

In the matter of

CEG Land Promotions Limited

The City of Bradford District Core Strategy
Appropriate Assessment under the Conservation of Habitats and Species
Regulations 2010 (as amended)

FURTHER OPINION

1. I am instructed by Freeths LLP to provide this Further Opinion¹ for CEG Land Promotions Ltd (“CEG”) in respect of the proposed City of Bradford Metropolitan District Council Core Strategy Draft Development Plan Document (“CS”) and in particular the appropriate assessment (“AA”) prepared in relation to that document, under the Conservation of Habitats and Species Regulations 2010 (as amended) (“2010 Regulations”). The AA has had various iterations, corresponding (albeit not by date) to the various published drafts of the CS. The current version, which this Opinion considers, is dated December 2014 and relates to the Publication Draft CS of February 2014. The background to the AA and emergence of the CS will be set out fully in CEG’s written Submissions and I will not repeat it in this Further Opinion.
2. The key policies in the CS are SC8 and HO3. SC8 reads as follows:

Strategic Core Policy (SC 8) Protecting the South Pennine Moors and their zone of influence

Development will not be permitted where it would be likely to lead to an adverse effect upon the integrity, directly or indirectly, of the South Pennine Moors Special Protection Area and Special Area of Conservation. To ensure these sites are not harmed, a number of zones have been identified:

Zone A

¹ I provided an initial Opinion (dated 14 November 2014) on the previous version of the AA issued for consultation in February 2014 (see Annex 1)

No development involving a net increase in dwellings would be permitted within a suitable buffer area around the upland heath/ South Pennine Moors (normally 400m) unless, as an exception, the form of residential development would not have an adverse effect upon the sites' integrity.

Zone Bi

Zone Bi would apply between 400m and 2.5km of the designated Site boundary. Within Zone Bi the Council will take a precautionary approach to the review and identification of potential Greenfield sites for development based on an assessment of carrying capacity using the available evidence from bird and habitat surveys and appropriate additional monitoring. The underlying principles will be to avoid loss or degradation of areas outside European Sites that are important to the integrity of sites and that sufficient foraging resources continue to be available, in order to ensure the survival of bird populations.

Zone Bii

Zone Bii would apply between 2.5km and up to 7km of the designated Site boundary

Within Zone Bii appropriate assessment is still likely to identify significant adverse effects in combination with other proposals, however appropriate avoidance or mitigation measures should allow development to take place.

3. It is Zone Bi which is principally of concern. It would appear to have the effect that what is described as a "precautionary" approach will be taken to greenfield sites within the zone, based on an assessment of carrying capacity, further surveys and monitoring, with the two principles of (1) avoiding loss or degradation of areas outside the European Site which are "important to the integrity of sites"; and (2) that sufficient foraging resources continue to be available in order to ensure the survival of bird populations.
4. It is the concern about loss of habitat from development within Zone Bi which feeds through into Policy HO3. This has reduced the housing allocation for Burley from 500 homes in the Further Engagement Draft CS to 200 in the current Publication Draft CS.² To put this in context the Draft CS makes provision for a total of 42,100 dwellings over the period 2013-2030.
5. I have been asked to consider the legality of the AA and advise on whether it supports the approach in Policy SC8 and the change in status and reduced provision of housing for Burley in Policy HO3.

² See Table 1.1, p. 14 of the AA.

Legal framework

6. The 2010 Regulations implement the Wild Birds and Habitats Directives, in particular in this case Articles 6(3) and 6(4) on AA. As the European case law refers to these articles it is more convenient to refer to them in this Opinion rather than the corresponding provisions of the Regulations. So far as is material, they provide, as is well-known, as follows:

3. Any plan or project not directly connected with or necessary to the management of the 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 and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

7. As is also well known, the case law on these provisions has laid down a number of glosses:

(1) At the screening stage of deciding whether a plan is likely to have a significant effect on the European site, such a risk exists “if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned” (see Case C-127/02 Waddenzee para 44).

(2) This question is linked to the conservation objectives of the site: “where a plan or project ... is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.” (see Case C-127/02 Waddenzee para 49) (emphasis added).

- (3) In addressing the likelihood of significant effects, mitigating measures which form part of the plan or project should be taken into account (see Hart District Council v. SSCLG [2008] EWHC 1204).
- (4) If a breach of Article 6(3) is alleged, the claimant who alleges there was a risk that has been overlooked must produce credible evidence that there was a real, rather than a hypothetical risk (see R (Boggis) v. Natural England [2009] EWCA Civ 1061).
- (5) The AA itself “implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed” (see Case C-127/02 Waddenzee paras 54 and 61).
- (6) On the issue of the integrity of the site:

“54. It is the essential unity of the site that is relevant. To put it another way, the notion of ‘integrity’ must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

55. The integrity that is to be preserved must be that ‘of the site’. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat.

56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is ‘why was *this particular site* designated and what are its conservation objectives?’”

(see Case C-258/11 Sweetman, AGO, paras. 54-56, approved by the Court (emphasis added)). Para. 54 picks up the definition of “integrity” in Circular 6/1995, which had

been accepted by Lord Nimmo Smith in Re the Petition of WWF-UK and RSPB [1999] CMLR 1021.

- (7) Further, on the integrity of the site, in Case C-251/12 TC Briels, AG Sharpston said (para. 41) in a formulation approved by the Court (emphasis supplied):

I can agree that the 'integrity of the site' should be viewed as a whole in the sense that it is its enduring essential character which must be considered, rather than insignificant and transient fluctuations in quality or area of a particular habitat. However, it seems to me that long-term deterioration of an existing natural habitat is something which necessarily concerns enduring essential character rather than insignificant and transient fluctuations.

- (8) In Briels, the Court formulated the requirements of AA as follows (emphasis added):

- 26 It is to be noted first of all that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Case C-127/02 *Waddervereniging et Vogelbeschermingsvereniging* EU:C:2004:482, paragraphs 57 and 58, and *Sweetman and Others* EU:C:2013:220, paragraph 41).
- 27 The assessment carried out under Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to that effect, *Sweetman and Others* EU:C:2013:220, paragraph 44 and the case-law cited).
- 28 Consequently, the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.
- 29 However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).

8. The AA adopts the description of site integrity from ODPM Circular 6/1995, which as mentioned above, is reflected in the European law (see para. 2.4.2):

“The integrity of a site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified.”

The proper role of AA

9. The first point I would make is a general but important one. The purpose of AA is to assess the effects of a proposed policy, and whether they would adversely affect the integrity of the Site in question. If it can be ascertained that there will be no such adverse effect on integrity, then the policy can be approved. If it cannot be ascertained that there would be no adverse effect on integrity, or the position is not certain, then the question becomes whether compliance with conditions or other restrictions within the policy can enable it to be ascertained that there would not be an adverse effect on integrity of the Site. This is clear from the Figure 1 Flowchart in ODPM Circular 06/2005 (page 7) which is appended to this Opinion for ease of reference. This flowchart relates to assessment of development proposals i.e. “projects”, but the rationale and process applies equally to proposed “plans”.
10. If, having considered the proposal with such mitigating measures, it still cannot be ascertained that there would be no significant adverse effect on integrity, then the attention turns to whether there are alternative solutions that would avoid such effects (again, see the ODPM Circular 06/2005 Flowchart).
11. Thus, to give an example, if there was a proposal for 500 houses, that proposal would need to be assessed. This would involve objective evidence, assessing the impact of the 500 houses on the integrity of the SPA. If that proposal could have significant effects on integrity then it would have to be considered whether those effects could be avoided by mitigating measures. If such measures could make the 500 house proposal acceptable in terms of no significant effect on integrity, then permission should be given subject to

those mitigating measures being secured. If the measures could not make the proposal acceptable, then in considering the alternative solution test, it would need to be considered whether an alternative smaller scheme (say 200 houses) would satisfy the need and yet avoid the adverse effect on integrity.

12. Hence there should be a logical, iterative process whereby the AA would inform the evolution of the proposal the proposal. What would not be correct is for the proposal to be modified by reduction to 200 houses in advance of a proper AA, and for the AA to be used to seek to justify the lesser proposal.
13. This fundamental point must be kept in mind. It is the role of the AA to assess policy proposals, not to justify policy proposals. I am concerned that the various iterations of the AA appear to have strayed into the role of seeking to justify restrictive policies, rather than considering whether restrictive mitigation is in fact necessary and justified.
14. So, for example, the 2013 AA acknowledged the paucity of data on potential effects and suggested further surveys. In the anticipation of those surveys it suggested a possible approach to mitigation, namely what became Policy SC8 and the consequent scaling back and redistribution of housing numbers.
15. The Draft of the CS in February 2014 was produced with the benefit of such further data as had emerged from those surveys in 2013. Nevertheless it simply adopted the restrictive policy approach canvassed in the 2013 AA, despite the apparent lack of any real evidence of possible impacts on integrity from that data. There was in fact no sound evidence to support that restrictive approach.
16. This approach has been perpetuated in the latest December 2014 Draft. Indeed it goes further in that (as the Council's Background Housing Paper shows) the principal reason for changing the status of Burley from a Local Growth Centre to a Local Service Centre and for reducing the 500 housing figure to 200 is the AA's approach of assuming adverse effects from the development of certain sites around and outside the SPA, which is an assumption based on no real evidence, as discussed further below.

17. A full analysis of the technical deficiencies in the December 2014 AA will be presented in separate submissions and in a technical report from Baker Consultants. However a key point is that in neither draft is there anything to suggest that the Council considered whether, in the light of the available data, the restrictive policies were justified, or whether less restrictive policies would have satisfied the “no adverse effect on site integrity” test. The Council should have considered on the basis of sound evidence, for example, whether housing locations exist which are deliverable without mitigation or indeed which are deliverable with mitigation, before concluding that they are not deliverable at all. An obvious way of satisfying the “no adverse effect on site integrity” test would have been simply a policy that any development likely to have a significant effect on a European Site will be subject to AA and that permission will be refused if it cannot be ascertained that there will not be adverse effects on integrity and the subsequent derogation tests cannot be met (I discuss this further below). That could, if appropriate, be stated to apply to a particular zone or area, but would not have to be. It would ensure that the CS could not through its policies have an adverse effect on integrity. Combined with a robust AA, this would be a perfectly acceptable way of proceeding. Indeed Policy EN2 in the draft CS is largely to that effect. I also note that this very approach was recently confirmed by Lang J in the Planning Court to be acceptable and compliant with the Habitats Directive (see Abbotskerwell Parish Council vs Teignbridge District Council [2014] EWHC 4166). I discuss this further below. I note that NE’s letter to the Council dated 31 March 2014 suggested policy wording which is significantly less restrictive than SC8.

18. The task of the AA is to establish whether the integrity test is passed. The Directives are not concerned as such with strictness of policies, provided that they meet this test. However, as a matter of domestic planning policy, restrictive policies should be justified by evidence identifying what harm they will prevent. Whilst according to para. 119 of the NPPF the general presumption in favour of sustainable development in para. 14 does not apply to development requiring AA, it is clear that local plans should be based on adequate, up-to-date and relevant evidence about economic, social and environmental

characteristics of the area (para. 158). Plans should be positive in seeking to meet objectively assessed requirements, and should be justified, i.e. “the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence” (para. 182).

