



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)  
RULES 2010

YORK POTASH HARBOUR FACILITIES APPLICATION

Application by York Potash Ltd

for

the installation of wharf/jetty facilities with two ship loaders capable of loading bulk dry material at a rate of 12m tons per annum (dry weight); Associated dredging operations to create berth; Associated storage building with conveyor to wharf/jetty; Including a materials handling facility served by a material transport system (the subject of separate applications) and conveyor to storage building and jetty.

At Wilton, Teesside

Planning Inspectorate Reference: TR030002

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**WRITTEN REPRESENTATIONS OF NATURAL ENGLAND**

Dated 21 August 2015

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# **1. INTRODUCTION**

## **1.1. Purpose and structure of these representations**

1.1.1. These Written Representations are submitted in pursuance of rule 10(1) of the Infrastructure Planning (Examination Procedure) Rules 2010 ('ExPR') in relation to an application under the Planning Act 2008 for a Development Consent Order ('DCO') for the York Potash Harbour Facilities and associated development ('the Project') submitted by York Potash Ltd ('the Applicant') to the Secretary of State.

1.1.2. Natural England has already provided details of its principal concerns in its Relevant Representations, submitted to the Planning Inspectorate on 5 June 2015. This document comprises an updated statement of Natural England's views, as they have developed in light of the common ground discussions that have taken place with the Applicant to date. These are structured as follows:

- a. Section 2 introduces the status and functions of Natural England.
- b. Section 3 is an account of the legislative framework.
- c. Section 4 is an account of the policy framework.
- d. Section 5 describes the conservation designations, features and interests that may be affected by the Project and need to be considered.
- e. Section 6 comprises Natural England's submissions in respect of the issues that concern it. This submission cross-refers to, and is supported by, the evidence contained in the Annexes.
- f. Section 7 is a dedicated section answering the Examining Authority's written questions which were asked on 27 July 2015, cross-referenced to the rest of this document.
- g. Section 8 provides a summary of Natural England's case.
- h. The Annexes contain evidence referred to in the main body of these Representations.

## **2. STATUS AND FUNCTIONS OF NATURAL ENGLAND**

### **2.1. Natural England**

2.1.1. Natural England is a statutory body established under the Natural Environment and Rural Communities Act 2006 ('NERC Act'). Natural England is the statutory advisor to Government on nature conservation in England and promotes the conservation of England's wildlife and natural features. It is financed by the Department for Environment, Food and Rural Affairs ('Defra') but is a Non-Departmental Public Body, which forms its own views based on the best scientific evidence available.

2.1.2. Natural England works for people, places and nature, to enhance biodiversity, landscapes and wildlife in rural, urban, coastal and marine areas; promoting access, recreation and public well-being, and contributing to the way natural resources are managed so that they can be enjoyed now and by future generations.

2.1.3. Section 2 of the NERC Act provides that Natural England's general statutory purpose is:

'... to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.'

2.1.4. Section 2(2) states that Natural England's general purpose includes

- a. promoting nature conservation and protecting biodiversity;
- b. conserving and enhancing the landscape;
- c. securing the provision and improvement of facilities for the study, understanding and enjoyment of the natural environment;
- d. promoting access to the countryside and open spaces and encouraging open-air recreation; and
- e. contributing, in other ways, to social and economic well-being through management of the natural environment.

2.1.5. Natural England is required to keep under review all matters relating to its general purpose,<sup>1</sup> and to provide public authorities with advice where they

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<sup>1</sup> NERC Act, s.3(1).

request this.<sup>2</sup> Natural England's remit extends to the territorial sea adjacent to England, up to the 12 nautical mile limit from the coastline.<sup>3</sup>

2.1.6. Natural England is a statutory consultee in respect of (amongst other matters):

- a. all applications for consent for Nationally Significant Infrastructure Projects which are likely to affect land in England;<sup>4</sup> and
- b. the environmental information submitted pursuant to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ('the EIA Regs').<sup>5</sup>
- c. plans or projects that are subject to the requirements of the Conservation of Habitats and Species Regulations 2010 ('the Habitats Regs') or the Offshore Marine Conservation (Natural Habitats etc) Regulations 2007 ('Offshore Regs') which are likely to have a significant effect on European protected sites – that is, sites designated as Special Areas of Conservation ('SACs') and Special Protection Areas ('SPAs') for the purposes of the EU Habitats and Birds Directives – in England;<sup>6</sup>
- d. proposals likely to damage any of the flora, fauna or geological or physiographical features for which a Site of Special Scientific Interest ("SSSI") has been notified pursuant to the Wildlife and Countryside Act 1981 (as amended) ('WCA 1981');<sup>7</sup>
- e. proposals relating to the English territorial sea capable of affecting, other than insignificantly, any of the protected features of a Marine Conservation Zone ('MCZ') or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent, where the Examining Authority believes that there is or may be a significant risk of the act

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<sup>2</sup> NERC Act, s.4(1).

<sup>3</sup> NERC Act, s.1(3).

<sup>4</sup> Planning Act s.42; Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, reg. 3 and sched.1.

<sup>5</sup> Regs. 2(1), 8(6), 9(1), 13(2)(b), 17(3)(g), 18(3)(f), 19(3)(e) of the EIA Regs.

<sup>6</sup> Regulation 61 of the Habitats Regs; regulations 24(1) and (3) and 25(3)(b) of the Offshore Regs.

<sup>7</sup> Section 28I of the 1981 Act.

hindering the achievement of the conservation objectives stated for the MCZ.<sup>8</sup>

2.1.7. It is also the Government's policy to consult Natural England in respect of sites listed for the purposes of the Convention on Wetlands of International Importance especially as Waterfowl Habitat signed at Ramsar on 2 February 1971 ('Ramsar sites'), as if they were European protected sites.<sup>9</sup>

2.1.8. In addition, Natural England performs duties relating to SSSIs under the WCA 1981, and in relation to European protected sites and species under the Habitats Regulations.

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<sup>8</sup> Marine and Coastal Access Act 2009, ss.126(2) and 147(1). It is submitted that where an expanse of sea is under consideration for designation as an MCZ this is a material consideration.

<sup>9</sup> National Planning Policy Framework (March 2012), para 118; PINS Advice Note 10: Habitats Regulation Assessment for nationally significant infrastructure projects, p.4.

### **3. LEGISLATIVE FRAMEWORK**

#### **3.1. Environmental Impact Assessment**

- 3.1.1. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ('EIA Regs') transposed Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended). That directive and its amending instruments have since been repealed and replaced by consolidated Council Directive 2011/92/EU ('the EIAD'). Development consent cannot lawfully be granted for EIA development unless there has been substantial compliance with the EIA Regs.<sup>10</sup>
- 3.1.2. Where the Examining Authority is considering adopting a scoping opinion in which it specifies what information should be required in the environmental statement, it must consult Natural England.<sup>11</sup>
- 3.1.3. The environmental statement must meet the requirements of Schedule 4 to the EIA Regulations. These include providing:
- a. an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects;
  - b. a description of the development, its construction and operation phases, its production processes, and an estimate by type and quantity of its emissions and residues;
  - c. a description of the aspects of the environment likely to be significantly affected by the development including air, water, soil, fauna and flora, and landscape;
  - d. a description of the likely significant effects of the development on the environment, including direct, indirect, secondary, cumulative, long- and short-term, temporary and permanent effects;
  - e. a description of the measures envisaged in order to prevent/avoid, reduce and remedy/offset the significant adverse effects on the environment;

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<sup>10</sup> *Berkeley v SSE* [2001] 2 AC 603, HL which also concerned the materially identical Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999..

