



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES
2010

**West Midlands Interchange Strategic Rail Freight Interchange
Written Representations of Natural England**

For:

The construction and operation of the West Midlands Interchange, a strategic rail freight interchange located at Four Ashes close to Junction 12 of the M6 in South Staffordshire and covering an area of approximately 297 Hectares.

Planning Inspectorate Reference: TR050005

5 April 2019

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¹ Note - Annex material presented separately in PDF form

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 construction and operation of a strategic rail freight interchange ('the Project') submitted by Four Ashes Ltd, a consortium, ('the Applicant') to the Secretary of State. The Project is situated south-west of Junction 12 on the M6 in South Staffordshire and will serve the West Midlands area.

1.1.2. Natural England has already provided its principal concerns in its Relevant Representations, submitted to the Planning Inspectorate on 29 October 2018. This document comprises a further detailed statement of Natural England's views, as they have developed in view of the common ground discussions that have taken place with the Applicant to date. The document is 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 statutory nature conservation and landscape 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. Annex A: Sets out key aspects of the email dialogue between the Applicant and Natural England since the Relevant Representation

1.1.3. In its letter of 4 March 2019 the Examining Authority asked the parties, including Natural England, a number of first written questions. The answers to those questions are contained within a separate document which has been submitted alongside these Written Representations entitled 'Schedule of Natural England's responses to Examining Authority's first round of written questions'.

STATUS AND FUNCTIONS OF NATURAL ENGLAND AND JNCC

1.2. Natural England

- 1.2.1. 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.
- 1.2.2. 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.
- 1.2.3. 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.'*
- 1.2.4. 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.
- 1.2.5. Natural England is required to keep under review all matters relating to its general purpose,² and to provide public authorities with advice where they request this.³
- 1.2.6. Natural England is a statutory consultee in respect of (amongst other matters):

² NERC Act, s.3(1).

³ NERC Act, s.4(1).

- a. all applications for consent for Nationally Significant Infrastructure Projects which are likely to affect land in England;⁴ and
- b. the environmental information submitted pursuant to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ('the EIA Regulations').⁵
- c. Plans or projects that are subject to the requirements of the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations') which are likely to have a significant effect on European protected sites – that is, sites designated as Special Areas of Conservation ('SACs') (and candidate SACs ('cSACs'))⁶ and Special Protection Areas ('SPAs') and potential SPAs ('pSPAs')⁷ for the purposes of the EU Habitats and Birds Directives – in England;⁸
- 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');⁹

1.2.7. 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.¹⁰

1.2.8. 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.

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

⁵ Regs. 3(1), 10(6), 11(1), 16(2)(b), 20(3)(g), 22(3)(f), 24(5)(f) of the EIA Regs.

⁶ As a matter of law cSACs are protected as they are included within the definition of 'European site' set out at regulation 8 of the Habitats Regs. A cSAC is the term given to sites which Member States have decided are Sites of Community Importance ('SCI') within their borders containing either species prescribed in Annex II of the Habitats Directive or which have Annex I habitat types. Sites containing priority habitats or species must be listed as SCIs and then designated as SACs. These sites are known as cSACs until such time as those sites are confirmed as SACs or a decision is taken that they should not be SACs.

⁷ As a matter of policy, the Government expects public authorities to treat pSPAs as if they are fully designated European Sites, for the purpose of considering development proposals that may affect them. National Planning Policy Framework (July 2018), para 176; PINS Advice Note 10: Habitats Regulation Assessment for nationally significant infrastructure projects, p.3.

⁸ Regulation 63 of the Habitats Regs; regulations 24(1) and (3) and 25(3)(b) of the Offshore Regs.

⁹ Section 28E(1) of the 1981 Act.

¹⁰ Revised National Planning Policy Framework (July 2018), para 176; PINS Advice Note 10: Habitats Regulation Assessment for nationally significant infrastructure projects, p.3.

2. LEGISLATIVE FRAMEWORK

2.1. Environmental Impact Assessment

- 2.1.1. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2010 ('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.¹¹
- 2.1.2. The descriptions in the schedules apply broadly, and are not to be interpreted as mutually exclusive 'pigeonholes'.¹² In assessing whether a development is likely to have a significant effect on the environment, the Planning Inspectorate must have regard to criteria in Schedule 3 of the EIA Regs.¹³
- 2.1.3. 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 in respect of proposed applications likely to affect land in England and the marine environment.¹⁴
- 2.1.4. 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;

¹¹ *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..

