged at this location.

- The structure and function of the habitats of the qualifying features;
- ...
- The populations of qualifying features”

19. In the 2009 document, Table 2d relates to species population objectives and the relevant text in the third row of the fourth column states:

“Target: Maintain the population within acceptable limits.

Measure: Populations on the Humber Estuary are known to fluctuate naturally ... Targets should therefore be set on a species by species basis according to the following:

- Based on the known natural fluctuations of the population, maintain the population at or above the minimum for the site (i.e. maintain the population above either the 5 yr mean peak count used at designation OR any other 5 year period since designation – whichever is the highest)

...”

20. It is not uncommon for conservation objectives to relate to the current condition of protected site features, rather than their historic condition. The approach however will vary from site to site. In the Humber Estuary, the approach taken reflects the dynamic nature of the site, so provides protection for changing populations and shifting habitats. However it also takes into account natural fluctuations and natural change. The dynamic nature of the Humber Estuary site inevitably affects Natural England’s understanding of favourable and unfavourable condition. If there were a shift in the number of Black Tailed Godwits roosting and feeding on the Humber due to an entirely natural event, say, volcanic activity in Iceland (the hypothetical example provided by the Panel during the hearing), this would be taken into account when assessing the impact of any development on those birds. The notion of taking into account natural change is important and is added to the conservation objectives of all sites. Furthermore, it is a requirement common to all sites that the protected features be restored should they fall into an unfavourable condition (for more detail on this, please see Natural England’s responses to questions 3 and 4 of the Panel’s second questions).

21. A 2011 EC Guidance Document (*The implementation of the Birds and Habitats Directives in estuaries and coastal zones*) provides guidance on setting conservation objectives in estuarine areas. Particularly relevant in this context is the guidance on p.18 (fifth bullet):

“When an estuary or coastal zone evolves, the presence or absence of species and habitats will also evolve therefore, the conservation objectives and measure for Natura 2000 sites should take into account the system-specific dynamics and evolutionary trends ...”

22. In this case it is clear that the numbers and distribution of Black Tailed Godwit in particular have evolved over recent decades, it is appropriate that this change is reflected in the conservation objectives for the site.

Further documents

23. Lincolnshire Wildlife Trust has provided Natural England with some information about the historic use of North Killingholme Haven Pits SSSI. This confirms that the SSSI designation dates from 1996 when illegal shooting stopped. It also confirms that the water levels of the site have been managed to provide an optimum level for waders, such as Black Tailed Godwit. A copy of the Wildlife Trust’s note dated 16 September 2012 and drawn up to give some background information to the Panel is provided at **Appendix A**.

24. Natural England has also provided the Panel (and parties) with copies of plans showing the extent of mudflat and sandflat across the Humber in 1987 and 2003.²

Policy HE1 and the South Humber Gateway advice

25. Policy HE1 of the Regional Strategy has not been implemented in relation to the marine and coastal areas. Given that the Government Office for Yorkshire and the Humber has been abolished it is perhaps unlikely that it will be. Natural England is not aware of any specific local strategy relevant to the marine and coastal aspects of the proposed development (see also Natural England’s response to the Panel’s second questions, para.28).

26. In relation to the terrestrial environment, Policy HE1 finds some expression in the South Humber Gateway advice, jointly drafted by Natural England and the RSPB. This sets out a strategic approach to mitigation in the wider development area of approximately 1,000 ha, excluding the foreshore. This work is explained further in a note and attachments at **Appendix B**. The work is in accordance with the provisions of North Lincolnshire Core Strategy (eg Policy CS1(e), see also paras.5.52 and 9.41). However, it has not been approved by the relevant local authorities.

² The references to these are for the 1987 plan: *English Nature Research Report 547. The Humber Estuary: A comprehensive review of its nature conservation interest December 2003* and for the 2003 plans *English Nature’s advice given under Regulation 33 (2) of the Conservation (Natural Habitats &c.) Regulations 1994. The Humber Estuary European marine site. Interim advice 2003*. While the latter report is available online (see <http://publications.naturalengland.org.uk/publication/63020>), the appended plans are not.

27. The advice that Natural England has given in this case is informed by and accords with the South Humber Gateway advice. In particular the provision of Mitigation Area A is consistent with that advice (the site at Killingholme Marshes will also deliver a relevant block of mitigation for the SHG). Development that accords with the South Humber Gateway advice should also meet, but does not go beyond, the requirements of the Habitats Regulations.