<sup>11</sup> Regulation 8(6) of the EIA Regs.

- f. the data required to identify and assess the main effects which the development is likely to have on the environment

3.1.4. Regulation 3(2) of the EIA Regs provides that a DCO must not be made unless environmental information has been taken into consideration. ‘Environmental information’ means the required environmental statement, including any further information requested, any other relevant information, and any duly made representations made about the environmental effects of the development and of any associated development.<sup>12</sup> The environmental statement must meet the required standard before consent may be granted.<sup>13</sup> Consideration of the environmental information must be done conscientiously. Where the development qualifies as EIA Development consent will be unlawful if the decision ignores issues relating to the significance of environmental impacts or the effectiveness of mitigation.<sup>14</sup>

## 3.2. Duty to conserve biodiversity

3.2.1. Section 40 of the NERC Act imposes a ‘*duty to conserve biodiversity*’ on public authorities, including members of the Examining Authority and the Secretary of State. In pursuance of this, section 40(1) states:

*‘Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.’*

For the purposes of the NERC Act, conservation includes restoring or enhancing a habitat or population of organisms.<sup>15</sup> The Secretary of State must in particular have regard to the Convention on Biological Diversity when performing his duty.<sup>16</sup>

3.2.2. Section 41 of the NERC Act requires the Secretary of State to publish a list of the living organisms and types of habitat which in the Secretary of State's opinion are of principal importance for the purpose of conserving biodiversity in England. Section 41(3) states:

‘the Secretary of State must–

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<sup>12</sup> EIA Regs, reg. 2(1).

<sup>13</sup> *R v Cornwall CC, ex p Hardy* [2001] Env LR 25.

<sup>14</sup> *Smith v SSETR* [2003] EWCA Civ 262.

<sup>15</sup> NERC Act, s.40(3).

<sup>16</sup> NERC Act, s.40(2).

- (a) take such steps as appear to the Secretary of State to be reasonably practicable to further the conservation of the living organisms and types of habitat included in any list published under this section, or
- (b) promote the taking by others of such steps.'

### **3.3. European Sites**

- 3.3.1. The Secretary of State and the individual members of the Examining Authority are each a 'competent authority' for the purposes of the Habitats Regulations, with a duty to have regard to the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') and Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds ('Wild Birds Directive').<sup>17</sup> So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds.<sup>18</sup>
- 3.3.2. The Secretary of State is also the 'appropriate authority' for the purposes of the Habitats Regulations.<sup>19</sup> He must accordingly exercise his functions which are relevant to nature conservation so as to secure compliance with the requirements of the Habitats Directive and Wild Birds Directive.<sup>20</sup> He must furthermore take such steps as he considers appropriate to secure the objective of the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of article 2 of the Wild Birds Directive.<sup>21</sup>
- 3.3.3. The Wild Birds Directive applies to all species of naturally occurring birds in the wild state in the European territory of the UK, including their nests, eggs and habitats.<sup>22</sup> Article 2 of the Wild Birds Directive requires populations of

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<sup>17</sup> Habitats Regs, regs 7(1)(a), 3(1), and 9(3). Directive 2009/147/EC has replaced Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

<sup>18</sup> Habitats Regs, reg.9A(8).

<sup>19</sup> Habitats Regs, reg.3(1).

<sup>20</sup> Habitats Regulations, reg. 9(1) and (2).

<sup>21</sup> Habitats Regs, reg 9A(1), (3)

<sup>22</sup> Wild Birds Directive, art.1.

wild birds to be maintained 'at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements'.<sup>23</sup> Article 3 requires Member States, in the light of Article 2, to 'take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats'. Article 5 requires Member States to take the requisite measures to establish a general system of protection for all their wild birds, prohibiting the deliberate killing or capture, deliberate destruction or removal of nests and eggs, and deliberate disturbance of the birds insofar as this is significant having regard to the objectives of the Directive. Article 4 requires SPAs to be established in respect of particular species, in order to ensure the survival and reproduction of these species in their area of distribution. In respect of SPAs, Article 4 requires that the Member States 'shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article'. It requires that '[o]utside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.' Article 13 provides that application of measures taken pursuant to the Directive may not lead to a deterioration in the present situation as regards the conservation of wild birds.

- 3.3.4. The Habitats Directive aims to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. It provides that measures taken pursuant to the Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest.<sup>24</sup> Member States, in consultation with the European Commission, must select and designate areas for protection as SACs pursuant to articles 3 and 4 of the Habitats Directive. Together with SPAs, these sites make up the Natura 2000 ecological network, which is supposed to be a coherent ecological European network that enables 'the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.<sup>25</sup>

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<sup>23</sup> Wild Birds Directive, article 2.

<sup>24</sup> Habitats Directive, art.2.

<sup>25</sup> Habitats Directive, art.3(1).

- 3.3.5. Article 6 of the Habitats Directive applies both to SACs and to SPAs.<sup>26</sup> Article 6(2) requires that Member States shall take appropriate steps to avoid, in the European sites, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive. Article 6(3) requires that any project not directly connected with or necessary to the management of the European site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site the competent national authorities shall agree to the project only after having ascertained that it will not adversely affect the integrity of the site concerned, unless it meets the enumerated criteria for derogation.
- 3.3.6. If an adverse effect on the integrity of the site cannot be ruled out, then the effect of Article 6(4) is that the project may only be carried out where (i) there are no alternative solutions, (ii) it must go ahead for imperative reasons of overriding public interest, including reasons of a social or economic nature; and (iii) all compensatory measures necessary to protect the overall coherence of the Natura 2000' network are taken. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised as 'imperative reasons of overriding public importance' are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or such other matters contained in an opinion of the European Commission.<sup>27</sup>
- 3.3.7. SACs and SPAs are protected as European sites in inshore waters off England (up to 12nautical miles) by the Habitats Regs and in offshore waters (i.e. outside 12nautical miles) by the Offshore Regs, which transpose the relevant parts of the Habitats Directive into domestic law. The provisions of Article 6 of the Habitats Directive which are noted above are found at regulations 61, 62 and 66 of the Habitats Regs and regulations 25, 26 and 30 of the Offshore Regs. In determining these applications, the Secretary of

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<sup>26</sup> Habitats Directive, art. 6 applies to SACs and art.7 applies it to SPAs designated under the Wild Birds Directive.

<sup>27</sup> Regulations 62 and 66 of the Habitats Regulations, transposing Article 6(4) of the Habitats Directive.

State will be acting as a competent authority for the purposes of those Regulations.

3.3.8. The Regulations describe a sequence of steps to be taken by the competent authority in respect of a European site (including SPAs of relevance with regards these applications) when deciding whether to authorise a project. Those steps are:

**Step 1** Consider whether the project is directly connected with or necessary to the management of the site?<sup>28</sup> If not—

**Step 2** Consider<sup>29</sup> whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects. If such an effect cannot be excluded –

**Step 3** Make an appropriate assessment of the implications for the site in view of its current conservation objectives.<sup>30</sup> In so doing, it is mandatory to consult Natural England<sup>31</sup> and have regard to its representations, and optional to obtain the opinion of the general public.<sup>32</sup> The competent authority is empowered to require the Applicant to provide information for the purposes of the appropriate assessment, or to enable the authority to determine whether such an assessment is required.<sup>33</sup>

**Step 4** Consider<sup>34</sup> whether the project will adversely affect the integrity of the site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (the ‘Integrity Test’).

**Step 5** Reject the project, unless it is ascertained that the project will not adversely affect the integrity of the site.<sup>35</sup>

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<sup>28</sup> Under regulation 61(1)(b) of the Habitats Regs or reg. 25(1)(c) of the Offshore Regs.