¹² *R(Warley) v Wealden DC* [2011] EWHC 2083 (Admin) at [41]-[44] and [63]-[64] per Singh J, in relation to the materially identical Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

¹³ EIA Regs, reg 7(1).

¹⁴ Regulation 8(6) of the EIA Regs.

- e. a description of the measures envisaged in order to prevent/avoid, reduce and remedy/offset the significant adverse effects on the environment;
- f. the data required to identify and assess the main effects which the development is likely to have on the environment.

2.1.5. 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.¹⁵ The environmental statement must meet the required standard before consent may be granted.¹⁶ 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.¹⁷

2.2. Duty to conserve biodiversity

2.2.1. 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.'

2.2.2. For the purposes of the NERC Act, conservation includes restoring or enhancing a habitat or population of organisms.¹⁸ The Secretary of State must in particular have regard to the Convention on Biological Diversity when performing their duty.¹⁹

2.2.3. 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–

- (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.'

¹⁵ EIA Regs, reg. 2(1).

¹⁶ *R v Cornwall CC, ex p Hardy* [2001] Env LR 25.

¹⁷ *Smith v SSETR* [2003] EWCA Civ 262.

¹⁸ NERC Act, s.40(3).

¹⁹ NERC Act, s.40(2).

2.3. European Sites

- 2.3.1. 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 ('the Wild Birds Directive').²⁰
- 2.3.2. The Secretary of State is also the 'appropriate authority' for the purposes of the Habitats Regulations.²¹ They must accordingly exercise their functions which are relevant to nature conservation so as to secure compliance with the requirements of the Habitats Directive and Wild Birds Directive.²²
- 2.3.3. 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.²³ 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'.²⁴
- 2.3.4. Article 6 of the Habitats Directive applies both to SACs and to SPAs.²⁵ 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.

²⁰ 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.

²¹ Habitats Regs, reg.3(1).

²² Habitats Regulations, reg. 9(1) and (2).

²³ Habitats Directive, art.2.

²⁴ Habitats Directive, art.3(1).

²⁵ Habitats Directive, art. 6 applies to SACs and art.7 applies it to SPAs designated under the Wild Birds Directive.

2.3.5. 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.²⁶

2.3.6. The Regulations describe a sequence of steps to be taken by the competent authority in respect of a European site 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?²⁷ If not—

Step 2 Consider²⁸ 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.²⁹ In so doing, it is mandatory to consult Natural England³⁰ and have regard to its representations, and optional to obtain the opinion of the general public.³¹ 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.³²

Step 4 Consider³³ 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.³⁴

²⁶ Regulations 64 and 68 of the Habitats Regulations, transposing Article 6(4) of the Habitats Directive.

²⁷ Under regulation 63(1)(b) of the Habitats Regs or reg. 28(1)(c) of the Offshore Regs.

²⁸ Under regulation 63(1)(a) of the Habitats Regs or reg.28(1)(b) of the Offshore Regs.

²⁹ Under regulations 63(1) of the Habitats Regs.or 28(1) of the Offshore Regs.

³⁰ under regulations 63(3) of the Habitats Regs or 28(3)(b) of the Offshore Regs.

³¹ under regulation 63(4) of the Habitats Regs or 28(3)(f) of the Offshore Regs.

³² By regulation 63(2) of the Habitats Regs or 28 (2) of the Offshore Regs.

³³ Pursuant to regulation 63(5) and (6) of the Habitats Regs or 28(4) and (5) of the Offshore Regs.

³⁴ Applying regulation 63(5) of the Habitats Regs, subject to regulation 64, or reg 28(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.³⁵ 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.³⁶ 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.³⁷

- 2.3.7. 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.
- 2.3.8. 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.³⁸
 - 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 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

³⁵ in accordance with regulation 64(1) of the Habitats Regs or 29(1) of the Offshore Regs.

³⁶ in accordance with regulation 64(1) of the Habitats Regs or 29(1) of the Offshore Regs.

