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Planning. Design. Economics.

Bradford Local Plan Core Strategy

Response to Main Modifications

On behalf of:

CEG Land Promotions Ltd

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Representor Reference: 495

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Leeds LS1



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Contents

1.0	Introduction	1
2.0	Modifications to Section 3 – Vision, Objectives and Core Policies	3
	Policy SC1 – Overall Approach and Key Spatial Priorities.....	3
	Policy SC4 –Hierarchy of Settlements.....	3
	Policy SC6 – Green Infrastructure.....	5
	Policy SC7 – Green Belt	5
	Policy SC8 – Protecting the South Pennine Moors and their Zones of Influence	6
3.0	Modifications to Section 4 – Sub Area Policies	7
	Policy WD1 - Wharfedale	7
4.0	Modifications to Section 5.3 – Housing Policies	9
	Policy HO1 – Scale of Housing Required.....	9
	Policy HO3 – Distribution of Housing Requirement	9
	Policy HO4 – Phasing and Release of Housing Sites.....	10
5.0	Modifications to Section 5.4 – Environment Policies	11
	Policy EN1 – Open Space.....	11
	Policy EN2 – Biodiversity and Geodiversity.....	11

Appendices

Appendix 1 Comments on Main Modifications by Freeths LLP and Baker Consultants Ltd

1.0 Introduction

- 1.1 These representations are prepared on behalf of CEG Land Promotions Ltd (“CEG”), in response to the publication of the Main Modifications (“MMs”) to the Bradford Local Plan Core Strategy (“Core Strategy”). CEG has provided representations to the earlier stages of the Core Strategy and was an active participant in the Hearing Sessions in March 2015 into the Examination of the Plan.
- 1.2 The representations have been prepared by Nathaniel Lichfield & Partners (NLP), in conjunction with Freeths LLP and Baker Consultants Ltd who have both provided specific input in respect of MMs emanating from the revised approach to Habitats Regulation Assessment, the protection afforded to the South Pennine Moors SPA/SAC and other relevant environmental protection matters including the latter’s relationship with development. A separate note, prepared jointly by Freeths LLP and Baker Consultants Ltd dealing with such matters is included at **Appendix 1** to this report, setting out the specific amendments required by CEG and the rationale for them. Together they jointly form CEG’s submission to the Main Modifications.
- 1.3 CEG has very carefully considered all of the proposed MMs, alongside the accompanying updates to both the Habitats Regulations Assessment (“HRA”) and the Sustainability Appraisal (“SA”) in the context of the issues that have been previously highlighted within our earlier representations and within our written and verbal submissions to the Examination. In overall terms, CEG welcome the proposed MMs as, in most cases they positively address many of the issues of soundness and legal compliance, as raised within our previous representations.
- 1.4 In particular, CEG support the modifications relating to the amended settlement hierarchy which re-instates Burley in Wharfedale as a Local Growth Centre and the associated revised distribution of the overall housing requirement. As our previous representations have demonstrated, and as set out further in the later sections of this response, such modifications are justified by the evidence and required to ensure that the Core Strategy can be deemed to be sound.
- 1.5 Importantly, CEG also consider that the modified wording of Policy SC8, being the key policy in the Core Strategy dealing with the protection of the South Pennine Moors (Phase 1) SPA/SAC and which was formulated and agreed during lengthy meetings between CEG, the Council and Natural England, is sound and legally compliant. The supporting text was not agreed in those meetings. Subject to a number of revisions to the supporting text necessary to ensure consistency with agreed Policy SC8, relevant legislation and EU and domestic case law, this supporting text can also be regarded as sound and legally compliant.
- 1.6 Notwithstanding the above, CEG do however continue to have a number of HRA-related concerns with a number of policies and supporting texts which are

currently inconsistent with agreed key Policy SC8 and also with HRA-related legislation and EU and domestic case law. A particular example is Criterion D(2) of Policy WD1 and all similar area based policies. Comments are also provided within the appended note prepared by Freeths LLP and Baker Consultants Ltd on the approach taken within the revised HRA. It is essential that the Natural England / Council / CEG-agreed approach to protection of the South Pennine Moors SPA and SAC, as set out clearly in Policy SC8, is fully adhered to throughout the Core Strategy. At present this is not the case.

