

Date: 13 March 2012  
Our ref: 47502  
Your ref: TR040002



**BY EMAIL ONLY**

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Dear Mr Amos

**Rules 17 and 8(1)(k) of the Infrastructure Planning (Examination Procedure) Rules 2010.  
The Examining Authority's request for Written Comments relating to an application for  
the proposed Ipswich Rail Chord, 1km north of Ipswich goods yard**

**Ref: TR040002**

Thank you for your letter of 2 March 2012. This letter is Natural England's formal consultation response under Regulation 61 of The Conservation of Habitats and Species Regulations 2010 (the "Habitats Regulations 2010") and Section 28 of the Wildlife and Countryside Act 1981 (as amended) (the "1981 Act"). This letter also considers potential impacts on European and nationally protected species.

**Legislative Framework**

**European Sites: Special Protection Areas ("SACs") and Special Areas of Conservation ("SPAs")**

SACs and SPAs are subject to the protection required by Article 6(2), 6(3) and 6(4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive").<sup>1</sup> Article 6(2) requires Member States to take appropriate steps to avoid in these areas the deterioration of natural habitats and the 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 Directive. Articles 6(3) and (4) require that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect on it, either individually or in combination with other plans or projects must be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of such an assessment, such plans or projects may only be agreed, save in the circumstances provided for in Article 6(4), after ascertaining that they will not adversely affect the integrity of the site. Article 6(4) provides that despite a negative assessment of the implications for the site a plan or project may nonetheless proceed where there are no alternatives to it and imperative reasons of overriding public interest why it must proceed. Where a plan or project proceeds on this basis, compensatory measures must be put in place to ensure the overall coherence of the Natura 2000 network.

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<sup>1</sup> SACs are subject to these Articles by direct reference; SPAs are subject to these Articles by reason of Article 7 of the Habitats Directive.

SACs and SPAs are protected as European Sites in England by the Habitats Regulations 2010 which transpose the relevant parts of the Habitats Directive into domestic law. These proposals have the potential to involve the Stour and Orwell Estuaries SPA and Ramsar site<sup>2</sup> as there is a direct hydrological link between the proposed development site and the Orwell estuary. Therefore waterborne pollution from the development could have an impact on the protected sites. The SPA is classified for the numbers of breeding and wintering birds which it supports listed in Annex 1 of Council Directive 2009/147/EEC on the conservation of wild birds. The Ramsar is listed for nationally rare plants, invertebrates and wintering waterfowl.

In determining these applications, the Secretary of State will be acting as a competent authority for the purposes of regulations 61, 62 and 66 of the Habitats Regulations 2010. He will determine these applications having had regard to the recommendations made to him by the IPC Examining Authority. Regulations 61, 62 and 66 of the Habitats Regulations 2010 describe a sequence of steps to be taken by the competent authority in respect of a European site (including the SPA of relevance to this inquiry) when deciding whether to authorise a project. Those steps are:

- Step 1 Under regulation 61(1)(b), consider whether the project is directly connected with or necessary to the management of the site? If not—
- Step 2 Under regulation 61(1)(a) consider whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects. If Yes—
- Step 3 Under regulation 61(1), make an appropriate assessment of the implications for the site in view of its current conservation objectives. In so doing, it is mandatory under regulation 61(3) to consult Natural England, and optional under regulation 61(4) to take the opinion of the general public. Regulation 61(2) empowers the competent authority 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.
- Step 4 Pursuant to regulation 61(5) and (6), consider 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 In accordance with regulation 61(5), but subject to regulation 62, reject the project unless, it is ascertained that the project will not adversely affect the integrity of the site.
- Step 6 If the project fails the Integrity Test in respect of the site, consider, in accordance with regulation 62(1), whether one is satisfied that there is no alternative solution; if not so satisfied, reject the project; but if so satisfied, proceed to steps 7 and 8.
- Step 7 Consider, in accordance with regulation 62(1), but subject to Step 6, whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.
- Step 8 Consider in accordance with regulation 66 whether one can secure that compensatory measures are taken which would be necessary to secure that the overall coherence of Natura 2000 is protected.