³⁷ As required by regulation 68 of the Habitats Regs or 36 of the Offshore Regs.

³⁸ CJEU, Case C-241/08 *Commission v France* at paras 30-36; Case C-535/07 *Commission v Austria* at paras 57-58.

or project will have a significant effect on the site concerned'.³⁹

- 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'.⁴⁰
- 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'.⁴¹
- e. In the context of priority habitats within SACs, 'a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal'.⁴²
- f. In order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.⁴³

³⁹ 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

⁴⁰ CJEU Case C-127/02 *Waddenzee* at para 61.

⁴¹ 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 and judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39).

⁴² CJEU Case C-258/11 *Peter Sweetman and Others v An Bord Pleanála* [2013] ECR-000, para 48. See also judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 116.

⁴³ CJEU Case C-323-17 *People Over Wind and Sweetman vs Coillte Teoranta*, para 40.

2.4. Sites of Special Scientific Interest (SSSIs)

- 2.4.1. SSSIs are notified 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.
- 2.4.2. 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.
- 2.4.3. 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.'*
- 2.4.4. 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.
- 2.4.5. 'Permission' is defined so as to include any kind of consent or authorisation.⁴⁴ 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.⁴⁵
- 2.4.6. 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.

2.5. European Protected Species

- 2.5.1. Regulation 9(3) of the Habitats Regulations, headed 'Duties relating to compliance with the Directives', 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'.*

⁴⁴ WCA 1981, s.28I(7).

⁴⁵ 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.

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.

- 2.5.2. 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 requisite measures to ensure that they are subject to a system of strict protection.
- 2.5.3. 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.⁴⁶
- 2.5.4. The plant species must be protected in particular from deliberate picking, collecting, cutting, uprooting or destruction in their natural range in the wild.
- 2.5.5. 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.
- 2.5.6. Regulation 43 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'.⁴⁷
- 2.5.7. 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.⁴⁸ Such a system of strict protection must enable the effective avoidance of deterioration or destruction of breeding sites or

⁴⁶ 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].

⁴⁷ CJEU, Case C-418/04 *Commission v Ireland* at para 208.

⁴⁸ CJEU Case C-183/05, *Commission v Ireland*, paras 29-30.

resting places caused by development.⁴⁹ Strict protection must be enforced even if the population of the species is not declining.⁵⁰

- 2.5.8. 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 they consider that the derogation criteria are likely to be met, in which case they should require any necessary licence to be obtained before development commences.⁵¹

2.6. **Nationally Protected Species**

- 2.6.1. Certain birds, other animals and plants which are listed in the schedules to the WCA 1981 are protected from disturbance, injury and capture or taking by the provisions of Part 1 that Act, which makes it a criminal offence to disturb, injure, capture or take them.
- 2.6.2. Under section 16 of the WCA 1981, licences may be issued to authorise these activities, provided that certain enumerated conditions are met. The enumerated conditions do **not** include derogation for the purpose of facilitating development, nor for general social or economic purposes.
- 2.6.3. Badgers and their setts are also protected under the Protection of Badgers Act 1992, which makes it illegal to kill, injure or take badgers or to interfere with a badger sett. There is provision within the legislation for Natural England to permit activities affecting badgers or their setts where there is suitable justification and the problem cannot be resolved by alternative means.

2.7. **Areas of Outstanding Natural Beauty ('AONBs')**

- 2.7.1. Section 85(1) of the Countryside and Rights of Way Act 2000 ('CRWA 2000') requires all persons holding public office, public bodies and Ministers of the Crown, when exercising or performing any functions so as to affect land in an AONB to 'have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty'. By section 92(2) of the CRWA 2000, this includes having regard for conserving its fauna, flora and geological and geographical features.

⁴⁹ CJEU Case C-383/09 *Commission v France*, opinion of Advocate-General Kokott at para 89; judgment at paras 21, 35, 37.

⁵⁰ CJEU Case C-103/00 *Commission v Greece* para 31; CJEU Case C-518/04 *Commission v Greece*, para 21.

⁵¹ 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.

3. POLICY FRAMEWORK

3.1. Introduction

- 3.1.1. The documents referred to below are statements of overarching policy which are central and applicable to planning decisions affecting biodiversity, such that it is presumed that the Examining Authority has copies of them, and it has not been thought necessary to include them as Annexes to these Written Representations.