<sup>29</sup> Under regulation 61(1)(a) of the Habitats Regs or reg.25(1)(b) of the Offshore Regs.

<sup>30</sup> Under regulations 61(1) of the Habitats Regs.or 25(1) of the Offshore Regs.

<sup>31</sup> under regulations 61(3) of the Habitats Regs or 25(3)(b) of the Offshore Regs.

<sup>32</sup> under regulation 61(4) of the Habitats Regs or 25(3)(f) of the Offshore Regs.

<sup>33</sup> By regulation 61(2) of the Habitats Regs or 25(2) of the Offshore Regs.

<sup>34</sup> Pursuant to regulation 61(5) and (6) of the Habitats Regs or 25(4) and (5) of the Offshore Regs.

<sup>35</sup> Applying regulation 61(5) of the Habitats Regs, subject to regulation 62, or reg 25(4) of the Offshore Regs subject to reg.26.

**Step 6** If the project fails the Integrity Test in respect of the site, consider, whether one is satisfied that there is no alternative solution.<sup>36</sup> If not so satisfied, reject the project; but if so satisfied, proceed to steps 7 and 8.

**Step 7** Consider whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.<sup>37</sup> If not, reject the application. If so, proceed to Step 8.

**Step 8** Consider whether one can secure that compensatory measures are taken which would be necessary to secure that the overall coherence of Natura 2000 is protected. If not, reject the application; if so, accept the application subject to requirements securing that the necessary compensatory measures will be implemented in the appropriate timeframe.<sup>38</sup>

3.3.9. The Directives are both to be construed purposively in the light of Article 191 of the Treaty on the Functioning of the European Union ('TFEU'). Article 191(1) TFEU provides that 'Union policy on the environment shall contribute to the pursuit of the...objectives [of] preserving, protecting and improving the quality of the environment'; and Article 191(2) provides that Union policy on the environment shall aim at a high level of protection, and shall be based on the precautionary principle and on the principle that preventive action should be taken.

3.3.10. The case law of the Court of Justice of the European Union has established the following points:

- a. Articles 6(2) and 6(3) are aimed at achieving the same level of protection. The Habitats Directive therefore requires that Member States take systematic and effective measures pursuant to Article 6(3) which guarantee the avoidance in fact of significant deterioration of the habitats or disturbance of the species for which SPAs and SACs have been designated.<sup>39</sup>
- b. 'Article 6(3) of [the] Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or

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<sup>36</sup> in accordance with regulation 62(1) of the Habitats Regs or 26(1) of the Offshore Regs.

<sup>37</sup> in accordance with regulation 62(1) of the Habitats Regs or 26(1) of the Offshore Regs.

<sup>38</sup> As required by regulation 66 of the Habitats Regs or 30 of the Offshore Regs.

<sup>39</sup> CJEU, Case C-241/08 *Commission v France* at paras 30-36; Case C-535/07 *Commission v Austria* at paras 57-58.

project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned... It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned'.<sup>40</sup>

- c. Under Article 6(3) of the Habitats Directive, 'an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field'.<sup>41</sup>
- d. 'An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned'.<sup>42</sup>

### **3.4. Ramsar Convention**

3.4.1. The UK is a party to the 1971 Convention on Wetlands of International Importance, done at Ramsar, Iran ('the Ramsar Convention').

3.4.2. Article 2(1) of the Convention provides that 'Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance'.

3.4.3. Article 4 of the Convention provides:

1. Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.

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<sup>40</sup> CJEU Case C-418/04 *Commission v Ireland* at paras 226 to 227; Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij* at paras 43-45

<sup>41</sup> CJEU Case C-127/02 *Waddenzee* at para 61.

<sup>42</sup> CJEU Case C-404/09 *Commission v Spain* at para 100; cf case C-304/05 *Commission v Italy* [2007] ECR I-7495, paras 58-59, 67-70.

2. Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

3. The Contracting Parties shall encourage research and the exchange of data and publications regarding wetlands and their flora and fauna.

4. The Contracting Parties shall endeavour through management to increase waterfowl populations on appropriate wetlands.'

3.4.4. The Government designates Ramsar sites in accordance with the criteria set out in the Convention, in recognition of the international importance of these sites as a wetland wildlife habitat.

3.4.5. In accordance with *Government Circular: Biodiversity and Geological Conservation Statutory Obligations and their Impact within the Planning System* (ODPM 06/2005), and the *National Planning Policy Framework* (2012), paragraph 118, Ramsar sites are subject to the same procedures described in the preceding section (in relation to European sites) as a matter of UK Government Policy, in order to assist the Government in fully meeting its obligations under the Ramsar Convention.

### **3.5. Sites of Special Scientific Interest (SSSIs)**

3.5.1. SSSIs are designated as such by Natural England under section 28 of the WCA 1981, where we are of the opinion that land is of special interest by reason of any of its flora, fauna, or geological or physiographical features.

3.5.2. Section 28G of the WCA 1981 places legal obligations on public authorities in relation to SSSIs. These authorities are known as 'section 28G authorities', and the definition given at s.28G(3) embraces all public office-holders including the Secretary of State and the Examining Authority.

3.5.3. An authority to whom section 28G applies has a duty in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest to:

*'take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.'*

- 3.5.4. In addition, where the permission of a section 28G authority is needed before proposed operations may be carried out, the section 28G authority must, in accordance with section 28I(5) of the WCA 1981, take any advice received from Natural England into account:
- (a) in deciding whether or not to permit the proposed operations; and
  - (b) if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.
- 3.5.5. 'Permission' is defined so as to include any kind of consent or authorisation.<sup>43</sup> As the Applicant requires development consent from the Secretary of State in order to proceed with its proposals, and as the Secretary of State is a section 28G authority, the duties under section 28I(5) apply to the Secretary of State.<sup>44</sup>
- 3.5.6. Section 35 of the WCA 1981 empowers Natural England to declare as a 'National Nature Reserve' ('NNR') any land which is managed as a nature reserve and is of national importance. There is no additional protection for these over and above SSSI, European or Ramsar site status.

### **3.6. European Protected Species**

- 3.6.1. Regulation 9(5) of the Habitats Regs, headed 'Exercise of functions in accordance with the Habitats Directive', stipulates that:

'a competent authority, in the exercising of any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions'.

The Examining Authority and Secretary of State are both 'competent authorities' by virtue of reg.7(1), which includes any person holding a public office.

- 3.6.2. In relation to species of animals and plants listed in Annex IV of the Habitats Directive, article 12 of the Directive provides that the UK must take the

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<sup>43</sup> WCA 1981, s.28I(7).

<sup>44</sup> Natural England accepts that the notice requirements of section 28I(2) to (4) have been satisfied for the purposes of the Secretary of State's determination of the planning applications at issue here.

requisite measures to ensure that they are subject to a system of strict protection.

