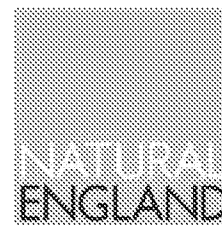


Date: 07 January 2016
Our ref: 173639
Your ref: P/97/15/PL



planning.responses@arun.gov.uk

BY EMAIL ONLY

Customer Services
Hornbeam House
Crewe Business Park
Electra Way
Crewe
Cheshire
CW1 6GJ

T 0300 060 3900

Dear Mr Davis,

Planning consultation: Managed breach of shingle spit & blocking of adjacent tidal inlet channel with shingle barrier. Formation of shingle island within Harbour following excavation of adjacent area of spit.

Location: Pagham Harbour West Sussex.

Thank you for your consultation on the above dated 04 December 2015 which was received by Natural England on 04 December 2015.

Natural England is a non-departmental public body. Our 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.

Pagham Harbour - Internationally and nationally designated sites

Pagham Harbour is nationally and internationally recognised as an important site for nature conservation. Its special interest includes coastal, wetland and marine habitats, and it supports both internationally and nationally important populations of overwintering wildfowl and waders, with over 120 species using the site. The site also supports internationally important breeding populations of common tern and little tern, and nationally important numbers of breeding birds (19 species). The Site of Special Scientific Interest (SSSI) interest features include the coastal geomorphology of the double spit system across the harbour mouth and its associated ebb delta. This shingle feature also provides the main breeding habitat for little terns and SSSI birds, including oystercatcher and ringed plover, and is the location of the rare and threatened vegetated shingle habitat. Other important and threatened habitats that occur within the harbour are saline lagoons and saltmarsh. The marine elements of the site include seagrass beds, the rare Defolin's lagoon snail, and lagoon sand shrimp.

In summary the site has the following designations:

- Pagham Harbour Special Protection Area (SPA)
- Pagham Harbour Ramsar site
- Pagham Harbour Site of Special Scientific Interest (SSSI)
- Pagham Harbour Marine Conservation Zone (MCZ)

The site is also a Local Nature Reserve managed by the RSPB.

Natural England's advice with regard to the proposal above in relation to these designated sites is set out in the following sections.



International sites (SPA and Ramsar)

The application site is within the Pagham Harbour SPA, which is a European designated site, and is also listed as Pagham Harbour Ramsar site.¹ As the application site is within a European designated site (also commonly referred to as Natura 2000 sites), it has the potential to affect its interest features, which are afforded protection under the Conservation of Habitats and Species Regulations 2010, as amended (the 'Habitats Regulations').

In considering the European site interest, Natural England advises that your authority, as a competent authority under the provisions of the Habitats Regulations, should have regard for any potential impacts that a plan or project may have.² The [Conservation objectives \(weblink\)](#) for each European site explain how the site should be restored and/or maintained and may be helpful in assessing what, if any, potential impacts a plan or project may have.

Natural England's advice, based on the information provided, is that your authority cannot rule out significant effects arising from the proposal, either alone or in-combination, on both the SPA and Ramsar site. This is due to the following potential impacts:

- a. As a result of the proposed breach, the direct loss of breeding/roosting habitat for little terns. The potential increased disturbance and predation on the little tern population due to increased accessibility to the spit is also likely to have a significant effect.
- b. The potential for the harbour to close as a result of the breach, thus removing the harbour from tidal influence. If this was to occur for any substantial period of time it would be likely to lead to significant effects on the overwintering and breeding birds that use the inner harbour due to changes in the supporting habitat.
- c. During the construction of the breach there is a risk that the changes in the harbour flow will reduce the intertidal foraging habitat for the overwintering birds. In addition there is also the potential for disturbance to overwintering birds from noise, construction vehicles and other construction activity. Together these impacts are likely to have a significant effect on these bird populations.

Appendix 1 provides further information regarding Natural England's advice on the potential impacts of the proposal on the internationally designated sites.

Therefore we advise that there are likely to be significant effects resulting from the proposal, and an Appropriate Assessment (AA) should be undertaken in accordance with the Habitat Regulations. Following this AA, planning permission can be granted only if through this assessment, you as the competent authority can ascertain that the proposals will not have an adverse effect on the integrity of the site. Natural England is a statutory consultee to AA and we would be happy to advise further on this.