3.2. National Policy Statements

- 3.2.1. The relevant statement is the National Policy Statement for National Networks (NPSNN).
- 3.2.2. This section summarises the provisions of the NPSNN that are most relevant to Natural England's case in relation to particular topics. Bracketed references are made to the corresponding sections of the NPS.

Environmental Statement

- 3.2.3. When considering an application for a DCO, the Secretary of State and the Examining Authority should satisfy itself that likely significant effects, including any significant residual effects taking account of any proposed mitigation measures or any adverse effects of those measures, have been adequately assessed [4.15]. Where necessary, the Secretary of State and the Examining Authority should request further information where necessary to ensure compliance with the EIA Directive [4.15].

Habitats and Species Regulations

- 3.2.4. Prior to granting a DCO, the Secretary of State must, under the Habitats Regulations, consider whether the project may have a significant effect on a European site (including Ramsar sites), either alone or in combination with other plans or projects [4.22].
- 3.2.5. The Applicant should seek the advice of Natural England and provide the Examining Authority, with such information as it may reasonably require, to determine whether an Appropriate Assessment is required [4.22]. In the event that an Appropriate Assessment is required, the Applicant must provide the Examining Authority with such information as may be reasonably be required to enable it to conduct the Appropriate Assessment [4.23].

National Designations

- 3.2.6. In sites with nationally recognised designations (including Sites of Special Scientific Interest) consent for national networks infrastructure should only be granted where it can be demonstrated that the objectives of site's designation will not be compromised by the development, and any significant adverse effects on the features for which the site has been designated are clearly outweighed by the benefits of the development at that particular location [5.29].

Impacts on Biodiversity and Geological Conservation

- 3.2.7. Where the development is subject to EIA, the Applicant should ensure that the environmental statement clearly sets out any effects on internationally, nationally, and locally designated sites of ecological or geological conservation importance, on protected species and on habitats and other species identified as being of principal importance for the conservation of biodiversity [5.22]. The Applicant should also show how the project has taken advantage of opportunities to conserve and enhance biodiversity and geological conservation interests [5.23].
- 3.2.8. As a general principle, development should aim to avoid significant harm to biodiversity and geological conservation interests, including through mitigation and consideration of reasonable alternatives. Where significant harm cannot be avoided, compensation measures including 'biodiversity offsetting' should be sought [5.25].
- 3.2.9. In taking decisions, the Secretary of State should ensure that appropriate weight is attached to designated sites of international, national and local importance; protected species; habitats and other species of principal importance for the conservation of biodiversity; and to biodiversity and geological interests within the wider environment [5.26].
- 3.2.10. Where a development proposal is located outside of a SSSI and is likely to have an adverse effect on the SSSI (either individually or in combination with other developments), development should not normally be granted. Where an adverse effect, after mitigation, on the SSSI's notified special interest features is likely, an exception should only be made where the benefits (including need) clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs [5.29]. The Secretary of State should use requirements and/or planning obligations to mitigate the harmful aspects of the development and, where possible, to ensure the conservation and enhancement of the site's biodiversity or geological interest [5.29].
- 3.2.11. For species and habitats that have been identified as being of principal importance for the conservation of biodiversity in England, the Secretary of State should ensure that these are protected from the adverse effects of development by using requirements or planning obligations [5.35]. The Secretary of State should refuse consent where harm to the habitats or species would result, unless the benefits (including need) of the development outweigh that harm [5.35]. In this context the Secretary of State should give substantial weight to any such harm to the detriment of biodiversity features of national or regional importance which it considers may result from the proposed development [5.35].
- 3.2.12. The applicant should include appropriate mitigation measures as an integral part of the development. These include measures that will minimise harm to species or habitats during the construction of the operation and, where practicable, restore habitats after construction work have finished [5.36]. The Secretary of State (and the Examining Authority) should consider what appropriate requirements should be attached to any consent and/or planning obligations entered into [5.37].

- 3.2.13. The Secretary of State (and the Examining Authority) will need to take account of what mitigation measures may have been agreed between Natural England or the Marine Management Organisation, and whether these bodies have granted or refused or intends to grant or refuse, any relevant licences, including protected species mitigation licences [5.38].