- 3.6.3. In relation to the animal species, the system must in particular prevent the deliberate capture or killing of specimens of these species in the wild; deliberate disturbance of these species; deliberate destruction or taking of eggs from the wild; and deterioration or destruction of breeding sites or resting places. Disturbance or destruction may be indirect, for instance through noise or light pollution, or loss of habitat.<sup>45</sup>
- 3.6.4. The plant species must be protected in particular from deliberate picking, collecting, cutting, uprooting or destruction in their natural range in the wild.
- 3.6.5. Article 16 of the Habitats Directive provides that this strict protection may be derogated from only where (i) there is no satisfactory alternative, (ii) the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, and (iii) the purpose is (a) protecting wild fauna and flora and conserving natural habitats; (b) preventing serious damage to crops, livestock, forests, fisheries and water and other types of property; (c) public health and safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment; (d) research, education, and repopulating and re-introducing these species; or (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.
- 3.6.6. Regulation 41 of the Habitats Regs and the provisions of the WCA 1981 make it a criminal offence to engage in the behaviour prohibited by the Habitats Directive. However, prohibitions enforced by penalties for infractions are not in themselves adequate to implement the Directive if they will not prevent significant destruction or disturbance taking place in fact: 'such protection requires that individuals be prevented in advance from engaging in potentially harmful activities'.<sup>46</sup>

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<sup>45</sup> CJEU Case C-103/00, *Commission v Greece*, judgment para 34 and Opinion of Léger AG delivered on 25 October 2001, paras 46, 56 and 57; *R(Morge) v Hampshire CC* [2010] EWCA Civ 608 at [49]. [2011] UKSC 2 at [19].

<sup>46</sup> CJEU, Case C-418/04 *Commission v Ireland* at para 208.

- 3.6.7. The Court of Justice of the European Union has accordingly ruled that Member States must not only adopt a comprehensive legislative framework but also to implement concrete and specific protection measures that are coherent, co-ordinated and preventive in nature.<sup>47</sup> Such a system of strict protection must enable the effective avoidance of deterioration or destruction of breeding sites or resting places caused by development.<sup>48</sup> Strict protection must be enforced even if the population of the species is not declining.<sup>49</sup>
- 3.6.8. The Secretary of State should follow the guidance in paragraphs 99 and 116 of Circular 06/2005, and take care to ensure that any disturbance of protected species, including harm to their habitats, food-sources, resting-places or breeding sites, is avoided unless he considers that the derogation criteria are likely to be met, in which case he should require any necessary licence to be obtained before development commences.<sup>50</sup>

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<sup>47</sup> CJEU Case C-183/05, *Commission v Ireland*, paras 29-30.

<sup>48</sup> CJEU Case C-383/09 *Commission v France*, opinion of Advocate-General Kokott at para 89; judgment at paras 21, 35, 37.

<sup>49</sup> CJEU Case C-103/00 *Commission v Greece* para 31; CJEU Case C-518/04 *Commission v Greece*, para 21.

<sup>50</sup> That was the approach endorsed by the High Court in *R(Woolley) v East Cheshire DC* [2010] Env. L.R. 5 at [27]-[28]. In *Morge v Hampshire CC*, the Supreme Court appears to have thought that it would not be unlawful to grant permission for a development unconditionally, unless it were thought unlikely that the criteria would be met. This was on the premise that it was sufficient for the prohibited conduct to be subject to criminal penalties if no species licence were obtained. However, the CJEU authorities cited above - which the Supreme Court did not consider in that case - make it clear that a preventive approach must be taken by the planning authority. It would be unsafe for the Secretary of State to grant consent without ensuring, so far as he can, that the requirements of the Directive would be met.

## **4. POLICY FRAMEWORK**

4.1.1. Natural England's approach to assessing issues such as 'integrity', 'coherence', 'deterioration', and 'disturbance' are informed by the guidance provided in these documents. As these documents are overarching policy documents which are central and applicable to all such applications before the Examining Authority, it has not been thought necessary to include them as Annexes to these Written Representations. However, should the Examining Authority require copies of the policy documents referred to, these can be provided.

### **4.2. National Policy Statements**

4.2.1. National Policy Statement for Ports pursuant to section 5(9) of the Planning Act 2008 is relevant to this Application. Section 4.7 regarding EIA requirements; 4.8 addresses the requirements of the Habitats Regulations; Section 5.1 on biodiversity and geological conservation; 5.11 in relation to landscape and visual impacts.

4.2.2. National Planning Policy Framework (2012) (particularly paragraphs 109, 115, 116, 118 and 119)

### **4.3. National planning policy and guidance on protected sites and species**

4.3.1. *Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System* (ODPM 06/2005) is relevant here.

4.3.2. *The Examining Authority is also reminded of the Planning Inspectorate's own Advice note ten: Habitat Regulations Assessment (August 2013).*

4.3.3. *National Parks - Guidance on s.85 of the 1949 National Parks and Access to the Countryside Act*  
*Duties on relevant authorities to have regard to the purposes of National Parks, Areas of Outstanding National Beauty (AONBs), and the Norfolk and Suffolk Broads.* Guidance note, Defra.2005.

### **4.4. European Commission guidance**

4.4.1. The European Commission has produced guidance on the protected sites and species regimes. This includes the following relevant guidance:

- a. *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (2000);*
- b. *EC (2001) Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6 (3) and (4) of the Habitats Directive 92/43/EEC (November 2001);*
- c. *Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC (2007);*
- d. *The implementation of the Birds and Habitats Directives in estuaries and coastal zones (2011);*
- e. *Wind energy developments and Natura 2000 (October 2010);*
- f. *Non-energy mineral extraction and Natura 2000 (July 2010);*
- g. *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version Feb 2007).*

## 5. CONSERVATION DESIGNATIONS, FEATURES AND INTERESTS THAT COULD BE AFFECTED BY THE PROPOSED PROJECT

The following is a brief summary of the interest features of the relevant designated areas of concern in this matter. Designation citations and maps are included in Annexes A and B.

### 5.1. International conservation designations

Teesmouth and Cleveland Coast SPA

#### **Qualifying Features:**

A143 *Calidris canutus*; Red knot (Non-breeding)  
A162 *Tringa totanus*; Common redshank (Non-breeding)  
A191 *Sterna sandvicensis*; Sandwich tern (Non-breeding)  
A195 *Sterna albifrons*; Little tern (Breeding)  
Waterbird assemblage

Teesmouth and Cleveland Coast Ramsar site:

#### **Qualifying interest:**

used regularly by over 20,000 waterfowl  
1% or more of the biogeographic populations of the following bird species:  
knot  
redshank  
sandwich tern

### 5.2. National conservation designations

The following sites are predominantly designated for their ability to support the important waterbird populations also covered by the SPA and Ramsar designations detailed above. However, some of the Sites of Special Scientific Interest (SSSI) are also designated for marine and coastal habitats, in addition to waterbird populations, as presented below.

#### **Cowpen Marsh SSSI;**

Waterbird population.

Cowpen Marsh includes the largest saltmarsh between Lindisfarne and the Humber estuary

#### **Seal Sands SSSI;**

Waterbird population

Seal Sands are the only extensive area of intertidal mudflats, with tidal channels on the East coast of England between the Lindisfarne National Nature Reserve to the north and the Humber Estuary to the south, a distance of 200 miles. These mudflats are of great ornithological importance attracting large numbers of migratory wildfowl (c. 4,000) and wading birds (c. 24,000) especially during the winter months. Of particular note are internationally important concentrations of shelduck (c.3,200 during peak counts) which feed on Seal Sands. These represent approximately 2% of the total Western European population.

### **Seaton Dunes and Common SSSI;**

Waterbird population.

Seaton Dunes and Common is an area of considerable importance for its flora, invertebrate fauna, and bird life. The range of habitats present include sandy, muddy and rocky foreshore, dunes, dune slacks and dune grassland, as well as relict saltmarsh, grazed freshwater marsh with dykes (known locally as fleets and stells) pools and seawalls.

### **South Gare & Coatham Sands SSSI;**

Waterbird population

The site is of considerable interest for its flora, invertebrate fauna and birdlife. The range of habitats present includes extensive tracts of intertidal mud and sand, sand dunes, saltmarsh and freshwater marsh which have all developed since the construction of the South Gare breakwater with tipped slag during the 1860's. Also exposed at low tide are areas of rocky foreshore along the breakwater, three slag banks known as the German Charlies, and Coatham Rocks.