19. I would regard this as indicating clearly that a blanket policy restricting and reducing housing or other development within a specified zone should not be imposed without proper evidential justification, particularly if a less restrictive policy would meet EU requirements. In other words if a local planning authority is going to go further than is necessary to ensure compliance with Article 6(3) Habitats Directive then it should justify its approach on the basis of sound evidence.

20. The fact that a plan is subject to AA does not in my view change that requirement. This is demonstrated by the PINS Guidance on Soundness (Examining Development Plan Documents: Soundness Guidance (August 2009)). Although this guidance has now been withdrawn it makes clear a key point which remains relevant i.e. that there are two distinct stages: legal compliance and soundness. The AA process concerns legal compliance. Soundness is concerned with whether a plan is justified, effective and consistent with national policy. In particular, to be justified it must be founded on a robust and credible evidence base and the choices made must be backed up by facts. It must also be demonstrable that the content is justified by evidence, and that assumptions are reasonable and justified. It must be the most appropriate strategy when considered against alternatives. There should be a clear audit trail showing how and why the preferred strategy and approach were arrived at.

21. In my view the restrictive policies in SC8 and the related HO3 do not meet these tests, for the reasons explained above. I note that NE was also of the view that HO3 may be challenged as unsound (see its letter to City of Bradford MDC dated 31 March 2014 at Annex 2).

Avoidance vs. mitigation

22. There is a further general point to be made, which is that the December AA appears to proceed on the assumption that the AA hierarchy requires that adverse effects be avoided as the first priority – this appears most clearly in para. 6.3.2, but also at other places such as 2.1.3, 2.1.4, 2.4.1. In other words, the approach appears to be that significant effects should be avoided before considering if they can be mitigated. This is based on what is referred to as “the hierarchy of intervention” (the provenance of which is not provided).
23. This approach appears also in parts of Policy SC8 of the CS which requires development to be avoided in Zone Bi.
24. This is not in my view a correct approach. As explained above, the first step is to consider the effects of the proposed development. If they are potentially significant in terms of the integrity of the site, the next step is not to require the development to be avoided, but rather to consider whether mitigation could reduce such effects to a level which does not affect integrity significantly.
25. This leads on to a further fundamental point, which is that a policy (such as that for Zone Bi of SC8) which precludes all development and in doing so effectively precludes the possibility of mitigation. So for example, if there is an impact on integrity as a result of loss of feeding habitat outside the SPA, that could in principle be capable of mitigation by the enhancement of other feeding grounds outside the SPA, as indeed has been recognised in case law (see *Hargreaves v. Secretary of State for Communities, Housing and Local Government* [2011] EWHC 1999).
26. Such an approach (i.e. one that precludes the possibility of mitigation) is contrary to the fundamental legal principles of AA, and in practice confuses the status of land within the SPA itself with land outside which has a supporting function for qualifying species. Such land may have implications in terms of the integrity of the SPA, but only indirectly (and there would need to be evidence of such implications, a point discussed further

below) and may well be inherently capable of replacement as feeding grounds by the existence, provision or indeed enhancement of other land outside the SPA. Moving straight to an approach of avoidance (by preventing development entirely or restricting its scale significantly) appears to me to put the cart before the horse in terms of mitigation. It also has the paradoxical and indeed perverse outcome that land outside the SPA is accorded a higher level of protection, i.e. no development, than is available to the SPA itself, where there is no absolute prohibition on development. Indeed, as regards such land, it is worth noting that the boundary of the SPA should have been drawn widely enough in the first place to provide for the conservation requirements of the relevant species, as the JNCC website makes clear:

Use of areas

27. Article 4.2 of the Birds Directive requires special measures to be taken for migratory species at "breeding, moulting and wintering areas and staging posts along their migration routes". The boundary of each SPA is so determined that it delimits an area which provides the conservation requirements of the species in the season(s) and for the particular purposes for which it is classified.³

The breeding bird assemblage

28. Another very important point is the reliance by the AA on the breeding bird assemblage as being a qualifying interest feature of the South Pennine Moors Phase 2 SPA. The CJEU in Case C-535/07 *Commission v. Austria* has emphasised the importance of legal clarity as to the species for which the SPA has been classified:

61. As regards identification of the protected species and habitats in each SPA, just as the delimitation of an SPA must be invested with unquestionable binding force (see *Commission v Belgium*, paragraph 22), the identification of the species which have warranted classification of that SPA must satisfy the same requirement. If that were not the case, the protective objective arising from Article 4(1) and (2) of the Birds Directive and from Article 6(2), read in conjunction with Article 7, of the Habitats Directive might not be fully attained.

³ <http://jncc.defra.gov.uk/page-1405>

29. The AA at Section 3.1 identifies four relevant European Sites: the South Pennine Moors SAC, the South Pennine Moors Phase 2 SPA,⁴ the North Pennine Moors SAC and the North Pennine Moors SPA.
30. Para. 3.1.4 accepts that the SPA qualifying features are listed in various sources, which differ as to what is included. It states that the advice of NE was (personal communication, 2014a) that the species listed on the 1998 SPA citation (which is dated 3 September 1998 and found on NE's website) should be used in the AA and that this advice was followed. Table 3.1 (page 13) for the South Pennine Moors Phase 2 SPA lists two Article 4.1 species of Annex I breeding birds (Merlin and Golden Plover) and under Article 4.2 (regularly occurring migratory birds – internationally important assemblage of breeding birds) lists some 12 species. It gives the source of this as the 1998 SPA citation.
31. The point is of relevance because the Article 4.1 list and the Assemblage includes a number of species which in principle could feed upon farmland or in-bye land on the edge of the moors and outside the SPA boundary, which is considered important to the long term conservation of the SPA population of these birds which breed within the SPA (see para. 5.2.2). Those specifically referred to are Golden Plover (Article 4.1 (Annex I)) and Curlew and Lapwing (Article 4.2 Assemblage). It is important in my view to be careful and precise as to the distinction between birds which breed within the SPA and are hence part of the Assemblage and those which breed outside the SPA and are not. As discussed below the AA fails to appreciate or recognise that distinction.
32. However, the 2001 JNCC review of SPAs removed the breeding bird assemblage from the qualifying features of the South Pennine Moors Phase 2 SPA (because this was no longer justifiable in terms of the guidelines for selection which were applicable at the

⁴ The AA (see footnote 3, p. 14) distinguishes between the two phases of designation of the South Pennine Moors SPA in 1996 and 1997. Phase 1 (an area over 16.5km south of Bradford is considered to be a separate legal entity with different qualifying features and conservation objectives, and is not considered in the AA.

2001 Review).⁵ It was replaced with a reference to Dunlin as the single Article 4.2 species.⁶

33. Indeed, consistent with the JNCC review, the AA 2013 and AA February 2014 made no reference to any breeding bird assemblage as being a qualifying feature of the SPA.
34. The AA at para. 3.1.5 refers to guidance from the NE website. This says that the legal list of qualifying species is given on the relevant SPA citation and that a review of the UK network of SPAs was co-ordinated by the JNCC in the late 1990s. The results were published in 2001 following formal submission to, and agreement by, relevant Ministers. It goes on to note that “... it is taking some time to revise all the relevant SPA citations in the light of the review” and that where there has been a mismatch between species listed in the extant citation and the 2001 Review, there has been confusion as to which list is correct. It advises that where there are such differences, then the relevant country agency should be contacted for further guidance.
35. It appears in this case that NE were contacted on a personal basis⁷ and advised that the list in the original (1998) citation should be used. Certainly the letter from NE to the Council dated 1 August 2014 (see Annex 2) states that the breeding bird assemblage is an interest feature and that the HRA should consider whether the distribution of housing and settlement targets can be delivered without adversely affecting the assemblage.
36. It says that when considering whether there is an adverse effect on the assemblage, the HRA should: (1) consider the numbers of assemblage birds present within functionally linked area; (2) identify the locations frequently visited by those birds; (3) consider the numbers present compared against their populations. In the absence of in-combination effects NE cautions against removing an allocation of land for housing on the basis that a single assemblage bird was recorded.

⁵ See <http://jncc.defra.gov.uk/default.aspx?page=2001>

⁶ It also added the Peregrine Falcon and Short Eared Owl as qualifying Annex I species.

⁷ Personal comm. 2014a was telephone correspondence with Alan Drewitt, Senior Ornithologist at NE (see p. 114).

37. The JNCC review was authorised and approved by Ministers. Indeed upon further inquiry by Andrew Baker of Baker Consultants with Dr David Stroud (the individual at JNCC who was responsible for the 2001 review) it is clear that it was not only formally accepted by the Committee of the JNCC (in June/July 2001) but was accepted by Ministers at DEFRA and then formally submitted to the Commission in October 2001.
38. It is clearly unacceptable that the original citation, which the Review was plainly intended to supersede, should still be regarded as extant and determinative for the purposes of AA in 2015, some 14 years later, simply because Natural England has not got around to amending the paperwork. I find it impossible to see how, as a matter of law, the assemblage can properly be regarded as a qualifying feature for the purposes of AA, if on review the JNCC and Ministers have decided it is not, and this decision has been properly communicated to the EU. The competent authority for this purpose are the relevant Ministers, advised by JNCC, not Natural England.
39. It cannot in my view be correct to conduct the AA on the basis of a former qualifying feature which has been superseded and which no longer accords with revised selection guidelines. The assessment is not being, in that case, undertaken on the basis of up to date information and against up to date criteria. It may be noted that the 2001 review added species to the Annex I list (Peregrine Falcon and Short-Eared Owl) and it would clearly be wrong to disregard those species because of a delay on the part of Natural England in regularising its own records.
40. Accordingly, the presence of Curlew and Lapwing as found in the 2013 survey on land outside the SPA is of no legal or ecological relevance to the assessment of impacts on the SPA.
41. Further, it is also apparent from the JNCC website⁸ that the 2001 Review in fact amalgamated the two phases of designation of the South Pennine Moors SPA into a single SPA, which shows four qualifying Article 4.1/Annex I species (Golden Plover,

⁸ <http://jncc.defra.gov.uk/page-2001>

Merlin, Peregrine and Short-Eared Owl) and a single Article 4.2 species (Dunlin). This raises the question of whether the AA is correct to disaggregate the Phase 1 and Phase 2 SPAs in the way it does. Plainly the assessment of the significance of effects will depend upon the size of the SPA being considered, so this seems a fundamentally important point.

42. Accordingly there are fundamental legal questions as to the correct basis of the AA in terms of qualifying features and the size of the SPA to be considered. It appears to me that the AA is currently premised on a serious mistake of law as to the relevant qualifying features of the SPA. It has therefore not had proper regard to the constitutive characteristics of the SPA (see Sweetman, above).