3.3. National Planning Policy and Guidance on Protected Sites and Species

National Planning Policy Framework (“NPPF”)

- 3.3.1. Although the NPPF does not contain specific policies for NSIPs, and defers to the NPSs in this respect, it is submitted that the provisions of the NPPF, including those relevant to the conservation and enhancement of the natural environment, are both important and relevant considerations, and should be taken into account by the Secretary of State and the Examining Authority for purposes of assessing this DCO application⁵².

Advice Note Ten: Habitats Regulation Assessment

- 3.3.2. The Examining Authority is also reminded of the Planning Inspectorate’s own Advice note ten: Habitats Regulations Assessment (April 2012).

⁵² See NPPF at paragraph 5.

4. CONSERVATION DESIGNATIONS, FEATURES AND INTEREST THAT COULD BE AFFECTED BY THE PROPOSED PROJECT

4.1. The following is a brief summary of the interest features of the relevant designated areas of concern in this matter. Designation citations are provided as links (where available).

National Conservation Designations

4.2. Sites of Special Scientific Interest

4.2.1. Belvide Reservoir SSSI

- a. Belvide Reservoir SSSI was first notified in 1951, and amended in 1987 under section 28C of the Wildlife and Countryside Act 1981.
- b. This SSSI covers an area of 88 Ha and lies immediately south of the A5 trunk route 4.5 Km west of Gailey. The site is a 'feeder reservoir' for the local canal system.
- c. The proposal is located 5km to the south-south-east of the SSSI.
- d. Belvide Reservoir SSSI is notified for its variety of both wintering and breeding wild birds. It supports aggregations of non-breeding birds, specifically Shoveler (Anas clypeata) and assemblages of breeding birds associated with lowland open and standing waters and their margins.
- e. Further information on Belvide Reservoir SSSI can be found in Annex B.

4.2.2. Doxey & Tillington Marshes SSSI

- a. Doxey & Tillington Marshes SSSI was first notified in 1977. and amended in 1989 under section 28C of the Wildlife and Countryside Act 1981.
- b. This SSSI covers an area of 124 Ha stretching from immediately east of the M6 at Stafford and following the River Sow south-east towards the town centre.
- c. The proposal lies 10km due south of this SSSI.

- d. The SSSI is notified for its floodplain grasslands, and wetland habitats which support breeding snipe (*Gallinago gallinago*) a rare wading bird of wet grasslands and moorland, and a range of over-wintering and breeding wild birds.
- e. Further information on Doxey & Tillington Marshes SSSI can be found in Annex B

4.3. **Nationally and Internationally Protected Species**

European Protected Species (EPS)

- 4.3.1. Consistent with our relevant representations Natural England confirms that a 'letter of no impediment' (in relation to the granting of a subsequent EPS licence application) was issued to Four Ashes Limited on 6.11.17 in respect of the following bat species:
 - a. Common pipistrelle
 - b. Soprano pipistrelle
 - c. Natterer's
 - d. Daubenton's
 - e. Brown long-eared

Nationally Protected Species

- 4.3.2. Pre-construction surveys⁵³ have identified that badgers will be impacted by the project and a licence may be required. This will depend upon whether sett/s are in active use prior to the relevant construction phase. Updated surveys will be needed to establish this.

⁵³ ES Doc 6.2 – Technical Appendix 10.2 – Confidential badger report

5. NATURAL ENGLAND'S CONCERNS AND ADVICE

5.1. In this section Natural England sets out its advice regarding the project at the time of submission of these representations.