As stated in Natural England’s relevant representations of 31 August 2011 and Natural England’s letter to Network Rail’s ecological consultants of 19 May 2011, we agree with the findings set out in Network Rail’s *Report as to Effects of European Sites* (dated 7 June, Rev 2.0, Document Reference 3.6) that the proposal is not likely to have a significant effect on the qualifying features of the Stour & Orwell

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<sup>2</sup> As a matter of policy, the Government has chosen to apply the same level of protection afforded to SPAs and SACs to *designated* Ramsar sites (see para 6 of PPS9).

Estuaries SPA and Ramsar site, either alone or in combination with other plans or projects, provided that adequate requirements are imposed in the draft Development Consent Order to prevent water pollution from the development reaching that protected site.

Provided that sufficient requirements are imposed, Natural England is content to conclude that the proposals will not have a likely significant effect and therefore an appropriate assessment by the competent authority is not required, as discussed above.

### **Site of Special Scientific Interest (“SSSI”)**

Section 28G of the 1981 Act places legal obligations on certain authorities in relation to SSSIs. These authorities are known as “section 28G authorities”. The Secretary of State expects that all section 28G authorities will take full account of their responsibilities under this duty whenever their actions may affect SSSIs. The legislation provides that section 28G authorities include a Minister of the Crown,<sup>3</sup> Government department, a local authority, and any other public body of any description.

An authority to whom section 28G of the 1981 Act applies has a duty in exercising its functions (so far as exercising them 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.’*

This section 28G duty applies to Natural England and the Secretary of State for purposes of this inquiry. It should be noted that this duty also applies to, for example, the local planning authority.

In addition, where the permission of a section 28G authority is needed before proposed operations may be carried out which are likely to damage any of the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest, the section 28G authority must give notice to Natural England and, in accordance with section 28I(5) of the 1981 Act, 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.

As Network Rail requires planning permission from the Secretary of State in order to proceed with its proposals, and as the Secretary of State is a section 28G authority in this matter, the duties under section 28I(5) apply to the Secretary of State as well.<sup>4</sup>

These proposals have the potential to involve the Orwell Estuary SSSI. This SSSI is notified for its species assemblages and numbers of breeding and non-breeding birds, vascular plants and intertidal mud flats. The proposals have the potential to involve the Orwell Estuary SSSI because, as stated above, there is a direct hydrological link between the proposed development site and the Orwell estuary. It is therefore potentially vulnerable to the effects of waterborne pollution from the proposed development.

Natural England is, however, content to conclude that the proposed operations are not likely to damage the protected features of the Orwell Estuary SSSI, provided that that adequate requirements are imposed in the draft Development Consent Order to prevent water pollution from the development reaching the Orwell estuary.

<sup>3</sup> Within the meaning of the Ministers of the Crown Act 1975.

<sup>4</sup> If a conclusion of likely damage to the protected features of the SSSI is reached by the Secretary of State, 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.

## European Protected Species

Species listed under Annex IV(a) to the Habitats Directive (and which are also listed in Schedule 2 of the Habitats Regulations 2010 by reason of the transposition of the Habitats Directive), are referred to as “European Protected Species”. In a case in 2009<sup>5</sup> it was established that a local planning authority, and by inference any determining authority (such as the Secretary of State in this case), must apply the tests of Article 16(1) of the Habitats Directive to their consideration of planning applications which have an effect on European Protected Species. LPAs (and here the Secretary of State) must consider whether:

- there are no satisfactory alternatives;
- there are imperative reasons of overriding public interest (including socio-economic reasons); and
- that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

The European Protected Species of relevance to this application are bats, otters, and certain species of invertebrates (including stag beetles). As stated in Natural England’s relevant representations of 31 August 2011 and its letter to Network Rail dated 11 April 2011, provided that the mitigation measures outlined in Tables 9-D and 9-E of Volume 2 as well as Tables 1-J and 1-K of Volume 3 of the Ecology Technical Report are adopted (which includes the replacement of bat roost opportunities, controls on lighting, and designs for bridges to incorporate a gap between the abutment and the river bank) we are satisfied that there is unlikely to be an adverse effect on the populations of bat species or on otters using the riparian habitat of the River Gipping, both during and after construction. This mitigation package should also be accompanied by the proposed ecological monitoring and management plan, to ensure that the mitigation is working as intended.