Whilst it is our advice that the impacts outlined above need to be addressed as part of the AA, it may be helpful at this stage to clarify Natural England's view regarding a specific element of the application. It is our advice that the proposal for creating new little tern breeding habitat within the site, to replace the current breeding sites on the spit, may need to be considered as compensation

¹ Listed or proposed Wetlands of International Importance under the Ramsar Convention (Ramsar) sites are protected as a matter of Government policy. Paragraph 118 of the National Planning Policy Framework applies the same protection measures as those in place for European sites.

² Requirements are set out within Regulations 61 and 62 of the Habitats Regulations, where a series of steps and tests are followed for plans or projects that could potentially affect a European site. The steps and tests set out within Regulations 61 and 62 are commonly referred to as the 'Habitats Regulations Assessment' process.

The Government has produced core guidance for competent authorities and developers to assist with the Habitats Regulations Assessment process. This can be found on the Defra website. <http://www.defra.gov.uk/habitats-review/implementation/process-guidance/guidance/sites/>



rather than mitigation. This is in keeping with our previous advice on this proposal at the scoping stage with regards to the 'Briels' judgement by the Court of Justice of the European Union (CJEU) in 2014³. In our scoping stage response of 15th May 2015, we advised:

'the CJEU ruling in the Briels case, may raise an issue as to whether the creation of habitat for SPA features within the site fabric of the SPA can be regarded as 'mitigation' under the Habitats Directive (currently there is no UK specific case law on this point although CJEU case law is binding). Rather it may be considered as 'compensation', an option which is available only after following the 'no alternatives' and 'imperative reasons of overriding public importance' tests under Article 6(4) of the Habitats Directive'.

With regard to this judgement, we advise that a proposal to create habitat within a European site can only be considered as mitigation in a strictly limited set of circumstances. These requirements are set out in the attached guidance. An assessment of how this judgement applies to this proposal can be considered in more detail as part of the AA, and at that time we would be able to provide further comments.

Wildlife and Countryside Act 1981 (as amended) - Site of Special Scientific Interest

This application is within the Pagham Harbour Site of Special Scientific Interest (SSSI). Natural England's advice is that this development proposal, as submitted, is likely to damage or destroy the interest features for which Pagham Harbour SSSI has been notified and that further information is needed on how these impacts can be adequately avoided or mitigated. Natural England advises that planning permission should not be granted at this stage. Further advice is set out below and in more detail in Appendix 2.

Currently the proposal only assesses the impact of the initial breach area with regard to the SSSI's interest features and views the subsequent reworking of the severed spit as occurring as part of natural processes. It therefore does not take into account the SSSI features on the area of the spit to be reworked (this includes vegetated shingle habitat and supporting habitat for breeding and overwintering birds). Our advice is that the proposal needs to assess the impacts on the SSSI from both the breach, and the severance of the spit, as a direct result of the breach, and include any potential mitigation measures needed to address these impacts.

Geomorphology feature:

Natural England considers that the proposal to breach the spit will lead to significant loss of, and damage to, the coastal geomorphology SSSI interest. The SSSI is also a Geological Conservation Review (GCR) site.⁴ Whilst the geomorphological interest would not be totally destroyed by the breach, as the system may continue to evolve, (subject to no maintenance dredging, and dependent on the supply of sediment) nevertheless, its interest would not be conserved and enhanced by this action. Its current national importance as an exceptional example of a rapid extension of a drift aligned spit would therefore be very significantly diminished. In addition, a unique opportunity for the scientific study of coastal geomorphology would be lost (see Appendix 2).