### **Redcar Rocks SSSI;**

This is a geological SSSI. When exposed at low tide the rocks and sands provide an important feeding ground for several species of wading birds e.g. knot, turnstone, sanderling and purple sandpiper, especially during the winter months. These compliment other areas of rocky foreshore within South Gare and Coatham Sands SSSI, including Coatham Rocks and the 'German Charlies'.

### **Tees & Hartlepool Foreshore and Wetlands SSSI;**

Waterbird population.

Saltholme and Dorman's Pools and Haverton Hole support a nationally important assemblage of breeding birds which includes shoveler, pochard, little ringed plover and great crested and little grebe.

### **Teesmouth National Nature Reserve (NNR).**

Main habitat: sand dunes, grazing marsh, intertidal sand and mudflats

Features of interest: Harbour seals and grey seals bask beside the tidal channels. There are 4 different species of marsh orchid, and thousands of migratory waterbirds feed on the mudflats.

### **5.3. European Protected Species**

Bats and otters are present in the area, but as stated in our relevant representations section 2.5 Natural England is satisfied that appropriate mitigation has been identified. No 'letters of no impediment' have been required for this proposal. An answer to the ExA question Ec 1.9 on bats is given in Annex C

### **5.4. Nationally Protected Species**

Reptiles, Breeding Birds and Marine Mammals are present in the area, and as stated in Natural England's Relevant Representation section 2.6, suitable mitigation measures have been identified. Natural England has responded to the ExA regarding marine mammals and the Marine Mammal Mitigation Plan (MMMP) in our answer to Ec. 1.4 (within Annex C).

## **5.5. Landscape designations**

Natural England has no further comments to make on landscape designations made in section 2.8 of our Relevant Representation.

## **5.6. Non-designated interests and features of concern**

Natural England has previously described the non-designated habitat affected by this proposal

5.6.1. Bran Sands and Dabholm Gut as noted in 2.4 of our Relevant Representations

5.6.2. The intertidal frontage including '1.85ha of mud' within the intertidal frontage which will be lost to the quay proposals (a maximum of 3.6ha intertidal habitat in total will be lost to the footprint of the closed quay structure). As before we defer to the Environment Agency on this matter as they have been in discussion with the applicant about the mitigation and enhancement measures on the Tees. The applicant had noted to us via email correspondence, and in the Statement of Common Ground, that the £50k contribution to the funding of the Tees Estuary Habitat Strategy (through the Tees Valley Local Nature Partnership), which we were previously unable to locate (section 3.2.3 of RRs), will be included along with the measures at Portrack Marshes (3.2.2 of RRs). We have since learnt that the river frontage profiles are no longer part of the package of measures and that the EA are still in discussion with the applicant. See answer to Ec 1.9 of the ExA questions contained in Annex C.

## **6. NATURAL ENGLAND'S CONCERNS AND ADVICE**

### **6.1. The principal issues**

6.1.1. Natural England identified and described the following main issues in its Relevant Representations and provided detailed advice:

- a. The impacts of the harbour facilities proposal on the interest features of the Teesmouth and Cleveland Coast SPA and the adequacy of the mitigation measures proposed through the mitigation and enhancement measures at Bran Sands Lagoon.
- b. The landscape and visual impacts of the wider York Potash scheme on the North York Moors National Park and its setting in terms of the Cumulative Impact Assessment (CIA) submitted for the wider scheme.

The following sections detail any further information about outstanding issues including the securing of mitigation and enhancement measures along with any further discussion with the Applicant.

### **6.2. Impacts on bird species – further comments on outstanding matters requiring attention (Part II of Relevant Representation)**

*Teesmouth and Cleveland Coast SPA waterbird assemblage – design of islands in Bran Sands Lagoon*

6.2.1. In the agreed Statement of Common Ground sections 6.14 – 6.16, the applicant has agreed to adopt the approach we suggested in section 4.2 of our relevant representation (to use a geotextile membrane topped with cockle shells) as this would create a more effective surface for roosting and nesting birds. The applicant has stated that the excess material generated in the final stages of the construction of the shallow water area will not be placed into the lagoon.

6.2.2. The applicant has also agreed via email to amend the wording of the DCO to include the two pipes and flow control structures detailed in 6.3 of our relevant representation.

*Teesmouth and Cleveland Coast SPA Review*

6.2.3. Natural England, since the acceptance of the project, has informally consulted on the SPA Review for the Teesmouth and Cleveland Coast SPA. As identified in the applicants own HRA (Document 6.3) this could encompass Bran Sands Lagoon, Dabholm Gut in relation to the waterbird

assemblage and redshank. It is also possible that due to common tern foraging, the intertidal frontage could be included. The ExA may wish to consider whether their HRA should include a consideration of this issue at this stage in order to future-proof the proposal.

#### *Draft DCO*

- 6.2.4. Natural England raised concerns about the securing of all mitigation measures in the draft DCO/DML within our relevant representation. We have met with the applicant's consultants to discuss our comments and provided the following advice alongside some references to suggested examples and guidance notes:

#### *Summary of discussion*

- 6.2.5. All documents referred to need to be correctly identified – it is a 'Mitigation and **Monitoring** Strategy' – not a Mitigation and **Management** Strategy (Appendix 3.1 of Document 6.3).
- 6.2.6. Even if some measures are in documents, because there is lack of clarity through the documents and the different measures, it is important that the principles are in the DCO/DML.
- 6.2.7. We would expect to see clarity in the DCO/DML so that it is usable and so that the DCO requirements or DML paragraphs clearly refer to either construction or operational activities and the elements of mitigation required for them. For instance, lighting and noise mitigation is proposed in the HRA for the protection of SPA birds during construction, but there are also noise mitigation requirements for marine mammals and lighting mitigation proposed for bats – this is not clearly understandable in the way it is currently presented.
- 6.2.8. It is not clear to Natural England that the ongoing monitoring and management works have also been adequately described. As well as the creation of the lagoon enhancement measures described in the DML (which is a construction activity), there is a monitoring programme that will need to inform the operational stage. Future management changes where necessary need to be related to the Indicators of Success (IOS). In addition there are wider habitat enhancement measures proposed across the scheme during construction (e.g.38 in CEMP) which will need to be managed in the long term.
- 6.2.9. We agreed that the DCO/DML are currently confusing in this regard. We consider that it needs to be clearly understood why the measures are there and suggest that the mitigation / enhancement measures should be clearly identified in the legal requirements/DML and brigaded in the conventional hierarchy for:
- the SPA,

- SSSI,
  - protected species,
  - other biodiversity measures
- 6.2.10. These also need to be clearly separated into:
- those measures required during construction
  - those measures required during operation
- 6.2.11. If detailed measures are to be agreed afterwards in plans etc., then this should be stated as well as who is responsible for securing their agreement
- 6.2.12. It was agreed that an amendment would be made with the wording we suggested in section 6.3 of our relevant representation regarding the two pipes.

### **6.3. Impacts on the landscape**

- 6.3.1. Natural England has little to add from our Relevant Representation section 3.4. We invite the Examining Authority to consider that advice alongside the determination of the mine and MTS applications by the North York Moors National Park Authority in relation to the overall impacts on landscape from the whole York Potash scheme, of which the Harbour facility is just one element. Please note our answer to the ExA questions LVA. 1.2.

### **6.4. Conclusions**

- 6.4.1. Natural England is satisfied that the York Potash Harbour Facilities element of the project being carried out in strict accordance with the details of the application, as submitted will not have an adverse effect on European protected sites; will not damage or destroy the interest features for which the affected SSSIs are notified provided that the measures are appropriately referenced and secured within the DCO requirements and DML.