5.2. The Principal Issues

- 5.2.1. Natural England identified the following issues in our relevant representations which were submitted to PINS on the 29 October 2018. The issues set out below required further work, or clarification, to enable a complete and robust assessment to be undertaken. Natural England and Four Ashes Limited have continued to collaborate on a statement of common ground accordingly (REP1-003).
- 5.2.2. Our relevant representations also described those themes and issues within our remit where no concerns remained at that time⁵⁴. These are as follows:
- 5.2.3. European or 'Habitats' sites – Special Areas of Conservation (SAC):
- a. Cannock Extension Canal SAC
 - b. Cannock Chase SAC
 - c. Motte Meadows SAC
- 5.2.4. Sites of Special Scientific Interest (SSSI):
- a. Four Ashes Pit
 - b. Chasewater and the southern Staffordshire Coalfield Heaths
 - c. Stowe Pool & Walkmill Claypit
- 5.2.5. Protected landscapes:
- a. Cannock Chase Area of Outstanding Natural Beauty
- 5.2.6. Protected species:
- a. European protected species
 - b. Nationally protected species
- 5.2.7. Natural England notes the Examining Authority's instruction in the Rule 8 letter regarding the use of hyperlinks to information. We have therefore included relevant information for all of the designated sites (SAC and SSSI) described above to ensure comprehensive information is available within the submitted representations.

⁵⁴ Natural England relevant representations – Sections 2.4.1 Special areas of conservation and 2.4.4 Site of special Scientific Interest

Issues requiring further work or clarification

Cumulative and In-combination Assessments – Assessment of air quality impacts on Belvide Reservoir and Doxey & Tillington Marshes SSSIs

5.2.8. Consideration of recent case law *Wealden v SSCLG* [2017] ('the Wealden Judgment 2017') has led to a need for clarification regarding air pollution arising from the proposal in combination with other relevant plans/projects. Natural England's latest guidance on this subject (NEA001⁵⁵) was published in July 2018 and therefore the ES could not reflect the step-wise approach laid out therein. While this guidance directly applies to European Sites the principles and broad steps described are likely to apply equally to nationally designated sites. Since the relevant representations stage Natural England and Four Ashes Limited have discussed further the issues described below in relation to these SSSIs and have updated our statement of common ground accordingly:

a. Belvide Reservoir SSSI –

The ES shows that this SSSI will be subject to indirect, adverse effects in the form of increased aerial emissions from road traffic associated with the proposal using the A5. These emissions are expected to be in the form of nitrogen oxides or NO_x (aerial concentrations) and nutrient nitrogen (deposition). Further assessment in the form of detailed modelling was undertaken as the predicted increase in deposition/concentrations exceeded the significance threshold of 1% of the critical load or levels⁵⁶. This modelling showed measurable increases in nitrogen deposition⁵⁷ up to 20m from the A5 over the project's lifetime. The ES concluded no significant adverse impacts were likely to arise as the notified wild bird interest at the SSSI is not regarded as sensitive to the effects of oxides of nitrogen or nitrogen deposition.

b. Doxey & Tillington Marshes SSSI

The ES shows that this SSSI will be subject to increased aerial emissions from road traffic associated with the proposal using the M6. These emissions are expected to be in the form of nitrogen oxides or NO_x (aerial concentrations) and nutrient nitrogen (deposition). No further detailed assessment, mitigation or compensation is proposed as the modelling indicates that the increase in air pollution from the proposal alone will fall below the 1% threshold of significance⁵⁸.

⁵⁵ 'Natural England's approach to advising competent authorities on the assessment of road traffic emissions under the Habitats Regulations – NEA001' - July 2018

⁵⁶ ES Ch 10 Ecology – 10.304 and ES Ch7 Air quality – 7.186-7.197

⁵⁷ ES Ch 10 Ecology – 10.305 and ES Ch7 Air quality – 7.186-7.197

⁵⁸ ES Ch 10 Ecology – 10.307-10.309

Soils resources

- 5.2.9. The ES identifies that the proposal will result in the phased, permanent loss of 51Ha of Grade 2 and 122Ha of Grade 3a 'best and most versatile land'. Natural England acknowledges the extent of permanent and irreversible loss of best and most versatile land when the scheme is complete. We welcome the DCO undertaking regarding use of the Defra 'Construction code of practice for the sustainable use of soils on construction sites' and the objective whereby soils are incorporated into the proposal's landscaping scheme. However with regard to soils resources (as distinct from best and most versatile land considerations) the maintenance of soil functionality as part of the proposal's landscaping provisions warrants further consideration. At the relevant representations stage Natural England and Four Ashes Limited were in active discussions in order to resolve this issue.