Vegetated Shingle:

The interest features of Pagham Harbour SSSI include vegetated shingle. This is a rare and threatened habitat of national importance. The proposal identifies the direct loss of 1.2 ha of perennial vegetated shingle habitat (which would include loss of the rare sea kale) within the breach area. The proposed mitigation to offset some of this loss is that the deposited shingle in the existing channel will provide shingle for this habitat to re-establish. However, this does not explain whether the conditions will allow it to be reworked by the sea. This lack of information on how the vegetation is expected to colonise this sediment needs to be

³ See <http://curia.europa.eu/juris/liste.jsf?num=C-521/12>;

⁴ GCR sites are identified as sites of national and international importance that are needed to show all the key scientific elements of the Earth heritage of Britain. These sites make a special contribution to the understanding and appreciation of Earth science and the geological history of Britain. See <http://incc.defra.gov.uk/page-2947>

addressed, including a confidence level of this occurring. Our advice is that the sea kale is unlikely to re-colonise to the same extent, and will take at least five years to develop, even with suitable conditions.

No assessment has been made of the vegetated shingle habitat that may be located on the proposed severed end of the spit or of any of the annual drift line habitat that may be impacted. Identification of all the vegetated shingle habitat that may be lost as a result of the proposal is required, as are sufficient details of mitigation measures.

Natural England's advice is that the currently identified loss of 1.2 ha of perennial vegetated shingle habitat would be a significant loss to the SSSI and of concern in a national context. Additionally, this is likely to be an underestimation of the impact given that the proposed severed end of the spit has not been assessed.

Consideration also needs to be given to the construction methods of the breach, the working area and any temporary traffic track ways that may be required, and details of specific routing to avoid further impact on the vegetated shingle or other habitats.

Breeding and over-wintering birds

Although the site is nationally important for a number of bird species (both over-wintering and breeding), the proposal focuses on the SPA/Ramsar bird features and does not currently assess the impact on the SSSI bird interest. Data is provided on some of these species but the significance of the impact and any mitigation measures are not identified. The SSSI breeding species that use the spit include little tern (also an SPA feature) and two species from the SSSI breeding bird assemblage (oystercatcher and ringed plover). These two wader species currently nest on the spit directly within the breach area. Further assessment is therefore required to ascertain whether this proposal would adversely impact on these breeding populations. A number of SSSI over-wintering birds also use the spit for roosting during high tide and/or feeding at low tide and the significance of this needs to be considered.

In addition, if the harbour were to close for any significant length of time and not re-open, the habitats within the harbour that support the SSSI over-wintering and breeding birds are likely to be damaged or destroyed. This risk needs to be assessed as there may be a significant impact on the ability of the site to support the SSSI bird interest for which it is designated.

SSSI habitats within Pagham Harbour

There are two other SSSI habitats which are nationally important in their own right (not just as supporting habitat for birds), that may also be adversely affected if the harbour were to close as the result of this proposal, these are:

- Saline coastal lagoon
- Saltmarsh

Furthermore, should the breach require re-opening in the future and there is no mechanism to deliver this, these SSSI habitats and the species that depend on them could be damaged or destroyed, depending on how long they are without tidal influence.

Schedule 5 Species:

The Defolin's lagoon snail and lagoon sand shrimp are listed in Schedule 5 of the Wildlife and Countryside Act 1981. The onus is on the applicant to ensure that they are legally compliant with the legislation. The applicant must determine that there are either no protected species in the area or, where they are present, ensure that the works will have no adverse impact on them.

Should the application change, or if the applicant submits further information relating to the impact of this proposal on the SSSI aimed at reducing the damage likely to be caused, Natural England will



be happy to consider this and provide further advice. If this advice falls outside our statutory advice, we may provide this as part of our chargeable advice service.

If your Authority is minded to grant consent for this application contrary to the advice relating to Pagham Harbour SSSI contained in this letter, we refer you to Section 28(1) (6) of the *Wildlife and Countryside Act 1981* (as amended), specifically the duty placed upon your authority, requiring that your Authority:

- Provides notice to Natural England of the permission, and of its terms, the notice to include a statement of how (if at all) your authority has taken account of Natural England's advice, and
- Shall not grant a permission which would allow the operations to start before the end of a period of 21 days beginning with the date of that notice.