In respect of stag beetles, Natural England is satisfied that the proposed mitigation to remove any dead wood out of the construction area to an area of suitable habitat nearby which would be undisturbed by the development is sufficient to maintain populations of this species on site.

Natural England advises generally in respect of bats and otters that lighting during construction should be kept to the minimum and should avoid direct illumination of the river corridor. As otters are known to use the River Gipping, the addition of ledges which otters could use under the new bridges should be considered [by way of additional enhancement work for the purpose of conserving biodiversity].

In addition, please note that Natural England’s Regulation team assessed the applicant’s draft mitigation licence application for bats (species: common pipistrelle and soprano pipistrelle) in January 2012. This draft application failed to meet the three licensing tests, and therefore it was not possible for Natural England to issue a ‘letter of comfort’ at this stage. Natural England is currently working with the applicant to help ensure that their draft application does meet Natural England’s protected species licensing requirements. We have therefore advised the applicant that further survey work should be undertaken in 2012 which is capable of providing the necessary additional supporting evidence in order to inform the licensing tests. If sufficient information is provided by the applicant when the draft licence application is resubmitted Natural England will be in a position to issue a ‘letter of comfort’ (the draft licence is expected to be resubmitted in summer 2012). If a ‘comfort letter’ is issued by Natural England, it will indicate that there is no impediment to issuing a mitigation licence should the Development Consent Order be granted, (when the licence application would be formally submitted).

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<sup>5</sup> *R (Woolley) v Cheshire East Borough Council* [2009] EWHC 1227 (Admin).

## **Nationally Protected Species**

As stated in ODPM Circular 06/2005 on *Biodiversity and Geological Conservation – statutory obligations and their impact within the planning system*, Part I of the 1981 Act sets out the protection that is afforded to all wild birds, and certain wild animals and plants. Section 25 places a duty on all local authorities to do what they consider expedient to bring the provisions of the 1981 Act relating to protected species to the attention of the public and particularly school children. Local authorities are also empowered to institute proceedings against any person committing an offence under Part I of the 1981 Act within their area. Furthermore, under section 16 of the 1981 Act, licences may be issued, providing certain conditions are met, derogating from the protection afforded to species for listed reasons, such as public health and safety. However, there is no provision for licences to be granted for the purposes of development.

The nationally protected species of relevance to this application are certain species of reptiles and certain species of fish (including eel)..

As stated in Natural England's relevant representations of 31 August 2011, we are broadly satisfied with the mitigation measures outlined for nationally protected species. We note that during the construction phase, this will consist of a mix of habitat manipulation, and physical translocation of reptiles to a receptor site to avoid harm to these species. Natural England notes that Network Rail has now provided satisfactory maps showing Environmental Management Plans and the proposed areas of habitat enhancement. Natural England is satisfied that there will be no adverse impacts on eel provided that adequate requirements are imposed in the draft Development Consent Order to prevent pollution from reaching the River Gipping.

The off-site receptor site which the reptile population will be translocated to in accordance with the proposed mitigation process will be Bramford Meadows Local Nature Reserve ("LNR"). In Natural England's opinion the receptor site should not currently support a reptile population but must be capable of supporting translocated populations provided that habitat enhancements are made to accommodate them. The current reptile status of Bramford Meadows LNR needs to be evaluated before any reptiles can be translocated from the application site. Natural England believe that the retention of some habitat and the creation of new habitat following construction should help to maintain invertebrate and plant interest on site.

## **Conservation of Biodiversity**

Finally, Natural England note that section 40(1) of the Natural Environment and Rural Communities Act 2006 places a duty on public authorities (including, for purposes of determining the proposals at issue in this inquiry, the Secretary of State) with respect to the conservation of biological diversity, as follows:

*'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.'*

Many of the species within the designated sites citations are also species listed in UK Biodiversity Action Plan.<sup>6</sup>

## **Natural England's comments on the draft Development Consent Order**

In light of the above legislative context, Natural England has the following comments to make on the draft Development Consent Order. Our comments relate in particular to the Schedule A Part 2 - Requirements.

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<sup>6</sup> The UK Biodiversity Action Plan published in 1994 was the United Kingdom Government's response to signing the Convention on Biological Diversity at the 1992 Rio Earth Summit. It set out a series of species for which work was needed to halt the loss of biodiversity. These are commonly referred to as BAP species.