5.3. Progress since the Relevant Representations

- 5.3.1. Since the Relevant Representations were submitted to PINS on the 29th October 2018 Natural England has had further communications with the applicant to discuss its submission and outstanding points of concern. Details of these matters are set out in the Statement of Common Ground (SoCG – REP1-003). Agreement has been reached on the following topics :

- a. Air quality and cumulative and in combination effects considerations in respect of Belvide Reservoir SSSI and Doxey & Tillington Marshes SSSI
- b. Soils resources – maintenance of soil functionality.
- c. SSSI enhancement/ biodiversity net gain

5.3.2. Belvide Reservoir SSSI – air quality and cumulative and in combination effects

- 5.3.3. No mitigation or compensation is proposed as the air quality assessment modelling indicates that air pollution from the proposal alone, while exceeding the 1% significance threshold, will not extend far enough from the A5 to affect the supporting habitats of the notified bird species at this SSSI⁵⁹.

- 5.3.4. In response to our advice regarding the need to demonstrate assessment of aerial emissions consistent with NEA001 FAL have confirmed that their approach to cumulative and in combination effects of these emissions is consistent with the approach described in NEA001, citing the following key references :

⁵⁹ ES Ch 10 Ecology – 10.302-10.306

- a. In combination approach – FAL states that “*in combination effects are inherent in the ES findings*” referring to the ES (paragraphs 15.74, 15.80-15.82, 15.311 and 15.312) traffic data used for assessments, including relevant committed developments assessed as part of the ES. The list of committed developments includes schemes and projects agreed with Staffordshire County Council and Highways England (15.311).
- 5.3.5. Natural England accepts that the stakeholders have exercised their professional judgement in deciding on their approach to the identification of other road traffic projects and plans in relation to in combination effects⁶⁰
- 5.3.6. FAL has proceeded to consider the final ES in terms of NEA001, concluding that this SSSI can be screened out at Step2 “*as the habitat sensitivity based on the SSSI designation is not sensitive to road traffic emissions (as Belvide Reservoir is primarily designated for its bird interest)*” . i.e. no direct ecological ‘pathway’ exists to allow impacts on bird species. Natural England agrees with this assessment.
- 5.3.7. Consideration was also given to the location and proximity of ‘supporting habitats’ in order to account for any indirect impacts upon the notified bird interest. No supporting habitats exist within the zone adjoining the A5 where aerial deposition breaching the relevant assessment significance threshold has been modelled.
- 5.3.8. Natural England is therefore satisfied that the final ES conclusions regarding the modelled aerial emissions and absence of significant adverse effects on the notified interest features of this SSSI are suitably evidenced.
- 5.3.9. Doxey & Tillington Marshes SSSI - air quality and cumulative and in combination effects
- 5.3.10. In response to our advice regarding the need to demonstrate assessment of aerial emissions consistent with NEA001 Four Ashes Limited have confirmed that their approach to cumulative and in combination effects of these emissions is consistent with the approach described in NEA001. This is for the following reasons:
 - a. With reference to the NEA001 Guidance “*the Doxey and Tillington Marshes site is screened out at Step 5, this is because the contribution is less than 1% of the Critical Level and Load. Even though the site exceeds the 1000 AADT threshold most importantly the modelled concentrations are less than the critical level / load threshold. As noted on page 17 of the Guidance “If there is already detailed, locally-based modelling available about the plan or project that shows the 1% of the environmental benchmark is not exceeded, even if 1000 AADT is, then this level of precision is sufficient to override the use of the very generic 1000 AADT guideline threshold above.”*

⁶⁰ NEA001 – Step 4b ‘apply the threshold in-combination with emissions from other road traffic plans and projects’ – Para 4.37

- b. *“As outlined above (see 6.4.4 a) , in-combination effects are inherent in the traffic data and so a separate in combination effects assessment isn’t required.”*

5.3.11. Natural England is therefore satisfied that the final ES conclusions regarding the modelled aerial emissions and absence of significant adverse effects on the notified interest features of this SSSI are suitably evidenced.

5.3.12. Soils resources

5.3.13. In response to our concerns regarding the maintenance of soils functionality Natural England has agreed with the applicant that the Soils Resources Plan for each phase of the development will be based on specific proposals and include final soil volumes to be managed as part of each development phase.