Conservation objectives

43. There is also an issue as to the Conservation Objectives for the SPA and how they are treated in the AA. The COs should be a critically important part of the AA, which is to be made in terms of the implications for the site's integrity in the light of the conservation objectives of the site (Article 6.3).
44. The COs listed for the Phase 2 SPA at paras. 3.6.5 and 3.6.6 of the AA refer to an overriding CO of ensuring the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Birds Directive. It then sets out five objectives at para. 3.6.6, which are to maintain or restore:
1. Extent and distribution of the habitats of the qualifying features.
 2. Structure and function of the habitats of the qualifying features.
 3. Supporting processes on which the habitats rely of the qualifying features rely.
 4. Populations of the qualifying features.
 5. Distribution of the qualifying features within the site.
45. As an initial observation, the COs are not accurately transposed when compared to the NE website. The NE website makes clear that the 5 objectives listed above are the means

by which the overarching objective is to be delivered, whereas the AA appears to suggest that the overarching objective is a stand-alone objective.

46. More fundamentally, the COs should provide the framework for the AA and the benchmark against which the potential effect on integrity is tested. However, when the actual AA is considered, the COs are not adequately addressed. They are not featured at all in Chapter 5 dealing with “Impact Pathways” where the importance of off-site wet meadows and in bye-land is emphasised, but is not judged by reference to the COs. So for example in Section 5.2 (Loss of Supporting Habitat) the survey results for birds are mapped by reference to the SHLAA sites, but no attempt is made to consider the implications of this for the COs.
47. The approach at present adopted is described as “precautionary” and “based on an assessment of carrying capacity, using the available evidence from bird and habitat surveys and appropriate additional monitoring” which it says is needed to safeguard supporting habitats as losses of feeding areas could otherwise have an impact on bird populations for which the SPA has been classified, particularly Golden Plover (para. 6.4.2). This in my view fails to undertake the AA in the light of the SPA’s specific COs.
48. While the COs are referenced in Chapter 7 on impacts assessment at para. 7.2, there is no forensic assessment of the evidence in relation to them. The approach is simply that development which impinges on areas where Annex I (Article 4.1) or migratory (Article 4.2) birds have been identified or where habitat judged as relevant has been identified during the 2013 surveys may result in a loss of habitat and consequent decline in population and range of these species (para. 7.2.2). There is then an immediate leap to Policy SC8 and Policy HO3, but without addressing (a) the implications of such development for the COs; (b) the implications for the integrity of the SPA; and (c) the ability to mitigate such effects, if significant.

Integrity

49. More specifically, the AA fails in my view to provide an adequate AA as to the impacts on the breeding bird assemblage and how this feeds in to any effects on the integrity of the site. Assuming, despite the error of law set out above, that the breeding bird assemblage is in fact a qualifying feature, the relevant potential effect is loss of feeding habitat outside the SPA. That should involve as a starting point a proper investigation as to which species within the assemblage are using the feeding habitat which would be lost or affected. I note that the AA has not followed this approach. The AA instead regards, as material to the assessment, sightings of birds irrespective of whether they are feeding or not and locations with habitat types regarded as relevant for feeding birds even when no bird has been seen in that location. This is not an appropriate approach.
50. The data underlying the AA identifies Curlew and Lapwing as the only species present on the SHLAA sites. The questions then are how far the loss of the feeding habitat would impact on the population of these species breeding within the SPA, secondly how far that impact would in turn impact on the population of the assemblage as a whole across the SPA, and thirdly to what extent the impact on the population of the assemblage as a whole would affect adversely the integrity of the SPA.
51. The AA is however fatally flawed as it does not distinguish between birds which are breeding on the SHLAA sites and those which are breeding within the SPA and are feeding on the SHLAA sites. As an example Baker Consultants' own survey work from 2014 shows that all the Curlew on CEG's site in Burley (BU/001) were in fact breeding. Hence they cannot be part of the breeding bird assemblage of the SPA. Therefore the AA cannot answer even the first fundamental question of impact on the specific species forming part of the breeding bird assemblage. It is clear that the AA has made a serious mistake on this point, as para. 5.2.20 comments that some of the birds surveyed "may be breeding outside of the SPA boundary but contribute to the larger SPA meta-population." This is very confused and unsubstantiated thinking. If birds are breeding outside the SPA they cannot possibly contribute to an assemblage which is defined as birds breeding within the SPA.

52. Even assuming it was relevant to consider the impacts on the limited numbers of Curlew and Lapwing found outside the SPA on the SHLAA sites, the AA does not explain how these impacts would affect the total assemblage of breeding birds. Rather the approach seems to be to treat each species which the AA deems to be part of the assemblage as if it were a qualifying species in its own right. That is a flawed approach in law. The impact (if any) on a single species plainly does not translate into, or equate to, an impact on the assemblage of all relevant species breeding within the SPA. What is relevant is the ability of the assemblage to sustain itself as a population breeding within the SPA. There is no reasoning whatsoever within the AA on this fundamental point.
53. There is in my view a further lack of any real analysis on the point of how any impact on birds present on the SHLAA sites would have implications for the integrity of the SPA. Rather there is an assumption that off-site wetland and in by-land areas are, of themselves, important to the maintenance of populations of Annex I and migratory/breeding bird assemblage species. There is not, so far as I can see, any hard evidence to back up that assumption. In any event the test is not the “importance” of land, but whether its loss would significantly affect the integrity of the SPA, and then if so, whether such effects could be mitigated.
54. There are further problems too. The analysis of the AA assumes that birds within 400m of a SHLAA site would be affected. However the 2013 bird surveys clearly show that birds are present within 400m of the existing urban development.
55. Also there has been no analysis of the total resource of supporting habitat that is available elsewhere away from SHLAA sites and whether the loss of the SHLAAs would amount to an adverse effect upon integrity, given the potential carrying capacity of the land elsewhere. These are in my view fundamental defects.
56. Therefore, to recap, the stages should be: (1) what is the effect on the species forming part of the qualifying assemblage (assuming for these purposes that it is in fact a qualifying feature, which I do not believe is correct); (2) how does that, if at all, translate

into an effect on the assemblage; and (3) how does that, if at all, translate into an effect on the integrity of the SPA. The AA singularly fails in my opinion, to address properly any of those stages. It assumes without evidence an impact on the species (without examining whether they are in fact breeding within the SPA so as to be part of the assemblage); it fails to address at all how effects on a limited number of members of a species would impact on the assemblage, simply assuming there would be such an effect; and it entirely fails to grapple with the ultimate and decisive test of impact on integrity of the SPA.

Failure to consider other acceptable types of policy

57. Thus the policies precluding development (SC8 and HO3) are in my view not necessary to ensure that development will not have an adverse effects on the SPA's integrity, and have not been demonstrated to be so by the AA.
58. It would be perfectly acceptable to have a policy which would require AA at the specific project level and provide that permission would not be granted in the absence of a favourable assessment.
59. By way of example, in the recent case of Abbotskerswell Parish Council v. Teignbridge District Council [2014] EWHC 4166 (Admin) the Planning Court accepted as lawful local plan policies which required development likely to have a significant effect on a SAC to be subject to AA and provided that it would not be permitted unless adverse effects could be fully mitigated (see para. 67). Bespoke mitigation at project level was to be considered at that later stage. This makes clear that it is acceptable to leave the full assessment, including the consideration of mitigating measures, to be assessed at the project stage, when the scope and details of the project would be known, as compared with the Local Plan, which is a high-level strategic document, setting out broad allocation policies, but without project detail (see para. 72)
60. In my view the restrictive policies in SC8 and the related HO3 are not justified by a sound AA.

61. The unnecessarily restrictive nature of the policies is highlighted by the fact that the Council recognises the need to boost the supply of land for development, in particular housing, and that one of the biggest challenges for the CS is to plan to meet the housing needs of a rapidly growing population (see City of Bradford MDC, Background Paper: 1. Overview (Updated), December 2014, paras. 4.3 and 4.15).
62. Background Paper: 1 (para. 9.9) accepts that whilst revisions to the total district wide housing target and updated evidence in the SHLAA might have had some effect on the Wharfedale settlement policies, the main driver was the potential direct and indirect impacts of the CS housing proposals on the SPA and its 2.5 km buffer zone.
63. It appears from Background Paper: 1 (paras. 9.16-9.17 and Table 2) that bird surveys in Spring and Summer 2013 were mapped onto proposed settlements which were considered deliverable within the 2.5 km buffer zone and discounting those SHLAA sites where survey work had found bird sightings or habitats regarded as relevant. It goes on to say that if the precautionary principle was followed, then there was a clear need to reduce housing targets in three settlements (Ilkley, Burley and Silsden) since the discounting of sites which coincided with bird recordings or habitats resulted in settlement capacities lower than the CSFED housing targets. So for Burley, the SHLAA capacity of deliverable or developable sites showed a capacity of 1,094 dwellings. Three SHLAA sites were affected by birds or habitats, and the Policy HO3 target was reduced from 500 in the CSFED to 200 in the CSPD, a 60% reduction. This in my view is not a reduction supported by any sensible or logical basis, and I understand that representations will be made to that effect.
64. In my view this is not an approach which is justified by the terms of the Birds and Habitats Directives, or by the AA. I also note that NE in its letter of 1 August 2014 p. 2/3) (justifying adverse effects), while advising that the HRA should provide sufficient confidence that housing targets can be delivered without adverse effects on site integrity, suggested that the Council should consider whether it is possible to identify sites that are (a) unlikely to be deliverable and should be avoided (where significant numbers are

recorded on-site or are likely to be disturbed off-site); (b) deliverable with mitigation (either site-specific or strategic); (c) deliverable without mitigation. The AA has in my view not followed this approach, despite the comment that it is considered “broadly to conform” with the approach suggested by NE (para. 6.3.8). There has been a very significant detrimental impact on the Burley site’s status simply on the basis of sighting one or two birds, which is contrary to the advice of Natural England expressly cautioning against removing land allocations for housing on the basis of recording single birds. The same is true of SHLAA sites generally, where the approach has been to discount SHLAA sites where there were any bird sightings on the 2013 survey, rather than considering whether the numbers of birds sighted were significant in terms of overall assemblage numbers.

Summary

65. In summary therefore the purported AA is seriously defective on a number of grounds, which I have set out in this Further Opinion. The key points are:

- (1) It proceeds on a fundamental mistake of law as to the qualifying features of the SPA by ignoring the fact that the original features were reviewed in 2001 and replaced by revised features, selected in accordance with revised criteria by JNCC, approved by Ministers as the competent authority and notified to the EU Commission under the Birds Directive. The revised features, in accordance with which the AA should have been undertaken do not include a breeding bird assemblage. Hence the whole exercise has been undertaken on a false premise.
- (2) The AA has failed to be carried out properly in the light of the conservation objectives for the SPA. It has failed to address them in any meaningful way.
- (3) Assuming, contrary to point (1) above, that the breeding bird assemblage is lawfully to be regarded as a qualifying feature of the SPA, the AA has singularly failed to appreciate, or has ignored, the fact that the assemblage is of bird

breeding within the SPA, and does not include birds of that species breeding outside the SPA. By treating all birds sighted in SHLAA sites (even if breeding there and not within the SPA) as relevant, the AA is not assessing impact on the assemblage correctly.