Phasing to accommodate DRAX

28. Q23 of the Panel's second questions raised the issue of the impact of the development of the neighbouring DRAX Heron Renewable Energy Plant on Mitigation Area A. In response, the Applicant clarified three potential alternative or phasing options, at the hearing it was made clear that only the first option was sought through the DCO process, and would not require further consent.

29. Option 1 is also the only option that has been considered in any detail by Natural England. Natural England agrees with the Applicant that the phasing proposal in option 1 would be capable of providing sufficient mitigation, if it is sought to rely upon this, details of the phased mitigation strategy should be included in the terrestrial EMMP and draft DCO.

30. As far as options 2 and 3 are concerned, Natural England would want to see more information before it could agree that these options could also avoid an adverse effect on site integrity. In particular, option 2 may have a greater impact on Curlew than the current proposal or option 1; option 3 appears to rely upon the use of mitigation land required for the Applicant's 'Able Logistics Park' (ALP) development. These matters at least would require further investigation, but may be academic if the Applicant is not seeking to pursue options 2 or 3.

Other impacts on the SPA/SAC, impacts on the marine environment and in-combination impacts

31. Working with the Applicant, Natural England has been able to resolve a considerable number of the concerns it has raised as part of this process, often through further assessment or the commitment to provide further mitigation from the Applicant. In the response to the Panel's second questions a number of outstanding matters (besides the main issue of the compensation site) are flagged, that Natural England would expect to be resolved. Natural England's view has always been that these matters ought to be capable of resolution (see Relevant Representations, para.1.15) however they do need to be addressed by the Applicant.

32. During the September hearings the lead Panel Inspector indicated that he would like an update as part of this Summary on what outstanding issues remained and the likelihood of them being resolved. The following table provides that update:

Issue	Ref. in NE's response to 2 nd Q's	Update	Resolved
Assessment of capital and maintenance dredging in-combination	Para.25(a), para.69 (table)	The MMO confirmed that the Applicant have adequately assessed the volume of material to be disposed of but, there has been no assessment of the in-combination impacts of disposal at sites HU081 and HU083. An assessment of the combined impacts of HU081 and HU082 has been carried out at report EX8.7. The Applicant is to provide further information.	Outstanding – Applicant to provide further information
Assessment of disposal of erodible material	Para.25(a)	There is no information at present on the impact of gravel disposal at site HU080 on the benthic environment, the Applicant has indicated that it will provide such an assessment.	Outstanding – Applicant to provide further information
Assessment of impact on Curlew in-combination	Para.25(c)	The Applicant has confirmed that it would commit to a further assessment of non-breeding birds, it needs to be clarified that this will include an in-combination assessment of the impact on Curlew.	Outstanding – Applicant to provide further information
Assessment of	Para.25(d)	During the inquiry ERM	

impact on Lamprey from tidal stream generators		provided Natural England with clarification on this point and reference to where the issue was considered in report EX10.2. Natural England has considered these.	Outstanding – Applicant to provide further information
Provision of noise and height restrictions against construction and operational disturbance	Para.69 (table)	Suggestions for noise and height restrictions have been provided to Natural England. Whilst Natural England has not yet had time to fully consider these, it is expected that the issue can be resolved through an appropriately worded requirement.	Capable of being resolved subject to clarification and inclusion in the terrestrial EMMP
Provision of mitigation for water voles	Para.69 (table)	Clarification has been sought from the Applicant on the details of mitigation for water voles, in particular the length of the ditches to be lost and recreated.	Clarification awaited
Impact on breeding birds (outside the SPA; s.40 NERC duty and s.9A Habitats Regulations)	Para.69 (table)	Natural England raised its concerns about the underassessment of the impact on breeding birds, and failure to make adequate provision on 12 September 2012. The Applicant confirmed that it would commit to a further assessment and include mitigation for any additional impacts.	Capable of being resolved subject to clarification and inclusion in the terrestrial EMMP

EMMPs and timetable

33. The main vehicle for the detail and delivery of the necessary mitigation for the terrestrial and marine environments are the EMMPs. As noted above, the detail

of the compensatory measures is required to be set down, this could either be by way of EMMP tied in as a requirement of the DCO or by way of a separate agreement, also linked to the DCO.

34. Natural England is willing to continue working with the Applicant to provide as much assistance as it is able in the final stages of the DCO examination process. It is however important that the Applicant takes the lead in producing further documents and reports and that it sets out its proposals in a robust and credible way. Consulting Natural England should not be an excuse for delay. It is important to bear in mind that Natural England has many other major infrastructure projects in which its advice and resources are required.

24 September 2012