5.3.14. The soil type data included the Agricultural Land Classification report (ES Technical Appendix 6.1) will be used as the basis of a soil inventory, where soils of a similar type will be managed accordingly. The applicant has expressed confidence that sufficient soil volumes exist for the development proposals and that the use of on-site soils for the creation of the landscaping bunds provides some flexibility in terms of the volumes of soils used in their construction if necessary.

5.3.15. Taken together with the relevant requirement provisions⁶¹ regarding the use the Defra ‘Construction Code of Practice for the Sustainable Use of Soils on Construction Sites’ Natural England is satisfied that the proposals satisfactorily address our concerns regarding the maintenance of soils functionality.

SSSI enhancement/‘biodiversity net gain’

5.3.16. Notwithstanding our conclusions above regarding assessment of aerial emissions Natural England notes the elevated background NOx levels and nutrient nitrogen loads recorded at the Belvide Reservoir and Doxey & Tillington Marshes SSSIs (see footnote 64). Taking account of the recently revised NPPF in our relevant representations⁶² we indicated our wish to secure further information and/or clarification over the scope for measures to conserve and enhance the SSSI as part of the proposal i.e. to understand whether a ‘biodiversity net gain’ outcome might be achieved.

⁶¹ Natural England relevant representations - Section 5.1.2 – Soils resources

⁶² Natural England relevant representations - Section 4.1.1 Natural England’s key concerns

5.3.17. The applicant has concluded that they are not minded to pursue this for the following reasons:

- a. The project has been assessed as having no significant impacts on the SSSIs.
- b. Biodiversity net gains are expected in relation to the on-site green infrastructure resource including the two 'Community Parks' proposed and the farmland bird compensation scheme off site.
- c. Insufficient time exists to progress any measures as discussions over Section 106 agreements are already at an advanced stage.

5.3.18. With specific regard to air quality Natural England has therefore sought clarification on the wider context of the project in particular requesting feedback on the approach taken to air quality issues at the international/national , regional and local levels. The applicant has responded as follows⁶³:

5.3.19. International/national context

- a. *"The case for a modal shift in transport choices in general are outlined in the NPSNN. A specific case for the Proposed development in terms of national benefit is included in the Planning Statement (Document 7.1A) in particular section 5.1. Also the carbon benefits are outlined in Section 11 of this document."*
- b. *"...in terms of emissions from Heavy Duty Vehicles (HDVs) the evidence suggests that NOx emissions from the latest diesel vehicles corresponding to 'Euro 6' engines are much lower than those corresponding to earlier 'Euro' standards.....The assessments undertaken (Tables 7.10 and 7.11 of the ES) do indicate modelled improvements in NOx and nitrogen deposition at the two SSSIs referenced."*

5.3.20. Regional context

- a. *"Bodies such as the 'Rail Freight Group' are looking at how improvements to rail freight journeys can be made in terms of lessening air quality effects (appropriate maintenance and choice of new stock). With specific respect to West Midlands Interchange, a sustainable transport strategy has been prepared which will look at opportunities for minimising journeys associated with the development."*

⁶³ See Annex – Email 14.12.18 from Ramboll Environ UK to Natural England – 'Air quality' section

5.3.21. Local context

- a. *“The blue/green infrastructure associated with the site will be maintained in accordance with management plans to ensure that enhancement measures are managed in the long term.”*

5.3.22. Natural England acknowledges the applicant’s approach with regard to blue and green infrastructure, the Community Parks and the farmland bird compensation package included in the project’s design. We are satisfied that, subject to agreement over the various requirements addressing these aspects of the project, it is not necessary to pursue scoping of separate enhancement or net gain measures in relation to the two SSSIs. We comment separately regarding the DCO requirements at section 6, below.

6. Draft Development Consent Order (DCO)

- 6.1.1. Natural England's 'relevant representations' comments regarding the draft requirements⁶⁴ still apply except for paragraph 5.1.3.7 which can be disregarded (Our comments above regarding SSSI enhancement/biodiversity net gain refer).
- 6.1.2. In our relevant representations Natural England drew attention to the 'cross – cutting' nature of biodiversity, landscape and soils related themes and their relationship with the delivery of multi-functional green and blue infrastructure. It remains important that the linkages between these themes are acknowledged in order to ensure that the various separate requirements act together to deliver effective mitigation.

Natural England

⁶⁴ Natural England relevant representations - Section 5 Development Consent Order