Marine and Coastal Access Act 2009

The proposed works, as set out in the information provided, are sited within a Marine Conservation Zone (MCZ). The Pagham Harbour MCZ has been designated due to the presence of:

- a. Intertidal Seagrass habitat
- b. Defolin's lagoon snail
- c. Lagoon sand shrimp

Having reviewed the evidence relating to the site we believe that the works, as set out in the application, will **not** be compliant with the requirements of the Marine and Coastal Access Act 2009 as there is the potential for the activity to significantly hinder the conservation objectives of the site. This is because there is a risk that it will affect all of the features listed above. Detailed comments regarding these impacts are outlined in Appendix 3. Natural England has sent a separate response advising the Marine Management Organisation (MMO) of these impacts and recommending it undertakes a Stage 1 MCZ Assessment test.

Should the application be modified or re-submitted with measures included to avoid/reduce the impacts identified, please consult Natural England again and we can provide further advice. We are happy to discuss this response in more detail as required.

Other advice

We would expect the Local Planning Authority (LPA) to assess and consider the other possible impacts resulting from this proposal on the following when determining this application:

- local sites (biodiversity and geodiversity)
- local landscape character
- local or national biodiversity priority habitats and species.

Natural England does not hold locally specific information relating to the above. These remain material considerations in the determination of this planning application and we recommend that you seek further information from the appropriate bodies (which may include the local records centre, your local wildlife trust, local geoconservation group or other recording society) and a local landscape characterisation document in order to ensure the LPA has sufficient information to fully understand the impact of the proposal before it determines the application. A more comprehensive list of local groups can be found at [Wildlife and Countryside link](#).

Protected Species

We have not assessed this application and associated documents for impacts on protected species.



Natural England has published Standing Advice on protected species. The Standing Advice includes a habitat decision tree which provides advice to planners on deciding if there is a 'reasonable likelihood' of protected species being present. It also provides detailed advice on the protected species most often affected by development, including flow charts for individual species to enable an assessment to be made of a protected species survey and mitigation strategy.

You should apply our Standing Advice to this application as it is a material consideration in the determination of applications in the same way as any individual response received from Natural England following consultation.

The Standing Advice should not be treated as giving any indication or providing any assurance in respect of European Protected Species (EPS) that the proposed development is unlikely to affect the EPS present on the site; nor should it be interpreted as meaning that Natural England has reached any views as to whether a licence may be granted.

If you have any specific questions on aspects that are not covered by our Standing Advice for European Protected Species or have difficulty in applying it to this application please contact us with details at consultations@naturalengland.org.uk.

Biodiversity enhancements

This application may provide opportunities to incorporate features into the design which are beneficial to wildlife, such as the incorporation of roosting opportunities for bats or the installation of bird nest boxes. The authority should consider securing measures to enhance the biodiversity of the site from the applicant, if it is minded to grant permission for this application. This is in accordance with Paragraph 118 of the NPPF. Additionally, we would draw your attention to Section 40 of the Natural Environment and Rural Communities Act (2006) which states that '*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*'. Section 40(3) of the same Act also states that '*conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat*'.

We would be happy to comment further should the need arise but if in the meantime you have any queries please do not hesitate to contact us.

For any queries relating to the specific advice in this letter please contact Angela Marlow on 0300 060 3893 or email Angela.Marlow@naturalengland.org.uk. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

Yours sincerely



Patrick McKernan
Manager
Sustainable Development
On behalf of the Sussex and Kent Team



Appendix 1 – Detailed consideration of the SPA and Ramsar features – breeding little terns and overwintering bird populations.