- (4) Even assuming that the birds found on the SHLAA sites including Burley (limited numbers of Curlew and Lapwing) are to be regarded as part of the breeding bird assemblage, there has been no effort to address how any impact on these birds would translate into an impact on the assemblage, as a percentage of total assemblage numbers or otherwise, or how such impacts would affect the ability of the breeding assemblage to sustain itself.
- (5) The process of assessment is also flawed because it considers only feeding habitat in terms of the SHLAA sites and ignores both the total resource of supporting habitat and the potential for improving or adding to that habitat (if found to be necessary) by way of mitigation.
- (6) It follows that the key test of whether there could or would be an adverse effect on the integrity of the SPA (which is the ultimate legal test) is not answered by the AA as it stands.
- (7) The AA therefore does not support the highly restrictive policies applying to the Burley site in the CS. No consideration has been given to whether such impacts as there may be could be mitigated, or as to whether a less restrictive policy could provide adequate protection to the SPA's integrity, whilst boosting the supply of housing.
- (8) The HRA conducted to date fails to comply with the requirements of the Habitats Directive. This aspect of the CS is therefore, in my opinion, unsound.

A handwritten signature in black ink, appearing to read 'Stromans', with a horizontal line underneath.

STEPHEN TROMANS QC
39 Essex Street
London, WC2R 3AT

13 February 2015

ANNEX 1

In the matter of

CEG Land Promotions Limited

**The City of Bradford District Core Strategy
Appropriate Assessment under the Conservation of Habitats and Species
Regulations 2010 (as amended)**

OPINION

1. I am instructed by Freeths LLP to provide this Opinion for CEG Land Promotions Ltd (“CEG”) in respect of the proposed City of Bradford Metropolitan District Council Core Strategy Draft Document (“CS”) and in particular the appropriate assessment (“AA”) undertaken of that document, in purported pursuance to the Conservation of Habitats and Species Regulations 2010 (as amended) (“2010 Regulations”).
2. CEG is promoting a site for proposed development in the area of Burley in Wharfedale (“Site”). The Site is currently within the Green Belt and CEG is seeking its removal from the Green Belt and its allocation for residential development in order to meet the housing needs of the District.

The Core Strategy

3. In the previous draft of the CS (the Further Engagement Draft, published in October 2011) the Site was identified as a Local Growth Centre within the settlement hierarchy: reference was made to accommodating up to 500 new homes at Burley with associated community facilities. In the latest version, the Publication Draft issued in February 2014, the Site was demoted to a Local Service Centre, with reference to 200 new homes at Burley, “to meet local need through redevelopment of sites within the settlement and

some local green belt changes". This is reflected in Policy HO3, showing the baseline distribution of housing requirement.

4. The explanation for this change is at para. 5.3.52 of the CS Publication Draft, where reference is made to the AA of the plan undertaken by consultants Urban Edge and a 2.5 km buffer zone around the South Pennine Moors SAC/SPA boundary. Policy SC8 of the CS Publication Draft provides that development will not be permitted where it would be likely to lead to an adverse effect upon the integrity, directly or indirectly, of the South Pennine Moors SAC/SPA and that to ensure these sites are not harmed, a number of zones have been identified. Zone A is a policy that no development involving a net increase in dwellings would be permitted within a suitable buffer around the SAC/SPA unless, as an exception, the form of residential development would not have an adverse impact on the SAC/SPA's integrity. Zone Bi is the most controversial area so far as CEG is concerned. The proposed policy provides that between 400m and 2.5 km of the SAC/SPA boundary a precautionary approach will be taken to the identification of potential Greenfield sites for development based on the assessment of carrying capacity using available evidence from bird surveys and additional monitoring. The underlying principle will be to avoid loss or degradation of areas outside the SAC/SPA that are important to the integrity of the site and that sufficient foraging resources continue to be available, in order to ensure the survival of bird populations. Zone Bii applies between 2.5km and 7km and in this area the policy states that appropriate avoidance or mitigation measures should allow development to take place.

5. Para. 3.115 explains that this policy is intended to take a precautionary approach to what it terms "supporting habitats", based on a literature review in the HRA report which suggests that many SPA/typical species travel as far as 2.5 km from the SPA/SAC boundary to forage. The intention is therefore to avoid direct habitat loss or disturbance of species within this "supporting habitat management zone". This has led to a reappraisal of the distribution of development within this zone.

The Screening Assessment

6. A screening assessment under the 2010 Regulations dealing in combination with the CS and the Bradford Waste Management DPD was prepared by Environ in June 2012. This concluded that there were risks of likely significant effects or uncertainty in relation to a number of sites including the South Pennines SAC/SPA. Thus, in the view of the authors, AA of the plans was required.

The 2013 AA

7. An AA Report was produced on the Further Engagement draft of the CS in May 2013 although was curiously backdated to October 2011. At para. 3.7.1, it suggested that in order to assess impacts of the CS on the SAC it was necessary to identify a group of "typical species". It came up with a "non-exhaustive" list which was to be considered as indicator species of good condition, having in that respect a similar role to species identified by Natural England in its Common Standards Monitoring approach to monitoring habitat condition. It identified at Table 3.2 "some of the typical species" of the Annex 1 habitat types present within the SAC. These included the following bird species: Merlin, Short-eared owl, Golden plover, Twite, Red grouse, Skylark, Meadow pipit, Dunlin, and Curlew.
8. The AA also identified (3.2.3 and 3.2.4) the species which qualified the SPA for classification under Articles 4.1 and 4.2 of the Wild Birds Directive: these being Golden plover, Merlin, Peregrine falcon, Short-eared owl and Dunlin. It is noted, however, that the conservation objectives dated 7 July 2014 on Natural England's website for the South Pennine Moors Phase 2 SPA gives the individual bird species qualifying features as Merlin, Golden plover, Dunlin only (and it is further noted that only Merlin and Golden plover were the individual bird species qualifying features listed in the original citation dated 3 September 1998 and signed by the Secretary of State).
9. Section 6.4.1 considers supporting habitat, and says that development that significantly impinges, either directly or indirectly, on in-by fields used by typical species of the Annex 1 habitats "...could have an adverse effect on the conservation status of these

species, and hence the habitat for which the SAC has been selected". By way of example, it is stated that Twite are known to forage in seed rich grassland up to 2.5 km from their nest sites. As well as in-bye land, reference is made to species rich agriculturally unimproved grassland as potentially supporting other species of birds (6.4.3).

10. Applying the assessment to the SAC/SPA it is concluded for the SPA that there is "great potential for impacts to bird species foraging offsite, particularly within around 2 km of the site" (7.2). In relation to the SAC it is concluded that there is "potential for impacts to typical bird species foraging offsite, particularly within around 2.5 km of the site" (7.3). In the case of both the SPA and SAC it is concluded that "At the present time it cannot be concluded that there will not be adverse effects on the ecological integrity of the [SAC/SPA]". It should of course be noted that it is not simply the potential effect on foraging bird species of the proposed plan policies which is considered, but also more direct effects such as increased air emissions, recreation and dog-walking, cat predation, fire, fly-tipping, etc.
11. The interim recommendations for gathering further evidence refer to the 2012 South Pennine Moorland Fringe Bird Survey as being expected to provide a "timely insight" on how the SPA birds use land within 1 km of the SPA, but also suggests that additional bird surveys should be carried out during spring/summer 2013 to establish how SPA/typical species may utilise suitable land within 2.5 km, in order that regularly protected areas may be protected from development and associated impacts (8.2.3 and 8.2.4).
12. It is also suggested that the overall level of housing proposed is such that adverse effects on the SAC and SPA may not be capable of being avoided and mitigated. It is stated that, using Rombalds and Ilkley Moors as a case in point, Burley in Wharfedale and nearby settlements would receive a combined total of 11,550 new dwellings over the plan period under the Further Engagement Draft Core Strategy (8.3.1). It says: "From the data that is available to date, it is clear that residential allocations should ideally be located more than 2.5 km from the SAC/SPA boundary" (8.3.2) and an impression of the

provisional spatial avoidance strategy that could be deployed is given at Fig. 8.1, which covers the whole of Burley.

The 2014 AA

13. In February 2014 the AA Report for the Publication Draft CS was published. As with the previous AA, this included a “non-exhaustive” list of Typical Species of the SAC (see 3.7.1, 3.7.2 and Table 3.2).
14. It considered bird survey results within the 2.5 km area at 5.2.12 – 5.2.31. There appear to have been few or no records of many species. By far the most numerous species recorded was Curlew, most of which were within the 2.5 km area (5.2.18). However, Curlew is not a qualifying species for the South Pennine Moors SPA under Article 4.1 of the Wild Birds Directive (and in respect of the North Pennine Moors SPA, for which Curlew is a qualifying species under Article 4.1, the AA concluded that there would be no adverse effect on site integrity (7.6.13)). There were some records of Golden plover, which is an Article 4.1 qualifying SPA species, with 23 sightings within the 2.5 km area (5.2.12). There appear to have been no relevant sightings of Merlin or Dunlin (the other two named SPA qualifying species, based on the conservation objectives published by Natural England (“NE”) on 7 July 2014) (5.2.14 and 5.2.16).
15. NE’s conservation objectives dated 7 July 2014 for the South Pennine Moors SPA refer to a “breeding bird assemblage” as being a further qualifying feature of the South Pennine Moors SPA, but the objectives give no list of species making up this assemblage. The original citation dated 3 September 1998 referred to Curlew as being within the Article 4.2 Wild Birds Directive breeding bird assemblage. However it is noted that the 2001 JNCC review of SPAs removed the breeding bird assemblage from the qualifying features of the South Pennine Moors SPA (presumably because this was no longer justifiable) and instead replaced it with Dunlin¹. Indeed, consistent with the JNCC review, the AA 2013 and AA 2014 made no reference to any breeding bird assemblage as

¹ See <http://jncc.defra.gov.uk/default.aspx?page=2001>

being a qualifying feature of the SPA. Therefore I doubt the existence of any “breeding bird assemblage” as a current qualifying feature of the South Pennine Moors SPA.

16. There were also surveys of bird species within the sites identified through the SHLAA where development might potentially take place. The records were essentially of Curlew, with a few sightings of other non-qualifying species (5.2.34 and Table 5.3).
17. The AA notes that, in response to the recommendation in the previous iteration, the Council had used the findings of the bird and habitat surveys described above to review the proposed distribution of residential development among settlements within the 2.5km zone, with essentially a 50% reduction in the number of proposed houses at Burley and the demotion from a Local Growth Centre to a Local Service Centre (6.3.2).
18. It notes at 7.3.2 that it has not been possible to demonstrate with certainty that there will not be adverse effects on the ecological integrity of the SPA, but that the CS establishes a “reasonable and pragmatic strategy approach to reducing the risk of adverse effects” and that further work will be needed during preparation of the Allocations DPD to avoid the most sensitive sites (see also 7.5.2).
19. At para. 7.4.3, Policy SC8 is described as taking a precautionary approach to the review and identification of greenfield sites for development “based on an assessment of carrying capacity using the available evidence from bird and habitat surveys”.