## **7. ANSWERS TO THE EXAMINING AUTHORITY'S WRITTEN QUESTIONS**

### **7.1. The questions received**

In its Rule 8 letter dated 27 July 2015, the Examining Authority asked Natural England a number of questions. These are set out, along with the answers, in the table provided at Annex C.

## **8. EXECUTIVE SUMMARY (ALSO AVAILABLE SEPARATELY)**

Natural England welcomes the additional information from the applicant provided in discussion and through the now agreed statement of common ground confirming that they are willing to adopt the suggested approach to create the islands in Bran Sands Lagoon and agree to the re-wording concerning the two pipes (and flow control structures) that will be installed. Natural England welcomes the mitigation and enhancement measures at Bran Sands Lagoon which will improve the quality of the site for SPA birds. We are satisfied that no further mitigation measures are required based on the information supplied with the application and our current understanding of the site in order to avoid adverse effects on the European site. We also welcome the measures being secured to compensate for the loss of intertidal habitat on the Tees.

Natural England is satisfied that the York Potash Harbour Facilities element of the project being carried out in strict accordance with the details of the application, as submitted will not have an adverse effect on European protected sites; will not damage or destroy the interest features for which the affected SSSIs are notified provided that the measures are appropriately referenced and secured within the DCO requirements and DML.

## ANNEXES

**ANNEX A: Designated site maps** (also attached to email in case they cannot be opened from this page)

### **Teessmouth and Cleveland Coast SPA and Ramsar Site**



Teessmouth and  
Cleveland Coast SPA

### **Cowpen Marsh SSSI;**



Cowpen Marsh SSSI  
Map.pdf

### **Seal Sands SSSI;**



Seal Sands SSSI  
Map.pdf

### **Seaton Dunes and Common SSSI;**



Seaton Dunes &  
common SSSI Map.pdf

### **South Gare & Coatham Sands SSSI;**



South Gare &  
Coatham Sands SSSI

### **Redcar Rocks SSSI;**



Redcar Rocks SSSI  
Map.pdf

### **Tees & Hartlepool Foreshore and Wetlands SSSI;**



Tees and Hartlepool  
Foreshore and Wetlands



Tees and Hartlepool  
Foreshore and Wetlands

### **Teessmouth National Nature Reserve (NNR).**



Teessmouth NNR  
Compartments Map.pdf

**ANNEX B: Designated site conservation objectives and citations (also attached to email in case they cannot be opened from this page)**

**Teesmouth and Cleveland Coast Ramsar Site**



2\_2\_2 Teesmouth & Cleveland Coast Ram

**Teesmouth & Cleveland Coast SPA - Conservation Objectives**



2\_2\_1 Teesmouth & Cleveland Coast SPA

**Teesmouth & Cleveland Coast SPA - Citation**



2\_2\_1 Teesmouth & Cleveland Coast SPA

**Cowpen Marsh SSSI – Citation**



2\_2\_3 Cowpen Marsh SSSI - Citation.

**Seal Sands SSSI – Citation**



2\_2\_4 Seal Sands SSSI - Citation.PDF

**Seaton Dunes and Common SSSI - Citation**



2\_2\_5 Seaton Dunes & Common SSSI - Cit:

**South Gare & Coatham Sands SSSI - Citation**



2\_2\_6 South Gare & Coatham Sands SSSI

**Redcar Rocks SSSI**



2\_2\_7 Redcar Rocks SSSI - Citation.PDF

**Tees & Hartlepool Foreshore and Wetlands SSSI**



2\_2\_8 Tees & Hartlepool Foreshore

**ANNEX C: Schedule of Natural England’s responses to Examining Authority’s initial questions.**

Question	Answer
<p><b>Development Consent Order (DCO) (APP-003)</b></p>	
<p><b>DCO 1.14</b>  <b>To: The Applicant To: Redcar &amp; Cleveland Borough Council To: Statutory consultees</b>  <i>Schedule 2: Requirements – Definition of Phases 1 and 2</i></p> <p>Do not Phases 1 and 2 need defining at the outset, together with provision of a phasing plan in order for the generality of the Requirements to be enforceable?</p> <p>The phasing of the construction period is described in paragraph 3.1.86 of the ES onwards. The construction of Phase 2 of the development is predicted to be within 6 years following the completion of Phase 1 (ES paragraph 3.1.91 <b>Doc 6.4</b>). The construction of the proposed development is anticipated to commence in January 2017 (ES paragraph 3.1.91 <b>Doc 6.4</b>). Paragraph 3.1.92 of the ES confirms that both phases of the proposed development are anticipated to require a 17 month construction period. Based on the above information, is it assumed that the construction of Phase 2 will overlap with the operation of Phase 1. However, the applicant is asked to clarify how the overlapping construction and operation periods have been assessed in the ES on a worst case basis.</p> <p>If Phase 2 is significantly in the future, does there not need to be a Requirement to ensure that the Environmental Statement is updated to take account of the change in the future baseline due to</p>	<p>Natural England agrees that since Phase 2 could be significantly in the future, there should be a Requirement to ensure that the Environmental Statement is updated to take account of the change in the future baseline due to construction and operation of Phase 1 and indeed changes which may have taken place due to the passage of time. This is consistent with the approach taken to other multi-phased developments.</p>

<p>construction and operation of Phase 1?</p> <p>Is the Council and all statutory Consultees satisfied that their interests will be sufficiently protected by these Requirements?</p>	
<p><b>Environmental Statement General (ES)</b></p>	
<p><b>HWF 1.9</b>  <b>To: Natural England (NE)</b>  <b>To: The Applicant</b></p> <p>The ES does not identify any significant impacts in relation to marine sediment and water quality and does not propose any monitoring of sediment or marine water quality (<b>Doc 6.4</b>). However, Table 7.5 (Summary of consultation responses on the scope of the sediment quality survey) record the following comment from NE <i>“Post dredging monitoring of Seal Sands should be taken from the same location as the baseline samples so to identify new deposits as a result of dredging activities. If dredging is found to be detrimental, additional mitigation may be required.”</i> To which the applicant responds ‘noted’.</p> <p>Natural England is requested to provide at Deadline 1 a statement as to whether this mitigation is required.</p>	<p>Following this issue being raised, the applicant produced a report from another development on the Tees, the Northern Gateway, on sediment modelling. That document highlighted that no sediment (or very little) was expected to go into Seaton Channel. Natural England’s initial concern was based on the original much larger dredge (approach channel and berth pocket) which was subsequently reduced in the submitted application. Based on the Northern Gateway document referred to above, we are confident that any deposits on Seal Sands from the dredge would be minimal. In addition, now that the approach channel dredge is no longer being considered we are further satisfied that no mitigation will be required.</p>
<p><b>Terrestrial Ecology and Marine and Coastal Ornithology (Ec) ES Chapters 10 and 11</b></p>	
<p><b>Ec 1.4</b>  <b>To: The Applicant</b>  <b>To: Natural England</b></p> <p><i>Impacts on specific species and habitats – marine mammals</i></p> <p>Please indicate how the MMMP is secured through the DCO, given that the mitigation measures outlined in the ES are considered</p>	<p>Natural England considers that the MMMP should be secured via a separate DCO Requirement. This would be in line with the discussions we have held with the applicant’s consultants referred to in our Written Representation (5.4) and below in our answer to HRA 1.21.</p>