- 1.1 Little terns are the smallest species of tern breeding in the UK, nesting exclusively on the coast in well-camouflaged shallow scrapes on beaches, spits or inshore islets. They do not forage far from their breeding site, which dictates a necessity for breeding close to shallow, sheltered feeding areas where they can easily locate the variety of small fish and invertebrates that make up their diet. Colonies are found around much of the coastline, but the main concentration is in south and east England, where the species' preference for beaches also favoured by people makes it vulnerable to disturbance⁵.
- 1.2 The little tern is listed in Appendix II of the Convention on Migratory Species and is covered under the African Eurasian Waterbird Agreement. It is also on Annex II of the Bern Convention. Within the EU it is listed on Annex I of the Birds Directive. In the UK, there are currently 28 breeding colony SPAs for which little tern is an interest feature, 23 of which are in England (Parsons *et al.* 2015).
- 1.3 The conservation objective for Pagham Harbour SPA is 12 pairs. As part of an EU-funded LIFE+ project being implemented by the RSPB, the aim at Pagham Harbour is to have a breeding colony of more than 20 pairs. A peak count of 76 pairs occurred at Pagham Harbour in 1976.
- 1.4 The shingle spit at Pagham Harbour provides the main area where the little terns nest. This year the site has experienced its highest number of fledged chicks (16) since 1979. Little terns are fickle with regard to nesting sites, and areas that appear suitable to the human eye may not be taken up by the little terns. They preferentially nest on freshly accreted shingle and the extended spit is the type of accreting coastal feature that they would naturally exploit. This shingle habitat, together with the management measures, provides the opportunity to return a successful colony of little terns. This is considered a realistic aim, as colonies can increase in size rapidly by drawing in adults from the wider population (often from less favoured sites, rather than simply the recruitment of young reared on site).
- 1.5 It is not possible to predict whether the current sediment supply rate to the spit, which has driven the recent growth, will last long enough to return the spit to its current extent if it is breached. This is due to the uncertainty surrounding the location and abundance of the supply source. Therefore, the result of the proposal may be the direct permanent loss of shingle habitat. This is a key risk to the conservation of the little tern for this site and is likely to have a significant impact. After the breach, the severed distal end of the spit will be removed via wave action and tidal currents, with this estimated to occur within 8-12 years, although potentially this could be more rapid depending on weather conditions. Without the proposed intervention the current spit is likely to exist into the medium term in some form for 25-50 years.
- 1.6 There also exists a potential risk of the harbour closing following the proposal. This presents a significant risk of negative impacts on the supporting habitat of the inner harbour for SPA/Ramsar bird populations (and in addition impacts on SSSI features including SSSI birds, and SSSI habitats on the spit and within the harbour, and also on MCZ features). The risk of closure is increased by this proposal, and the likelihood increases proportionately as the annual longshore rate moves above a 20,000m³ threshold. The current proposal for mitigating any closure is that the breach will be re-opened. However; the current proposal provides for only one re-opening of the breach and therefore would not address any subsequent closure. It is Natural England's advice that should the harbour remained closed for a substantial period there may be a significant impact on the SPA/Ramsar site.

⁵ Georgina Pickerell in Seabird Populations of Britain and Ireland JNCC

- 1.7 The potential loss of intertidal habitat (through changes to water levels) for wintering waterbird features during the construction period needs to be considered. This is because the predicted loss of 4.5 ha of intertidal foraging habitat (representing 4.5% of this supporting habitat within Pagham Harbour SPA/Ramsar site) due to changes in water levels during the construction of the proposed project is significant and we would advise that this should be considered likely to have a significant effect. However, we note that this impact will be temporary (over a 9-11 week period and only occur during one winter) and there will be other areas of habitat for the birds to use within the harbour. Cold weather restrictions (such as those used for wildfowling) could be considered to ensure that bird fitness is not compromised. We would also suggest that a watching brief could be kept on the little tern breeding period, as there could be potential for construction to take place after terns have fledged and before the peak of overwintering birds arrives.
- 1.8 Disturbance of wintering waterbird features during construction of the proposal should also be considered. Natural England does not consider the 50m disturbance zone around the construction area on the spit used in the assessment to be sufficient. This is because this is only considering plant movements and not disturbance from people working on site (which can result in disturbance impacts at greater distances). WeBS data (low tide and core counts, as provided in the assessment) can be used to assess impacts to the individual qualifying species. However, we again note that this impact will be temporary and there will be other areas of habitat for the birds to use within the harbour.