Legal framework

20. The 2010 Regulations of course implement the Wild Birds and Habitats Directives, in particular in this case Articles 6(3) and 6(4) on AA. As the European case law refers to these articles it is more convenient to refer to them in this Opinion rather than the corresponding provisions of the Regulations. So far as is material, they provide, as is well-known, as follows:

3. Any plan or project not directly connected with or necessary to the management of the 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 and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

21. As is also well known, the case law on these provisions has laid down a number of glosses:

- (1) At the screening stage of deciding whether a plan is likely to have a significant effect on the European site, such a risk exists “if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned” (see Case C-127/02 Waddenzee para 44).
- (2) This question is linked to the conservation objectives of the site: “where a plan or project ... is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.” (see Case C-127/02 Waddenzee para 49) (emphasis added).
- (3) In addressing the likelihood of significant effects, mitigating measures which form part of the plan or project should be taken into account (see Hart District Council v. SSCLG [2008] EWHC 1204).
- (4) If a breach of Article 6(3) is alleged, the claimant who alleges there was a risk that has been overlooked must produce credible evidence that there was a real, rather than a hypothetical risk (see R (Boggis) v. Natural England [2009] EWCA Civ 1061).
- (5) The AA itself implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives

must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed" (see Case C-127/02 Waddenzee paras 54 and 61).

(6) On the issue of the integrity of the site:

"54. It is the essential unity of the site that is relevant. To put it another way, the notion of 'integrity' must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

55. The integrity that is to be preserved must be that 'of the site'. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat.

56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is 'why was *this particular site* designated and what are its conservation objectives?'"

(see Case C-258/11 Sweetman, AGO, paras. 54-56, approved by the Court (emphasis added)). Para. 54 picks up the definition of "integrity" in Circular 6/1995, which had been accepted by Lord Nimmo Smith in Re the Petition of WWF-UK and RSPB [1999] CMLR 1021.

(7) Further, on the integrity of the site, in Case C-251/12 TC Briels, AG Sharpston said (para. 41) in a formulation approved by the Court (emphasis supplied):

I can agree that the 'integrity of the site' should be viewed as a whole in the sense that it is its enduring essential character which must be considered, rather than insignificant and transient fluctuations in quality or area of a particular habitat. However, it seems to me that long-term deterioration of an existing natural habitat is something which necessarily concerns enduring essential character rather than insignificant and transient fluctuations.

(8) In Briels, the Court formulated the requirements of AA as follows (emphasis added):

- 26 It is to be noted first of all that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Case C-127/02 *Waddervereniging et Vogelbeschermingsvereniging* EU:C:2004:482, paragraphs 57 and 58, and *Sweetman and Others* EU:C:2013:220, paragraph 41).
- 27 The assessment carried out under Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to that effect, *Sweetman and Others* EU:C:2013:220, paragraph 44 and the case-law cited).
- 28 Consequently, the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.
- 29 However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).

Conservation objectives

22. It is therefore obviously relevant to consider the conservation objectives for the SPA and SAC when looking at the AA.
23. For the SAC, the qualifying features are habitats types, not species. The objective (as set out in NE's conservation objectives for the SAC) is to ensure that the integrity of the site is maintained or restored and to ensure that the site contributes to achieving the favourable conservation status of its qualifying features, by maintaining or restoring:
- The extent and distribution of the qualifying natural habitats

- The structure and function (including typical species) of the qualifying natural habitats
 - The supporting processes on which the qualifying features rely.
24. For the SPA, the NE conservation objectives dated 7 July 2014 state that the qualifying features are Merlin, Golden plover and Dunlin (all breeding) plus a breeding bird assemblage. The conservation objectives do not name the species making up the assemblage. Comment has already been provided above on the anomalies and confusion linked to the qualifying features of this SPA. The objective (as set out in NE's conservation objectives for the SPA) is to ensure that the integrity of the site is maintained or restored and that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:
- The extent and distribution of the habitats of the qualifying features
 - The structure and distribution of the habitats of the qualifying features
 - The supporting processes on which the habitats of the qualifying features rely
 - The population of each of the qualifying features
 - The distribution of the qualifying features within the site.
25. NE's conservation objectives for the SPA do not refer to "typical species" for the simple reason that the Wild Birds Directive is concerned with species and not habitats, whereas the Habitats Directive is concerned with habitats which host typical species, the condition of which may be relevant to the condition of the habitat.

Review of the adequacy of the AA

26. The AA undertaken for the local planning authority has been reviewed for CEG by Andrew Baker of Baker Consultants, with a legal review by Penny Simpson of Freeths LLP. It forms Appendix 3 to the representations on the CS submitted on behalf of CEG on 31 March 2014.
27. As is clear from the summary above, the 2013 AA acknowledged serious gaps in the data necessary to undertake AA and recommended further work to collect data. The review at Appendix 3 criticises the data on which the 2014 AA was based as inadequate. In particular there is a lack of evidence as to recreational impacts (see paras 57-63), the

effects of dogs, trampling and erosion, urban edge effects, fires, cat predation and urbanised avifauna, all of which have been found to be capable of affecting integrity in the case of lowland heaths such as Thames Basin and Dorset (para. 64).

28. In this context my instructing solicitors recently made a Freedom of Information Act request to City of Bradford Metropolitan District Council requesting correspondence as between NE and the Council in relation to the Core Strategy. Since drafting this opinion my instructing solicitor has received the Council's response and in the little time available I have had the opportunity to consider it only briefly at this stage, although I note that my instructing solicitor will be considering the response in more detail in due course. It is very surprising in my view to see in the response important correspondence as between NE and the Council, relating to the AA, which has not previously been made publically available. In my brief review I have noted that NE's letter to City of Bradford Metropolitan District Council dated 31 March 2014 demonstrates that NE is also very concerned about the absence of data from the AA, in relation specifically to visitor surveys. I make reference to the NE correspondence in the following part of my opinion, as it seems clearly to support and confirm the views I had formed when drafting the opinion before having seen it.

29. I agree with NE's criticism of the AA process and its concern as to the lack of underpinning data. It is hard to find in either the 2013 or 2014 AA any clear consideration of the relevant pathways for impacts, the projected scale and effect of those impacts, and consideration of whether they would affect the integrity of the SPA/SAC, which is the essential test.

30. Taking a precautionary approach does not in my view justify what really amounts to no more than speculation as to possible effects. For example the discussion at para. 7.2.17 of the 2014 AA (to take just one example): "There is a risk of wide ranging cats reaching Rombalds Moor/Ilkley Moor if green field development within Wharfedale or Airedale is permitted within close proximity to the SPA boundary. This could have localised impacts on the population and range of SPA birds."

31. Further, as the review at Appendix 3 points out, it is not legitimate to extrapolate from heathlands such as Thames Basin to the Pennine Moors, which are very different habitats and are used by visitors in very different ways.
32. I therefore agree with the criticism of Andrew Baker and Penny Simpson and indeed with the criticisms of NE. The AA does not in my view meet the standard required by the CJEU in Briels, cited above: “[the AA] cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.”
33. In addition, it is not permissible to extrapolate from other sites – according to Waddenzee, para. 49, again cited above, “The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.”

Treatment of typical species

34. The Appendix 3 review cogently criticises the approach of the 2013 and 2014 AA to “typical species”. I agree with those criticisms. The AA’s approach is in my view mistaken in law. I also note from my brief review of the Council’s Freedom of Information response that NE’s clear and well presented letter dated 31 March 2014 to the Council is also in agreement with these criticisms.
35. Essentially any justification for the 2.5 km zone which is now embodied in Policy SC8 of the CS Publication Draft can only be found in the assumption that “typical species” of birds use by-meadows or unimproved grassland within that zone for feeding and foraging. The only species identified in the surveys using such land in potentially appreciable numbers appear to be Curlew, which may be a typical species of the SAC

but, as is stated in paragraph 5.2.17 of the AA 2014, is not a species listed specifically as a qualifying feature of either the SAC or SPA.

36. In my view the correct approach to typical species should be clear:

- (1) For the SPA the concern is with the individually listed qualifying species and (only if relevant, which I doubt based on the position of JNCC as described above) any qualifying breeding bird assemblage. They could in principle be impacted by loss of feeding areas outside the SPA, either by direct loss of such areas or by development which causes disturbance for birds using those areas. The question would then be whether the effect on the individual qualifying species or on any relevant assemblage is such as to adversely affect the integrity of the site in the sense explained above of its continued wholeness and soundness. The populations of the qualifying species within the site where known would be relevant, but it does not of course follow that any change would be an adverse effect on integrity of the site. Furthermore, in relation to assessing impacts, a distinction must be made as between the individually listed qualifying species and any breeding bird assemblage if relevant (which I doubt). In relation to the latter (in contrast to the former) the assessment should concern itself with impacts on the assortment of species making up the assemblage. Consistent with this, I note that NE has stated in its letter dated 1 August 2014 to the Council that caution should be exercised against concluding any adverse impact or risk of adverse impact on site integrity on the basis that a single assemblage species was recorded.

- (2) For the SAC the concern is with the qualifying habitat types. Offsite development in the 2.5 km zone would not of course affect the SAC directly but might affect its typical species if they forage off site. The typical species are in my view relevant as components of the habitat. The question of integrity relates to the habitat, not the typical species. If the habitat retains its ability to support the typical species its integrity is not affected. The concern is with the integrity of the qualifying habitat in

terms of its functioning and structure, not with what may happen to a typical species outside the SAC.

(3) This accords with the SAC objective in this case: to maintain the structure and function (including typical species) of the qualifying habitats. It is not to maintain the populations of the typical species.

37. I therefore agree with the conclusions in the Appendix 3 review at paras. 47-53 that the hypothesis that possible effects on the feeding grounds of typical but non-qualifying bird species outside the SAC could have an effect on the integrity of the SAC is misguided and wrong in law. NE is clearly of the same opinion.

Justification for Policy SC8

38. The Appendix 3 review concludes that the AA does not justify the restrictive policy on development at SC8, or the consequent reduction in allocated housing numbers within the 2 km zone. The NE letter to the Council dated 31 March 2014 makes this point too.

39. I agree with those criticisms. As discussed above, in my view the AA does not have a sound evidence base and is legally flawed in the approach it takes to typical species. There is however also another point, which the Appendix 3 review picks up. The 2013 AA acknowledged the paucity of data on potential effects and suggested further surveys. In the anticipation of those surveys it suggested a possible approach to mitigation, namely what became Policy SC8 and the consequent scaling back of housing numbers.

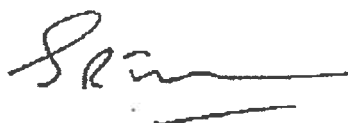
40. The Publication Draft of the CS in 2014 was produced with the benefit of such further data as had emerged from those surveys in 2013. Nevertheless it simply adopted the restrictive policy approach canvassed in the 2013 AA, despite the apparent lack of any real evidence of possible impacts on integrity from that data. There is in fact no sound evidence to support that restrictive approach.