<p>appropriate by NE. Is a specific Requirement needed?</p>	
<p><b>Ec 1.5</b>  <b>To: The Applicant</b>  <b>To: Natural England</b>  <i>Impacts on specific species and habitats - bats</i>          Whilst no bat roosts have been identified within the DCO boundary, potential bat roosts have been identified in structures in the vicinity of the DCO scheme.          Confirm that potential impacts on bats feeding or roosting from disturbance during the construction phase (e.g. noise, dust) have been adequately assessed and show where this has been done.</p>	<p>Natural England is satisfied that impacts on feeding and roosting bats have been sufficiently mitigated via the lighting mitigation which is proposed in the ES and referenced in the CEMP. The detailed descriptions on the environment within this industrial area are contained in Section 10 Appendix 10.2 of the ES.</p>
<p><b>Ec 1.9</b>  <b>To: Natural England</b>  <i>Securing enhancement</i>          Your relevant representation confirms that you are content with the proposed enhancement measures described in the Environmental Statement. However, it then states that these measures will need to be shown to be deliverable through an appropriate legal mechanism which should be captured within the DCO. Please confirm the extent to which the enhancement measures proposed are to be regarded as mitigation.</p>	<p><b>Part 1 of question</b>          There are two elements to the mitigation at the proposed Port development:</p> <p><b>1. Impacts on SPA bird interest features which require mitigation:</b></p> <ul style="list-style-type: none"> <li>• Loss of roosting and feeding habitat due to installation of piled supports for the conveyor system within either Dabholm Gut or Bran Sands lagoon, construction of the port terminal and removal of the Northumbria Water Ltd (NWL) jetty.</li> <li>• Disturbance impacts, comprising noise, lighting and overshadowing due to the presence of the conveyor in the northern conveyor corridor (if this route is progressed), and potential fragmentation of the lagoon habitat.</li> </ul> <p>Natural England considers therefore that the measures at Bran Sands Lagoon are for the most part mitigation. The positive management measures will improve the quality of the site for SPA birds by creating additional feeding and roosting habitat if undertaken in line with the</p>

<p>Is Natural England satisfied that the implementation of all the ecological enhancement measures set out in the Environmental Statement are specifically and adequately secured through provisions in the draft DCO including through the Governance Tracker if this is made a certified document properly referenced in the DCO or through the proposed s106 undertaking to the extent that its provisions are to be regarded as necessary mitigation? If you are not satisfied, what do you consider to be the most appropriate ways to deliver these through the draft DCO?</p>	<p>Mitigation and Monitoring Strategy (Appendix 3.1 of Document 6.3). In addition, including two pipes and associated flow control structures will not only enable the site to be isolated in case of any oil spills, it will also enable further water level manipulation in the future should the underlying site conditions allow. It is essential that the monitoring parts of the proposal are fully secured alongside the requirement to amend management measures if not delivering to the Indicators of Success.</p> <p><b>2. Compensation for loss of the intertidal habitat along the river frontage (not for SPA birds).</b></p> <p>We consider that the low quality intertidal habitat (including BAP mudflat habitat) being lost through this proposal would be compensated for via the proposed measures on the Tees including those at Portrack being progressed by the applicant and the EA. This also includes the financial contribution to the Tees Habitat Strategy/Vision. We refer you to the EA for further detail.</p> <p><b>Part 2 of question</b></p> <p>We would consider these ‘ecological enhancement measures’ appropriate if they are improved in clarity and more specifically (see question HRA 1.21 below) in relation to Teesmouth and Cleveland Coast SPA.</p> <p>However, for the other compensation measures proposed, Natural England are content in principle as we have already described and note the following:</p> <ul style="list-style-type: none"> <li>• We have been advised via email from the applicant and text within the agreed NE/YP Statement of Common Ground that ‘the financial contribution is a commitment and will be included in the Development Consent Obligation’. This is the £50K</li> </ul>
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	<p>towards the Tees Estuary Strategy/Vision.</p> <ul style="list-style-type: none"> <li>We have also been informed that the detail and agreement of the 'offsetting measures' being undertaken at Portrack and elsewhere has yet to be finalised. For example, the Tees river frontage re-profiling works detailed in the submitted documents are no longer part of the proposal. We would expect the Portrack Marshes and any other measures to be captured in the s106 but that we are aware that the mudflat biodiversity offsetting/compensation is still being negotiated between the applicant, EA and TVWT and that agreement has yet to be reached - please refer to the EA on this matter. We have spoken to the EA and they are also responding to this question with further detail.</li> </ul>
<p><b>Landscape and Visual Impact Assessment (LVIA) ES Chapter 20</b></p>	
<p><b>LVA 1.2</b>  <b>To: Natural England</b>  <i>Landscape</i>  In your Relevant Representation, concern is expressed over the cumulative landscape impact between the Port structures, those of the Material Transport system and the mine head itself. Please explain more fully how these concerns arise in relation to the Port in view of the apparent lack of inter-visibility between its structures and those of the MTS and mine head even during construction?</p>	<p>This issue is not about inter-visibility, but about the separation of the York Potash Project into separate applications under different consenting regimes. The Port development is the NSIP application part of the overall scheme to export polyhalite with the material mined and transported to Wilton dealt with via other planning applications. Therefore the Cumulative Impact Assessment (CIA) should deal with all cumulative matters including landscape. Please refer to the explanation we provided within our Relevant Representation at section 3.4. We have provided the full detail of the advice given in our responses to the Mine and MTS applications appended to the Relevant Representation. The applicant agrees that the overall scheme does impact on the landscape of the North York Moors National Park – see Table 1 of the NE/YP Statement of Common Ground.</p>
<p><b>Habitat Regulations Assessment (HRA)</b></p>	

<p><b>HRA 1.1</b>  <b>To: Natural England</b>  <i>Identification of the relevant European sites and features</i>  Please can NE confirm, as the relevant SNCB, whether they agree that the applicant has applied an appropriate study area to identify the relevant European site which may be affected by the proposed development and that the applicant has not omitted any relevant European sites or features of those sites, from their assessment? If the applicant has omitted any relevant sites or features, please can NE identify these to the ExA?</p>	<p>Natural England can confirm that an appropriate study area has identified all relevant European Sites and interest features which may be affected by this proposed development.</p>
<p><b>HRA 1.2</b>  <b>To: The Applicant</b>  <b>To: Natural England</b>  <i>Sites screened out of further consideration in the applicant's HRA</i>  The HRA Report has concluded that whilst North York Moors SAC and SPA sites and Arnecliff &amp; Park Hole Woods SAC are shown close to the transport routes identified on Figure 5.1, the potential emissions from road traffic during the construction and operation of the harbour development would make an insignificant contribution to the traffic flows generated by the York Potash Project (YPP) as a whole and effects would not extend into the North York Moors National Park (NYMNP) or influence the North York Moors SAC or SPA (paragraph 5.1.2). Whilst the HRA Report acknowledges that the air quality effects of the YPP are predicted to cause exceedences of Objective levels for ecology within NYMNP, prior to mitigation, these are predicted to arise due to a combination of the influence of traffic emissions and the contributions from construction phase generators at the minehead and Lockwood Beck Intermediate Shaft site and not from traffic alone. On this basis, the applicant has screened out of the HRA for the harbour facility potential effects on North York Moors SPA and SAC (paragraph 5.1.3).  Please can NE state whether they agree with the applicant's conclusion that there will not be any effect on the North Moors SAC</p>	<p>Natural England considered these air quality impacts as part of our responses to the North York Moors National Park Authority and subsequent agreement on their HRA which took into account any in-combination impacts of the Port development. We had outstanding concerns about air quality at the original submission of the mine and MTS applications. These concerns were resolved by the mitigation measures proposed within the Supplementary Environmental Information (SEI).</p> <p>Natural England agrees with the applicant's conclusion that there will not be any effect on air quality of the North York Moors SAC and SPA sites from the Harbour facility project alone and in combination with the other elements of the overall YPP development, namely the Lockwood Beck Intermediate Shaft as part of the mineral transport system application.</p>