Appendix 2 Detailed considerations of the SSSI interest features – coastal geomorphology and vegetated shingle habitat

- 2.1 The shingle spit system (including the ebb tidal delta) at Pagham is currently experiencing a set of processes which are thought to be unique to this location. The recent abundant supply of marine gravel and the consequential rapid extension and drift alignment of the spit in the past decade are anomalous within the context of similar systems elsewhere in Great Britain, the majority of which have experienced a net sediment deficit since the onset of attempts to engineer sea defences. Pagham therefore represents a significant and important opportunity for the study of geomorphological processes involved in gravel spit formation.
- 2.2 However, we know these sediment supplies are episodic. In 1977 the Geological Conservation Review described the site thus: 'Today the natural sediment supply has largely ceased as a result of anthropogenic influences, but the ridge patterns preserve the history well.' Through the 1990s and up to 2004 the Environment Agency carried out annual shingle recycling to rebuild and reshape the beach fronting at Church Norton to prevent flooding, which halted when the spit accreted naturally.
- 2.3 The Pagham Harbour spits are subject to periods of episodic evolution and we do not know for how long the current 'pulse' of sediment will continue. There is therefore no guarantee that the proposed breach of the spit will simply turn back the clock and allow the process of evolution to resume. The recent changes to the spit should be regarded as being exceptional for a gravel-dominated coastal spit in England and Wales (if not in the UK), and therefore nationally important to scientific investigation for studying the natural evolution of this feature.
- 2.4 The shingle spit also provides the sediment and exposure to coastal processes that create suitable conditions to support the formation of the nationally rare and threatened vegetated shingle habitat. From its early annual vegetation of drift lines (AVDL), to the pioneering stages of the perennial vegetation of stony banks (PVSB), these two distinct forms can be found on the spit at Pagham. The pioneer vegetated shingle has been formed over many years with typical ridge and trough formations of sediment influencing where sea kale and other vegetation forms. Sea kale is a pioneer plant which enables other plants to colonise through the trapping of vegetation around these robust plants, and decay of its own



vegetative material, creating more nutrient rich conditions. Over time the landward ridges and troughs develop more species diversity and coverage (if undisturbed) with distinct lichens developing on pebbles. It is unlikely that material excavated from the breach and cast in the channel would develop in the same way. Reworking of the shingle under coastal processes is a natural evolution of this habitat type. In addition, the reworking of the severed distal spit may not result in the shingle coming onshore within the site, and shingle that does accrete on the Pagham frontage can be subject to garden invasives and disturbance impacts and therefore may be of poorer quality.

Appendix 3: Detailed consideration of MCZ feature and guidance on Stage 1 Assessment.

- 3.1 The current conditions of all the marine features listed previously are heavily dependent on tidal influences, and alterations to the current environmental regime could significantly impact all of the Pagham Harbour MCZ features. The general impacts of tidal change are recognised by the proposal and proposed mitigation measures are outlined. However, in order to make a thorough assessment of the impacts Natural England requires further information on potential changes in tidal influence of this project, and of any proposed mitigation measures for significant change.
- 3.2 There is insufficient evidence to rule out a significant impact on existing populations of Defolin's lagoon snail, as the extent of the feature is unknown. Current best estimates are derived from the surveys conducted in 2007 and 2013 and approximations of prime habitat. Given that the shingle habitat is continuous along the spit there is a distinct possibility that colonies exist within the proposed site. To make an assessment of the impacts on this MCZ feature we require information on the extent of the shingle habitat which will be lost as a result of the project, including the proposed breach area and the habitat that may be lost during the operation of the plan (i.e. as the spit washes away). Alternatively, the provision of evidence which definitively concludes the absence of the snail on the affected portion of Church Norton Spit would address this concern.
- 3.3 Additionally, the project proposes increased activity during construction immediately adjacent to Little Lagoon on Pagham Spit, in close proximity to existing colonies. We require further information to ensure there will be no impact on existing populations located in Pagham Spit Lagoon, specifically during construction, or detail of sufficient mitigation/avoidance.
- 3.4 The location of the proposed little tern habitat creation may overlap with existing populations of the Defolin's lagoon snail as surveyed in 2007 and again in 2013. The proposed creation of a new Tern Island on top of this existing habitat would have significant negative effects on any colonies present. Further information is required to definitively conclude presence or absence of the snail on the affected portion of the site. Natural England can advise on how this information could be attained.
- 3.5 The extent and method of constructing the proposed little tern habitat is not specified, therefore we are unable to make an assessment as to whether there will be an impact on the intertidal seagrass feature of the MCZ. Further information is required to make this assessment of any potential impacts on MCZ features.
- 3.6 The potential effects of the works on the lagoon sand shrimp feature have not been sufficiently assessed. This feature was screened out of the assessment due to lack of hydrodynamic connectivity, as a small pipe is the only connection between the lagoon and the harbour. However, on this basis, any change in the amount of water flowing in and out of this pipe may have a disproportionately large impact on the habitat quality, and may affect the condition of the feature. Therefore we require further information to ensure there will be no impact on this species, or detail of sufficient mitigation for this impact that can be employed.