41. Nor is there anything to suggest that the local planning authority considered whether, in the light of the available data, the restrictive policy was justified, or whether a less restrictive policy would have satisfied the “no adverse effect on site integrity” test. The Council should have considered on the basis of sound evidence, for example, whether housing locations exist which are deliverable without mitigation or indeed which are deliverable with mitigation, before concluding that they are not deliverable at all. An obvious way of satisfying the “no adverse effect on site integrity” test would have been simply a policy that any development likely to have a significant effect on a European Site will be subject to AA and that permission will be refused if it cannot be ascertained that there will not be adverse effects on integrity and the subsequent derogation tests cannot be met. That could, if appropriate, be stated to apply to a particular zone or area, but would not have to be. It would ensure that the CS could not through its policies have an adverse effect on integrity. Combined with a robust AA, this would be a perfectly acceptable way of proceeding. Indeed Policy EN2 in the draft CS is largely to that effect. I note that NE’s letter to the Council dated 31 March 2014 has suggested policy wording which is significantly less restrictive than SC8. But even this suggestion is against a background of an AA which is deficient in a number of respects, as NE explains in its letter. As such this wording would have to be reviewed thoroughly to assess its suitability and appropriateness once those deficiencies have been fully rectified.

42. The task of the AA is to establish whether the integrity test is passed. The Directives are not concerned as such with strictness of policies, provided that they meet this test. However, as a matter of domestic planning policy, restrictive policies should be justified by evidence identifying what harm they will prevent. Whilst according to para. 119 of the NPPF the general presumption in favour of sustainable development in para. 14 does not apply to development requiring AA, it is clear that local plans should be based on adequate, up-to-date and relevant evidence about economic, social and environmental characteristics of the area (para. 158). Plans should be positive in seeking to meet objectively assessed requirements, and should be justified, i.e. “the most appropriate

strategy, when considered against the reasonable alternatives, based on proportionate evidence" (para. 182).

43. I would regard this as indicating clearly that a blanket policy restricting and reducing housing or other development within a specified zone should not be imposed without proper evidential justification, particularly if a less restrictive policy would meet EU requirements. In other words if a local planning authority is going to go further than is necessary to ensure compliance with Article 6(3) Habitats Directive then it should justify its approach on the basis of sound evidence.
44. The fact that a plan is subject to AA does not in my view change that requirement. This is demonstrated by the PINS Guidance on Soundness (Examining Development Plan Documents: Soundness Guidance (August 2009)). This makes clear that there are two distinct stages: legal compliance and soundness. The AA process concerns legal compliance. Soundness is concerned with whether a plan is justified, effective and consistent with national policy. In particular, to be justified it must be founded on a robust and credible evidence base and the choices made must be backed up by facts. It must also be demonstrable that the content is justified by evidence, and that assumptions are reasonable and justified. It must be the most appropriate strategy when considered against alternatives. There should be a clear audit trail showing how and why the preferred strategy and approach were arrived at.
45. In my view the restrictive policies in SC8 and the related HO3 do not meet these tests, for the reasons explained above. I note that NE is also of the view that HO3 may be challenged as unsound (see its letter to City of Bradford MDC dated 31 March 2014).



STEPHEN TROMANS QC
39 Essex Street
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14 November 2014

In the matter of

CEG Land Promotions Limited

**The City of Bradford District Core
Strategy**

**Appropriate Assessment under the
Conservation of Habitats and Species
Regulations 2010 (as amended)**

OPINION

**STEPHEN TROMANS QC
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Ms Penny Simpson**

ANNEX 2

Date: 31 March 2014
Our ref: 7206/112721



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BY EMAIL ONLY

Dear Sir/Madam

Planning consultation: Core Strategy – Publication Draft
Location: City of Bradford Metropolitan District

Thank you for your consultation on the above dated 17 February 2014 which was received by Natural England on the same day.

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.

Having reviewed the Publication Draft Core Strategy Natural England's opinion is that the Core Strategy is not supported by a robust Habitats Regulations Assessment or Sustainability Appraisal. These concerns relate to the impacts of the core strategy upon the South Pennine Moors Natura 2000 site, and the effectiveness and delivery of viable avoidance and mitigation measures.

Consequently in our view the plan has not been justified, may not be effective, and is not consistent with national planning policy.

Natural England also makes below representations on thematic policies which should deliver environmental protection and enhancement. These representations suggest amendments which ensure greater consistency with national planning policy and better environmental outcomes.

Habitats Regulations Assessment

Prior to this consultation, Natural England provided considerable advice to Bradford Council regarding the supporting Habitats Regulations Assessment (HRA). This advice focused on the potential indirect impacts of additional housing upon the South Pennine Moors Special Protection Area (SPA) and Special Area of Conservation (SAC) due to the loss of functionally linked land, urban edge effects and recreational disturbance and trampling of habitat.

Natural England has also provided advice on the Core Strategy's effects upon air quality, and the impact of wind turbines upon SPA birds (strikes and/or disturbance).

This pre-publication advice was intended to ensure that adverse effects upon integrity are avoided

or mitigated within the Core Strategy. This is required by regulation 102 of the Conservation of Habitats and Species Regulations 2010 (as amended).

Having reviewed the HRA of the Publication Draft Core Strategy, Natural England consider the screening of likely significant effects (Stage 1 of the HRA) is compliant with the EU Habitats Directives and national regulations.

Natural England is however concerned that the subsequent appropriate assessment (Stage 2), particularly the avoidance and mitigation measures, are not supported by sufficient evidence that they are justified, viable and deliverable. Without this evidence the Core Strategy's housing policies may be considered unsound.

Screening of Likely Significant Effects

Natural England concur with the HRA's initial screening that likely significant effects could not be ruled out as a result of the following impacts:

- loss of feeding habitat (functionally linked land);
- increased emissions to air from road; collision and displacement due to wind turbines;
- increased recreational impacts (trampling and disturbance);
- and urban edge effects.

These have been carried forward to the appropriate assessment.

Appropriate Assessment

Natural England considers the evidence supporting the assessment of the Core Strategy's likely impacts upon the moorland SPAs and SACs is comprehensive.

Natural England concurs with the appropriate assessment's conclusions that – with mitigation and further assessment of the subsequent allocations document – adverse effects upon the North Pennine Moors SPA and North Pennine Moors SAC can be avoided.

However, given the scale and distribution of development proposed in the Core Strategy and its proximity to the South Pennine Moors SPA and SAC, adverse effects upon their interest features are harder to mitigate and a clearer solution needs to be in place at this stage.

Natural England has previously expressed concerns that the loss of functionally linked land (feeding habitats beyond the SPA), recreational disturbance of SPA birds (on and off-site) and trampling of SAC habitat requires a robust assessment to determine the scale of impact and the effectiveness and deliverability of mitigation.

Loss of Functional Land – South Pennine Moors SPA

Natural England previously advised that due to evidence of feeding distances of Pennine moorland SPA birds beyond the site boundary (2.5km for Golden Plover), the HRA should include evidence that the housing targets for settlements within this distance can be delivered within the subsequent allocations development plan. If sufficient sites, without feeding habitat or evidence of SPA birds are not available, the Core Strategy's housing distribution may not be deliverable.

The publication draft has reduced the number of dwellings within Airedale and Wharfedale, this has been justified in terms of impacts on the SPA/SAC. The HRA however has not justified the redistribution of housing from settlements within Wharfedale and Airedale to Bradford. Policy HO3

may therefore be challenged as unsound.

Prior to publication Natural England advised that further bird and habitat surveys would indicate whether sufficient sites within 2.5km of the Natura 2000 site could be allocated. We welcome the inclusion of the 2013 bird and habitat surveys. Table 5.3 and Appendix III provide confidence that potential housing sites (identified in the SHLAA) can be allocated without the direct loss or disturbance to SPA birds. Given this conclusion, the redistribution of housing to avoid adverse effects on the SPA and SAC, does not appear justified.

The HRA has identified bird species which are typical to the South Pennine Moors SAC, these include Twite, Skylark, and Meadow Pipit. Wading birds (redshank and curlew, neither of which are SPA species) have also been surveyed to indicate important grassland sites for biodiversity and therefore of potential value to SPA birds. Whilst the inclusion of these birds within the surveys provide additional confidence that allocations will not adversely affect SPA birds (through loss of feeding habitat or prey for raptors), typical moorland SAC and SSSI bird species should not be used by themselves to discount allocations and reduce a settlement's housing or employment target. The existence of SPA birds should be the focus of the HRA; namely merlin, short eared owl, golden plover and dunlin.

Natural England does not agree with the assertion, in para 7.4.1, that the loss of typical bird species within the South Pennine Moorland SA, due to loss of feeding/functional habitat and recreational disturbance, would adversely affect SAC interest features (dry heath, wet heath, sessile oak woods, blanket bog and transition mires). These habitats are not dependent on the presence of these species. The effects on these species should be addressed through the SA, as these are SSSI interest features.

The publication draft has reduced development targets for settlements within 2.5km of the SPAs in order to avoid adverse effects. Given the low number of SPA birds identified on SHLAA sites (or neighbouring land) within 2.5km and the requirements of policy SC8 (Protecting the South Pennine Moors and their Zones of Influence), this may be unnecessary. . Prior to any reduction in housing targets, the HRA must prove that sufficient sites, to meet the previous settlement targets, cannot be allocated without adverse effects on integrity. Without this, any reduction may be challenged and found unsound. From the information provided to date, Natural England considers there to be sufficient availability of land and adequate mitigation safeguards proposed in the Core Strategy to provide confidence that sites can be delivered, without the need to reduce the housing target **in relation to the South Pennine Moors SPA.**

Whilst the survey data indicates that sufficient development sites may be allocated, given the inherent uncertainties where a higher tier plan is likely to affect mobile interest features (SPA birds), Policy SC8 part Bi provides further confidence that appropriate avoidance and mitigation measures are in place to ensure allocations can deliver the Core Strategy's development targets without significant losses of feeding habitat.

The data identifying SSSI bird interest features (Curlew and Twite) should inform the Sustainability Appraisal (SA). The SA should determine whether the distribution and scale of housing will adversely affect the SSSI and, in accordance with the mitigation hierarchy, ensure that sites that are likely to be used by SSSI interest features are avoided. If shown to be the most sustainable option any loss of significant areas favourable feeding habitat should be mitigated.

Recreational Disturbance and Trampling – South Pennine Moors SPA and South Pennine Moors SAC

Natural England welcomes the addition of further visitor survey data within the HRA. However full data analysis has not yet been undertaken of the 2013 visitor survey (this data should inform further

development of mitigation). Given this late stage in the plan making process, the absence of this analysis is a serious concern and Natural England is unable to concur with the findings of the HRA, especially the justification for and effectiveness of mitigation without having been consulted on the finalised analysis of results. Advice in relation to the information provided to date is provided below:

The 2000 and 2013 visitor surveys indicate that the majority (58%) of visitors use the Natura site regularly (weekly) for walking with or without dogs. The 2013 survey also indicates that the majority of residents within Bradford (75%) travelled approximately 5km by car to access the Natura 2000 site.

Due to the size of the Natura 2000 site however, the levels of recreational activity vary according to the site's proximity to neighbouring settlements and its accessibility (car access, parking and rights of way). Most notably, Rombalds Moor (including Ilkley Moor) were used more regularly than SPA and SAC moorland areas in the west of the Borough.

Whilst the detailed surveys of recreational activity within the South Pennine Moors have not yet been analysed (distances people walk into the site and where they go), the HRA has applied evidence collected for the southern lowland heaths and other empirical studies. These indicate that 50% of visitors could walk approximately 860m into a site¹ and potentially disturb birds nesting within 200m where routes are not paved. This distance is reduced to 50m where paving occurs².