<p>and SPA sites from the Harbour facility project alone and in combination with the other elements of the overall YPP development, namely the Lockwood Beck Intermediate Shaft as part of the mineral transport system application?</p>	
<p><b>HRA 1.6</b>  <b>To: LPA and Natural England</b>  <i>In combination assessment</i>  Please can the LPA and Natural England confirm whether they agree that the applicant has identified all the relevant 'other plans and projects' for consideration in the applicant's HRA.</p>	<p>Natural England is not aware of other plans or projects for consideration in the applicant's HRA.</p>
<p><b>HRA 1.13</b>  <b>To: The Applicant</b>  <b>To: Natural England</b>  <i>Provision of artificial nesting platforms</i>  The HRA infers that artificial nesting platforms can be provided beneath the suspended deck of the quay (if the open quay structure is proposed). This design option would be of particular benefit for nesting shags. Can the applicant confirm if this option will be adopted in the final design and if so how it is secured in the draft DCO/DML? Please can Natural England comment on whether they Bran Sands Lagoon MMS should include the provision of artificial nesting platforms?</p>	<p>The applicant agreed at meetings and in writing that they intend to provide these platforms for nesting shags, under an open quay scenario.</p> <p>While it cannot be categorised as a mitigation measure, the provision of artificial nesting platforms for shags beneath a suspended deck structure (should that be the selected quay option) would make a positive contribution to biodiversity at a minimal cost. Shag is Amber Listed in the latest <i>Birds of Conservation Concern</i>. The UK holds over a third of the world population of the species, but in 2013 the index of UK breeding abundance fell to the lowest level yet recorded, 52% below the 1986 baseline (source: JNCC website). Teesside lies on the very edge of the UK breeding range, yet a few pairs have recently colonised the nearby ConocoPhillips jetties. Dark and sheltered ledges beneath quay superstructures act as proxy sea cave breeding habitats for the birds.</p> <p>Provision of nesting platforms should therefore be included within the Bran Sands Lagoon MMS. It was in the version Natural England previously agreed prior to submission.</p>

<p><b>HRA 1.18</b>  <b>To: The Applicant</b>  <b>To: Natural England</b>  <i>Applicant's screening and integrity conclusions</i>  Table 8.1 identifies the potential effects associated with the harbour facility that could affect the Teesmouth and Cleveland Coast SPA and Ramsar sites. The screening matrices for these sites identify a likely significant effect on all the qualifying features /criteria of these sites from the project alone (see Table 8.2 for the effects arising from the project alone on these features/criteria) and in combination (see Table 8.7 which identifies the other plans and projects which may result in in combination effects), during construction and operation, but not during decommissioning. Therefore, all the qualifying features /criteria of these sites have been taken forward to appropriate assessment. The HRA Report has concluded that in the context of the Teesmouth and Cleveland Coast SPA conservation objectives (provided in Appendix 5.1), the project alone, with the measures to mitigate the impact of construction noise and visual disturbance and the habitat enhancement measures in Bran Sands lagoon, would not affect the integrity (structure and function) of the SPA. The HRA Report has concluded that in the context of the Teesmouth and Cleveland Coast Ramsar criteria (provided in Section 5.3), the project alone would not affect the integrity (structure and function) of the Ramsar site. However, it is noted that the applicant when reaching this conclusion, does not rely on measures to mitigate the impact of construction noise and visual disturbance and the habitat enhancement measures in Bran Sands lagoon.  Please can the applicant clarify whether they are relying on measures to mitigate the impact of construction noise and visual disturbance and the habitat enhancement measures in Bran Sands lagoon to conclude no adverse effect on site integrity for the Teesmouth and Cleveland Coast Ramsar?</p>	<p>It is Natural England's view that the applicant has relied upon the construction mitigations measures and enhancement measures in Bran Sands Lagoon. We have been clear with the applicant that we see these measures as mitigation, throughout our discussions over the last year. However, we recognise that the lagoon habitat enhancement will make improvements beyond mitigation of benefit to SPA interest features. This is to be welcomed.</p>
<p><b>HRA 1.19</b></p>	<p>Natural England discussed construction impacts fully on-site with the</p>

<p><b>To: Natural England</b></p> <p>The Bran Sands lagoon MMS stipulates that the ES and HRA were undertaken on the assumption that construction works would not be seasonally constrained (section 5.2 in Appendix 3.1 of the HRA Report). The MMS records that Natural England advised that with the proposed mitigation measures in place, it could only be concluded that the risk of indirect impacts on waterbirds would be reduced to an insignificant level if it could be guaranteed that the construction works would avoid the wintering period. However, the MMS records that NE accepted that the potential disturbance effects would not have an adverse effect on the integrity of the Teesmouth and Cleveland Coast SPA (and Ramsar?), due to the limited period over which the disturbance would occur (3 to 4 months) in combination with the mitigation proposed.</p> <p>Please can Natural England confirm whether they agree with the Applicant's statement that the potential disturbance effects arising from the development would not have an adverse effect on the integrity of the Teesmouth and Cleveland Coast SPA and Ramsar sites? If Natural England agrees with the Applicant's statement, please can Natural England state on what basis they have reached this conclusion? Please can Natural England expressly state any assumptions or mitigation relied upon in their response?</p>	<p>applicant prior to submission. These discussions included the mitigation measures proposed in the HRA (which includes noise attenuation / visual barriers as well as lighting restrictions) combined with the temporary nature of the disturbance. NE is satisfied that while there would be some effects, these would not constitute an adverse effect on the integrity of the Teesmouth and Cleveland Coast SPA.</p>
<p><b>HRA 1.21</b></p> <p><b>To: The Applicant</b>  <b>To: the Environment Agency</b>  <b>To: Natural England</b></p> <p><i>Absence of adverse effects – securing mitigation</i></p> <p>Natural England's Relevant Representation (RR-007) gives a prospective view that no adverse effects are anticipated on any European Sites as a result of the proposed development provided that intended mitigation measures are implemented, subject to assessments in relation to additional species that may be affected should expected review proposals be implemented. On the assumption that such assessments do not reveal new issues needing</p>	<p>The SPA Review is still at the informal consultation stage and boundaries and details have yet to be confirmed. Please see section 6.2.2 of this Written Representation.</p> <p>Natural England met the applicant's consultant via telephone to discuss our comments on the DCO and in particular the deliverability of the mitigation measures previously agreed and submitted, and how to secure them. We advised measures detailed in Section 6.2.4-6.2.11 on how to secure the mitigation within the DCO requirements. In addition the applicant has confirmed that references to the Mitigation and Monitoring Strategy will be made clearer</p>

<p>to be addressed, can it be confirmed whether the DCO contains articles and/or Requirements that satisfactorily guarantee that the mitigation measures would be secured? If not please specify any additional mitigation measures and a means by which to secure them.</p>	
<p><b>HRA 1.22</b>  <b>To: Natural England</b>  <i>In-combination effects</i>          Bearing in mind the apparent absence of consideration of the cumulative impacts of Dogger Bank C &amp; d, can Natural England confirm they are content that there would be no Likely Significant Effects/adverse effect on the integrity after mitigation measures on any European Sites for both the project alone and in-combination with other plans/projects.</p>	<p>Natural England is aware that Dogger Bank C &amp; D have been recently shelved. Based on this news there will be no impacts in-combination from these projects,</p>