Natural England's approach to considering habitat creation as mitigation following the *Briels* Judgment

Christina Cork, Richard Broadbent, Ginny Swaile & Steve Clifton



The decision of the Court of Justice of the European Union in *Briels* has been the subject of considerable scrutiny by the HRA community.

In May 2014, a judgment was handed down by the Court of Justice of the European Union ('the Court'), which provides a further, authoritative interpretation of parts of the Habitats Directive, and consequentially the Habitats Regulations 2010 (as amended). This relates to the *Briels* case (refer Graham Machin's article on page 25 of the July 2014 issue)

This case centred on what types of measures are relevant to consider as mitigation, when coming to a conclusion as to the effect on European site integrity of a proposed plan or project. The Court ruled in this case that the habitat creation on land within a SAC proposed to avoid an overall loss of habitat was in fact a compensatory measure and not eligible to be included as mitigation against damaged or lost habitat of the same type. As such this should not be taken into account until later in the formal Habitats Directive decision making process i.e. after the consideration of alternative solutions and only having

established overriding public interest in the project. In coming to this view the Court placed particular weight on the typical uncertainty of success and timescales which can be associated with habitat creation. In light of the judgment, Natural England will not normally consider any proposed creation (including translocation) of either designated or supporting habitat within the same European Site, in response to a predicted loss, to be "mitigation".

It is Natural England's view, though, that there may be a very limited set of circumstances where habitat creation within a European site provided as a mitigation measure is compatible with the *Briels* judgment (as described in sections C.5.4 and C.5.5.1 of the Handbook), that is where new plans or projects can be compatible with achieving the Conservation Objectives of the site and the maintenance of site integrity. We would consider that in these particular situations such a

measure could be taken into account during the appropriate assessment stage of a HRA. These cases are likely to be extremely rare, however.

These limited circumstances would be defined by four key criteria which would apply, over and above the baseline of achieving 'no net loss' of designated habitat. Under this approach, any proposed creation of habitat within a European Site must be:

- confined to areas which are not designated or supporting habitat (site-fabric),
- small in scale,
- technically feasible with a high degree of certainty of success, and
- timed to ensure it can be completed (present and functioning appropriately) rapidly and before the predicted harmful impact is allowed to occur.

This potential habitat creation must be above and beyond any measures required to meet the definition of