This indicates that 68% of Rombalds Moor is likely to be disturbed. The bird surveys support this finding. Given the evidence available, Natural England concurs with the HRA's conclusion that there is significant potential for additional recreational disturbance and trampling of habitat as a result of the strategy's housing policies. Therefore adverse effects on the SPA cannot be ruled out and mitigation is required.

Policy SC8 sets out three methods of mitigating the effects of recreational disturbance which is generated within 7km of the SPA/SAC. These include additional natural greenspace to deflect pressure, access management measures, and habitat management and monitoring. These are standard approaches which have been employed elsewhere (most notably Thames Basins Heath). In order for the plan to comply with the Habitats Regulations, implementation strategies or supporting SPDs which deliver these measures should be referred to in the Core Strategy. Whilst these may not have been completed, confidence in the delivery of additional green space, access and site management measures is required to provide certainty that mitigation will prevent adverse effects.

The Council has recognised that further work needs to be undertaken to identify opportunities for new green space (paragraph 6.5.3). As part of this work, Bradford Council should consider whether existing green infrastructure or open space strategies provide a starting point for identifying opportunities for new or improved natural green space. The Core Strategy should ensure that green infrastructure is a priority within Airedale and Wharfedale Sub Areas (see advice below).

Management plans for the Natura 2000 sites may also provide evidence that opportunities for on-site mitigation measures exist and their cost.

Urban Edge Effects

Given the proximity of settlements to the South Pennine Moor SPA/SAC and the distribution of development proposed, Natural England concurs that adverse effects upon the Natura 2000 site as

¹ Mean distance of Dorset and Thames Basin Heaths, Ashdown Forest and Wealdon Heaths

² Finney SK, Pearce-Higgins JW & Yalden DW (2005): The effects of recreational disturbance on an upland breeding bird, the golden plover

a result of urban edge effects cannot be ruled out.

Policy S8 seeks to avoid such effects by restricting residential developments within 400m. This should not prevent the delivery of housing within the Borough as the bird and habitat surveys indicate that development sites outside 400m exist.

However in Ilkley sustainably located brownfield allocations which are within 400m of the SPA/SAC will require assessment of mitigation measures.

Sustainability Appraisal

Natural England considers the framework which underpins the Sustainability Appraisal (SA) compliant with the SEA Directive (2001/42/EC), Planning and Compulsory Purchase Act 2004, The Environmental Assessment of Plans and Programmes Regulations 2004, and DCLG's Practical guide to the Strategic Environmental Assessment Directive (2005).

The SA would however benefit from a clearer examination of alternatives. Whilst the Issue and Options Consultations in 2007 and 2008 would have provided alternatives, it is critical that the SA explain why the objectives and subsequent policies were chosen and others not.

There are a number of background papers, including two on housing and employment, the findings of which should be incorporated within the SA as these should inform the assessment of alternatives.

Suggested Amendments

The SA has identified a number of mitigation measures and amendments to the strategy (Table NTS3). Natural England welcome and support those amendments which would reduce the generation of waste in accordance with the waste hierarchy and PPS 10 (retained) and ensure impacts on biodiversity are considered within policy CS5 (Location of Development).

Habitats Regulations Assessment

Paragraph 1.3 (Habitats Regulations Assessment) refers to a Report to Inform Screening for Appropriate Assessment. This should be updated to reflect the conclusions of the screening assessment, the appropriate assessment and subsequent amendments to the strategy which avoid or mitigate adverse effects. The comprehensive bird, habitat and visitor survey work which underpins the HRA should also inform the SA.

Spatial Distribution (Policy HO3)

The appraisal of the core strategy spatial distribution should consider the bird and habitat surveys undertaken to support the HRA. These would indicate whether the distribution can be achieved without significant effects upon the bird interests of the South Pennine Moors SSSI (see HRA advice above). As a result the uncertainties within Table 5.4 may be resolved. Whilst it would appear that the Core Strategy is unlikely to result in the significant loss of feeding habitat for SPA birds, this is not the case for SSSI interest features, notably curlew, which were recorded widely across the survey area. This distribution reflects their preference for breeding sites within semi-improved areas adjacent the moors.

Paragraph 2.5.1 summarises the effects of development distribution. It refers to the proximity of Principle Towns to the South Pennine Moors SPA, SAC and SSSI as a significant consideration. Whilst the HRA addresses impacts on the SPA/SAC, the SA should determine whether harm to the SSSI is significant.

In accordance with paragraph 118 of the NPPF, any significant harm should then be weighed against the benefits of housing in these strategic locations.

Sub Area Policies

Unlike the assessment of the sub area policies for Wharfedale, the likely significant effects of Airedale sub area policies upon the South Pennine Moors SSSI is not considered within section 5.3.2. Given the proximity of Bingley, Keighley, Steeton, Eastburn and Silsden, this needs addressing within next iteration of the SA.

Monitoring

In addition to the effects on the interest features of the SPA and SACs, monitoring should also assess impacts on SSSI interest features. This can be done through changes to its unit conditions.

The protection and creation of priority habitats (formally BAP habitats) is also a potential indicator of the Core Strategy's positive ecological impacts. BAP targets are identified in Appendix A (protection and enhancement of hedgerow, in-bye land, upland oak and river habitats). These should be mirrored within SA indicators.

Assessment of Policies (Appendix D)

Policy SC4

The assessment of policy SC4 against SA objective 5 (conservation and enhancement of wildlife) refers to local sites. It should also consider impacts on SSSI interest features.

Policy SC8

The SA refers to zones around the SPA/SAC within which development is restricted (it also refers to exclusions zones elsewhere). This is incorrect, the 400m, 2.5km and 7km zones proposed within the Council's HRA are intended to ensure development can proceed whilst avoiding or mitigating their adverse effects. Natural England therefore advises that reference to 'exclusion zones' may be misleading and suggests that 'zones of influence' may be more appropriate.

Policy SC9

This policy would score positively if, as Natural England advises, it made specific requirements to incorporate biodiversity within new developments (see advice on policy SC9).

Policy AD1

The SA determines that policy AD1 will positively conserve and enhance wildlife (Objective 5). As it proposes urban extensions and the likely loss of greenfield sites, this achievement will be dependent on the allocations selected and the application of policies which seek to protect and enhance biodiversity. Until allocations are identified, its effects upon wildlife are likely to be uncertain.

Policy AD2

This policy would score positively against objective 5 if green infrastructure (including natural greenspace) were an infrastructure priority (see advice on policy AD2). Prioritising Green Infrastructure would also assist the delivery of climate change adaptation, recreation and health

objectives.

Policy WD2

See advice on AD2. Prioritising green infrastructure within Wharfedale will assist the delivery of biodiversity, climate change, health and recreational objectives.

Publication Core Strategy

Policy SC5

The SA suggests that policy SC5 (Location of Development) should refer to wildlife or habitats within the site selection criteria. The NPPF requires planning policies minimise effects of development upon wildlife through the mitigation hierarchy (avoid, mitigate, and as a last resort, compensate). Therefore the selection of allocations must consider the existence of nature conservation sites, priority habitats and priority species to ensure effects are avoided. Whilst biodiversity is a consideration when allocating brownfield sites, it is not clear how biodiversity is considered within categories 2 to 4.

Policy SC6

The HRA has identified new or improved natural green space (alongside access management) as mitigation measures to address increased recreational disturbance/trampling on the South Pennine Moors Natura 2000 site. Policy SC6 should reflect this as a sub-regional driver for green infrastructure. We advise that a fourth bullet should therefore be included; this could state:

“Mitigating the adverse effects of increased recreation upon the South Pennine Moors SPA/SAC.”

This could then be explained further within supporting text.

Whilst part b refers to the river corridors and South Pennine Moors as key green infrastructure, policy SC6 should explicitly refer to biodiversity/ecological networks. In accordance with NPPF paragraph 114 the Core Strategy should set out a strategic approach for the creation, protection, enhancement and management of networks of biodiversity as well as green infrastructure. Policy SC6 should also ensure that other biodiversity networks (identified through the BAP) are enhanced. These habitats include hedgerows, in-bye land, river corridors, and upland oak woodland.

This strategic approach would be delivered through the applications of policies SC9 and HO7 during the selection of allocations and determination of planning applications.

Policy SC8

Policy SC8 is required to avoid adverse effects upon the South Pennine Moors SPA and SAC. The zones and avoidance/mitigation measures have been identified through the HRA process and their inclusion within the plan is required to ensure the strategy complies with the EU Habitats Directives and national regulations.

Natural England believe this policy could be simplified. Instead of separating the policy between Zones A, Bi, Bii, and Bi and Bii, it could simply set out a policy for Zone A (up to 400m), Zone B (400 - 2.5km) and Zone C (or Bi) (400-7km). Developments/allocations within 2.5km will be within Zones B and C and therefore have to address both loss of functional land and recreational disturbance.

Zone C (or Bi) could usefully read:

“Zone C would apply between 400m and up to 7km of the South Pennine Moor SPA and SAC. Due to increased recreational disturbance and trampling of their interest features, residential

developments within Zone C will adversely affect the South Pennine Moor SPA and SAC. However appropriate mitigation measures should allow development to take place.

Within Zone C residential developments that result in a net increase of one or more dwellings will be required to contribute to:

- 1. The provision of additional natural greenspace and appropriate facilities to deflect pressure from moorland habitats and the long-term maintenance and management of that greenspace.*
- 2. The implementation of access management measures, which may include further provision of wardens, in order to reduce the impact of visitors*
- 3. A programme of habitat management and manipulation and subsequent monitoring and review of measures*

To mitigate impacts on European Sites due to the increase in population, an approach will be adopted within the XXX SPD. This will set out a mechanism for the calculation of the planning contribution."

The reference to an appropriate assessment under Zone Bii is not required, as proposals which accord with policy SC8 should not adversely affect site integrity.

As delivery mechanisms have not been identified or assessed through the HRA, Natural England advises that the Core Strategy should identify an SPD which will outline the mitigation measures and calculate the required developer contributions. The Core Strategy should also be supported by evidence (within or supporting the HRA) which provides confidence that opportunities for additional greenspaces and access management measures exist and can be delivered.

In the interim period, between adoption of the Core Strategy, adoption of the Allocations DPD, and development of mitigation delivery mechanisms, residential developments within 7km will require appropriate assessment in accordance with Core Strategy policy EN2 and the Habitats Regulations.

Policy SC9

Policy SC9 should promote, where possible, the protection and enhancement of the natural environment within developments. The NPPF seeks to deliver net-gains in biodiversity and encourages planning authorities to take opportunities to incorporate biodiversity in around developments. Without reference to incorporating nature within a policy which seeks to 'make great places', the LPA will be unable to take these opportunities. Disregarding the natural environment, ignores this key pillar of sustainable development.

Policy AD2 and WD2

Given the requirement to deliver natural green space to mitigate the effects of recreational disturbance upon the South Pennine Moors Natura 2000 site, investment in green infrastructure should be a priority within the Airedale and Wharfedale Sub Areas. This would increase confidence that mitigation will be delivered.