Footnotes

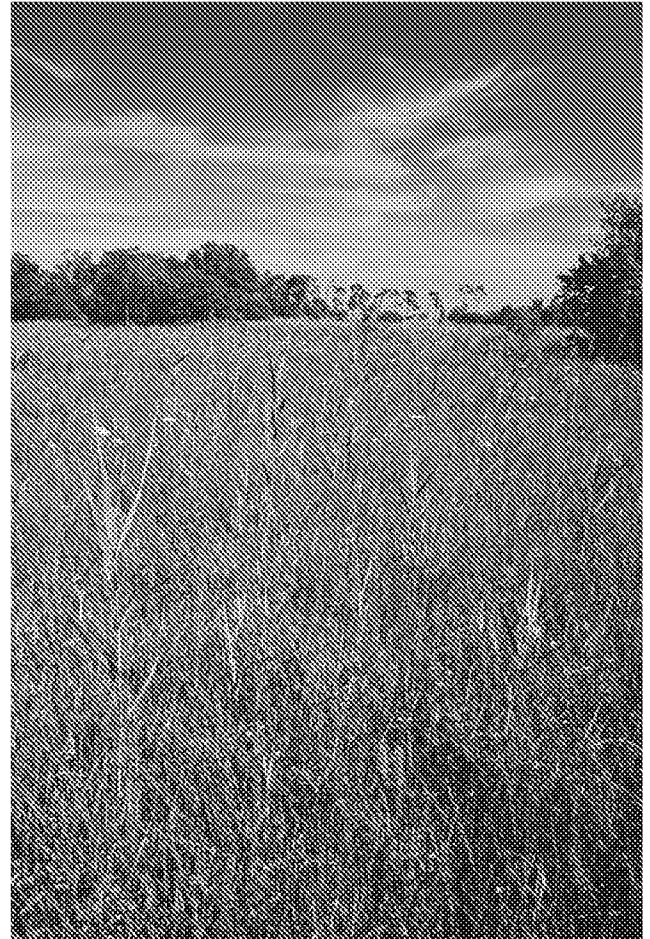
1. 'Site-fabric' is a general term used by Natural England to describe land and/or permanent structures present within a designated site boundary which are not, and never have been, part of the special interest of a site, nor do they contribute towards supporting a special interest feature of a site in any way, but which have been unavoidably included within a boundary for convenience or practical reasons. Areas of site-fabric will be deliberately excluded from condition assessment and will not be expected to make a contribution to the achievement of conservation objectives.

favourable condition, in terms of measuring both the extent and quality of the feature, and these restorative measures would need to be guaranteed before agreeing the additional creation. It is difficult to apply this approach on a site with an objective to restore the extent of the feature in question, unless the recovery to favourable condition was near complete. A full and detailed Habitat Mitigation Plan, which formally incorporates the above, should be an enforceable condition or restriction of any permission granted in these circumstances.

If any of these criteria above cannot be satisfied, and reasonable scientific doubt remains as to the certainty of successful habitat creation within a short timeframe, Natural England would advise that a predicted loss cannot be mitigated for by habitat creation, and must instead constitute an adverse effect on site integrity. The project must then pass the tests given in regulation 62 of no alternatives and only proceed from there on the basis of there being imperative reasons of overriding public interest. At that point, compensatory measures for the lost or damaged habitat would need to be provided by the usual means to satisfy regulation 66 as required.

It is further noted that due to tightly-drawn boundaries notified at the time of designation, site-fabric is not prevalent in many protected sites and using creation of habitat from site fabric to mitigate loss has not been common practice in the past. Natural England will continue to work with applicants to find alternative solutions which do not result in loss of habitat and seek other types of mitigation where needed. Natural England will continue to take into account clarifications in the law when giving its advice to competent authorities on plans and projects likely to significantly affect European sites.

Christina Cork (Principal Specialist, Protected Areas), **Richard Broadbent** (Principal Adviser, Legal Services) **Ginny Swaile** (Principal Adviser, Protected Sites) & **Steve Clifton** (Senior Specialist, Protected Sites) all work for Natural England.



The habitats affected in Briels was molinia meadow which is a qualifying feature of 33 SACs in the UK. Photo 'Molinia meadow habitats at Chippenham Fen, Fenland SAC' by Natural England

Introducing our Editorial Panel Members



Bernie Fleming (Director of Fleming Ecology)

Around 1995, as English Nature's Conservation Officer for Manchester and Merseyside, I encountered one of the earliest examples of HRA as the proposed extension of Southport sea wall threatened the Ribble & Alt Estuaries SPA. This precipitated the call for help to David Tyldesley who

inevitably sorted things out. This led to a working relationship that I have benefitted from ever since.

My career with NCC, EN and NE took me across the country and exposed me to a whole range of HRAs; large and small; good and bad. This gave me great experience and a desire to improve the standard. That's one of the reasons I established 'Fleming Ecology' and why I'm delighted to have been asked to join the editorial panel!

As for me, I'm from Leigh in Lancashire, but live in Yorkshire. My two children exhaust everything I have but, at last, are beginning to take some responsibility for their actions. This leaves some time for walking, reading and battlefield tours but I don't do any of them anywhere near enough and my creaking back prevents a return to my motorbikes. Other than that, following United dominates everything else and you can always find me and my lad at Old Trafford where, like a good HRA, there are few things better.