Multi-functional green infrastructure would also compliment other priorities, notably managing flood risk and providing cycling and walking infrastructure.

Policy HO3

See advice regarding HRA and justification for reducing housing in Wharfedale.

Policy HO7

Whilst Natural England supports the general approach within policy HO7 (allocation selection), part F2 (maximising environmental benefits) should go beyond ensuring there is no net loss in biodiversity. It should ensure that developments achieve net gains in bio-diversity and enhancements to the ecological network. This accords with paragraphs 6, 109 and 152 of the NPPF. Part F2 should therefore read:

"Would achieve net-gains in biodiversity and enhancements to biodiversity networks"

Part G3 (minimising environmental impacts) should read:

"Avoiding development of sites which would result in the fragmentation of the biodiversity network or isolation of natural habitats;"

Policy EN1

Policy EN1 should ensure natural greenspace, required to mitigate the effects of increased recreational pressure upon the South Pennine Moors is delivered through a supporting Supplementary Planning Document. Whilst the requirements of the HRA are identified in paragraph 5.4.22, given the consequences of not delivering alternative greenspaces (non-compliance with the habitats regulations and failure to deliver the housing policies), the policy should include the following paragraph:

"Mitigating Recreational Pressure

In accordance with policy SC8, residential developments which contribute to recreational pressure upon the South Pennine Moors Natura 2000 site will be required to mitigate these effects through provision of new recreational natural greenspaces, contributions to off-site natural greenspaces or improvements to existing open spaces.

The requirements and delivery of these natural greenspaces will be set out in the XXX Supplementary Planning Document."

Policy EN2

This policy does not include a criteria for the protection or enhancement of Sites of Special Scientific Interests (SSSIs). Bradford has four SSSI, including the South Pennine Moors, Bingley South Bog, and Trench Meadows. These may be joined by other sites during the plan period.

Whilst the moors are also internationally protected, the interest features for the SSSI include a wider variety of breeding birds and habitats. Consequently developments may not affect the SAC/SPA but have adverse effects upon the SSSI.

Policy EN2 should ensure that SSSI interest features are protected in accordance with paragraph 118 of the NPPF. This is required to ensure the Core Strategy distinguishes between internationally, nationally and locally protected sites.

Natural England welcomes and supports the designation of areas shown to support feeding SPA birds as local wildlife sites. This complies with the NPPF's requirement to enhance the biodiversity network and BAP.

Policy EN4

Natural England supports the Core Strategy's landscape policy.

This concludes Natural England's advice regarding the soundness of the Publication Draft Core Strategy. We appreciate this response is lengthy but believes it offers much helpful to your authority and Natural England welcomes further engagement before the examination.

We would be happy to comment further prior to submission 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 only please contact John King on 03000 604129. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

We really value your feedback to help us improve the service we offer. We have attached a feedback form to this letter and welcome any comments you might have about our service.

Yours sincerely

Des O'Halloran
Principal Adviser Land Use

Date: 01 August 2014
Our ref: 127125
Your ref:



Jane Scott
Development Plan Team
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Dear Sir/Madam,

Planning consultation: Publication Core Strategy – Further Advice
Location: City of Bradford Metropolitan District

This letter should be read alongside previous advice to City of Bradford Metropolitan District Council (CBMDC) regarding the soundness of the Publication Core Strategy (letter dated 31 March 2014).

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.

Having reviewed our previous advice on policy HO3 (Spatial Distribution) and the supporting HRA, Natural England would like to take this opportunity to clarify our position regarding the soundness of this policy.

Previous Advice

Natural England advised that the Core Strategy's Habitats Regulations Assessment (HRA) of policy HO3 had not justified the redistribution of housing for settlements within 2.5km of the South Pennine Moors Special Area of Conservation (SAC) and Special Protection Area (SPA).

Typical SAC bird species

Our concerns were based primarily on the HRA's use of 'typical SAC bird species' to determine whether the settlement housing targets would require functionally linked land, the loss of which, would adversely affect the SAC's interest features and conservation objectives.

Whilst the recording of 'typical SAC species', including bird species where appropriate, forms part of the monitoring of a sites favourable condition status (Article 17, Appendix 5) and Natural England encourage their consideration within HRAs, in this case their inclusion is not seen as having foundation. The typical bird species identified could not be considered an integral component of the SAC's habitat interest as they are not species which contribute to the maintenance or restoration of the habitat's structure and function (a conservation objective).

South Pennine Moors (Phase 2) – Breeding Bird Assemblage

The HRA's assessment of effects upon the Special Protection Area (SPA) Phase 2 did not recognise the inclusion of the site's assemblage of breeding birds as an interest feature. This was



not made clear by Natural England within our previous letter. In light of this oversight, Natural England would like the following advice taken into consideration.

The breeding bird assemblage was included within the SPA data form, its citation and conservation objectives. The conservation objectives have been reviewed and were updated on the 30 July 2014. Both the citation and updated objectives are available to view at:

<http://publications.naturalengland.org.uk/publication/4885083764817920?category=5758332488908800>

In addition to named qualifying features (dunlin, European golden plover and merlin), the breeding bird assemblage is also an interest feature. The citation lists the assemblage as lapwing, snipe, curlew, redshank, common sandpiper, short-eared owl, whinchat, wheatear, ring ouzel and twite. The HRA should therefore consider whether the distribution of housing and subsequent settlement targets can be delivered without adversely affecting the assemblage of these birds.

This should not require further surveying as this was undertaken to determine the likely presence of the typical SAC bird species.

When determining whether there is an adverse effect upon the assemblage, the HRA should consider: the numbers of assemblage birds present within functionally linked areas; identify those locations frequently visited by these birds; and the numbers present compared against their populations. Unless there is an in-combination effect, Natural England would caution against the removal of potential allocations on the basis that a single assemblage bird was recorded.

Justifying Adverse Effects

As the core strategy does not allocate sites, the HRA should provide sufficient confidence that the housing targets for those settlements within the functionally linked zone can be delivered within the allocations DPD. This will require a clear explanation, within the HRA, of the methodology used to determine whether the targets can be delivered without adverse effects on site integrity. This should include the parameters used to screen potential development sites.

Natural England appreciate CBMDC's have sought to avoid, rather than mitigate any adverse effects and that the precautionary principle has been applied. However when appraising potential development locations the Council should consider whether it is possible to identify sites/locations that are a) unlikely to be deliverable (where significant numbers are recorded on-site or likely to be disturbed off-site) and therefore should be avoided, b) deliverable with mitigation (either site specific or strategic mitigation), or deliverable without mitigation (unconstrained).

In summary, Natural England advises that the HRA should be amended to include a robust methodology (including effects on the SPA breeding bird assemblage) as this would provide justification that the housing distribution proposed within policy PO3 can be delivered without adverse effects upon the South Pennine Moors SPA.

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 only please contact John King on 03000 604129. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

We really value your feedback to help us improve the service we offer. We have attached a feedback form to this letter and welcome any comments you might have about our service.

Yours sincerely

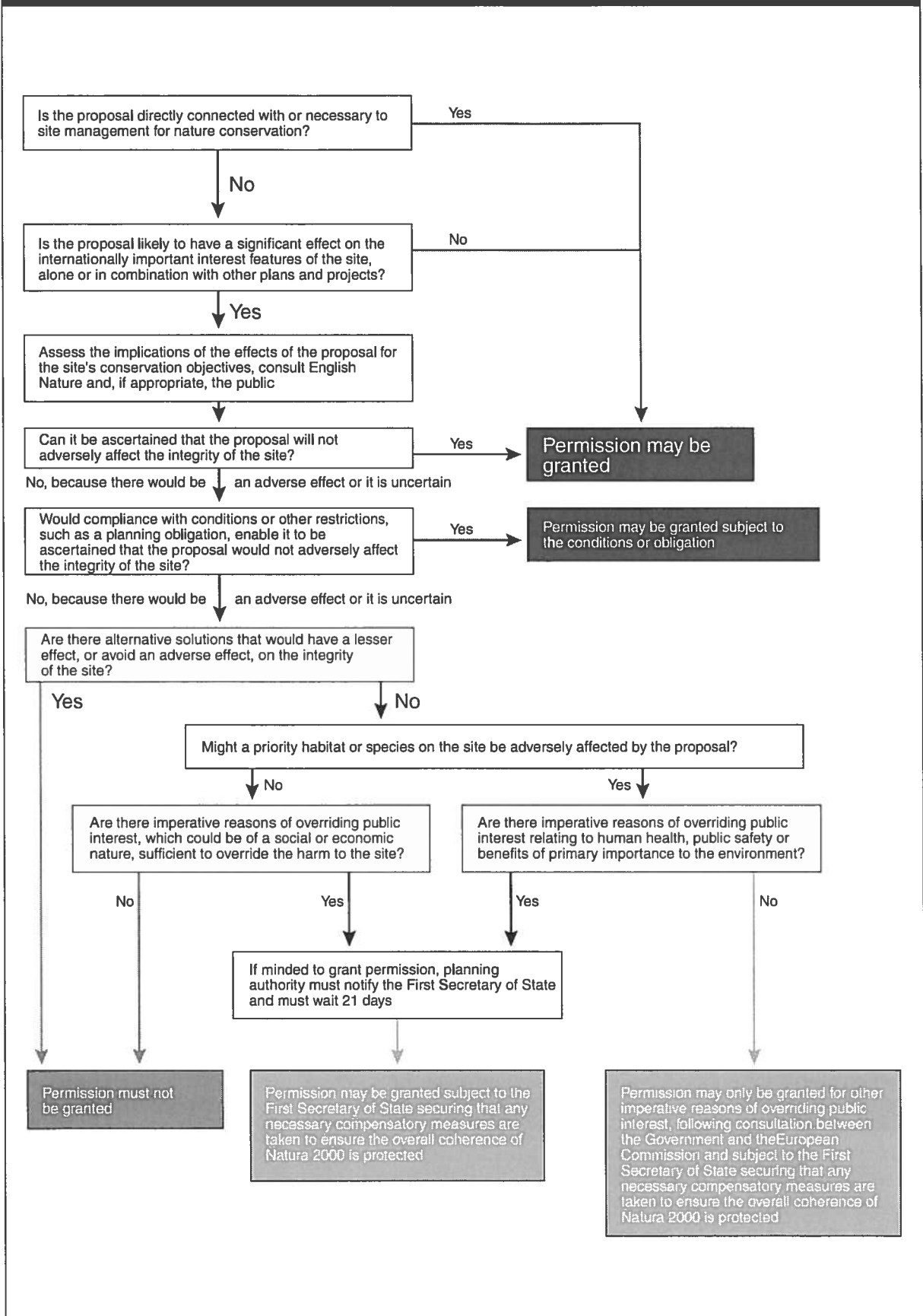


John King MRTPI
Marine and Sustainable Development
Yorkshire and Northern Lincolnshire



ANNEX 3

Figure 1: Consideration of development proposals affecting Internationally Designated Nature Conservation Sites



In the matter of

CEG Land Promotions Limited

**The City of Bradford District Core
Strategy**

**Appropriate Assessment under the
Conservation of Habitats and Species
Regulations 2010 (as amended)**

FURTHER OPINION

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