1.7

Finally, the representations provide comments on a number of MMs relating to the wider policies upon which CEG has previously commented. Whilst our response highlights some concerns and suggested alterations, CEG's general position is that the MMs, when taken as a whole, are to be welcomed and make for an improved Core Strategy and one that when considered as a whole can be considered sound and legally compliant in accordance with paragraph 182 of the National Planning Policy Framework ("NPPF").

2.0 **Modifications to Section 3 – Vision, Objectives and Core Policies**

Policy SC1 – Overall Approach and Key Spatial Priorities

MM2

- 2.1 CEG supports the revisions arising from MM2, which reintroduces reference within Part B5 of Policy SC1 to Burley in Wharfedale being identified as a Local Growth Centre and therefore a hub for the local economy, housing and community and social infrastructure. The modification therefore ensures that Policy SC1 is consistent with the revisions to the overall settlement hierarchy set out in the modified Policy SC4. CEG’s support for this revision is discussed more fully below and reflects the detailed evidence submitted on their behalf to the earlier Publication Draft and the subsequent Examination in Public.

Policy SC4 –Hierarchy of Settlements

MM7 – MM13

- 2.2 Modifications 7-13 all relate to revisions to the settlement hierarchy identified in Policy SC4. CEG supports these modifications, particularly the reinstatement of Burley-in-Wharfedale as a Local Growth Centre and for the reasons set out below consider that they are necessary in order for the Core Strategy to be considered sound.
- 2.3 The position of Burley-in-Wharfedale in the settlement hierarchy is a matter upon which CEG has previously provided detailed submissions¹ and was subject to considerable debate at the examination hearing sessions.
- 2.4 Burley-in-Wharfedale (as well as Menston) was previously identified as a Local Growth Centre in the earlier Further Engagement Draft of the Core Strategy and identified as such at that time, not only because of their acknowledged status as settlements which could accommodate growth in a sustainable manner, but also because of the relative constraints within the Regional City element of the District. This is confirmed at Paragraph 9.8 of the Core Strategy Background Paper 1 – Overview (SD/015).
- 2.5 This Background Paper also confirms at paragraph 9.9 that the ‘main driver’ for the subsequent downgrading of the status of Burley-in-Wharfedale to that of a Local Service Centre in the Settlement Hierarchy as contained in the Publication Draft was the potential direct and indirect impact upon the SPA and its 2.5km buffer.

¹ See CEG Matters Statement 3.2 (PS/D025d)

- 2.6 It has, however, subsequently been established and agreed by Bradford Council and Natural England, alongside CEG in the 'Note of Agreed Principles' (PS/F014), that *"the settlement status for Burley-in-Wharfedale as a Local Growth Centre and the housing targets set out in the Further Engagement Draft of the Core Strategy for Burley-in-Wharfedale (as a minimum) are highly likely to be able to be delivered without any adverse impact on the integrity of the SPA or the SAC alone or in combination with other plans or projects"*.
- 2.7 In light of these conclusions, which have subsequently been confirmed by the Council's HRA as presented in its Appropriate Assessment dated November 2015 ("AA Nov 2015")², the reinstatement of Burley-in-Wharfedale as a Local Growth Centre is therefore clearly justified, particularly given that the potential impact upon the integrity of the South Pennine Moors SPA was acknowledged by the Council as the reason for its previous downgrading.
- 2.8 The approach is further justified, based upon the relative sustainability of Burley-in-Wharfedale as a location to accommodate growth. The Council's most up to date evidence on the sustainability of the settlements across the District is the Draft Settlement Study (EB/040-042). This was produced to inform the Further Engagement Draft and led the Council to conclude at that time that Burley-in-Wharfedale rightly met the definition of a Local Growth Centre in the Settlement Hierarchy. CEG's own assessment *"Burley-in-Wharfedale: A Sustainable Development Location"*, contained as an appendix to Hearing Statement 3.2 (PS/D025d) also concludes that the settlement is a sustainable location with excellent transport links and a wide range of shops, services and community facilities. It also concluded that it has the capacity for growth in the most viable area for housing development in the plan area.
- 2.9 Finally, although not a set criterion, Burley-in-Wharfedale clearly accords with the description of Local Growth Centres, as defined in parts A and B of that section of Policy SC4, insofar as it is located along a 'key public transport corridor' and is an 'accessible, attractive and vibrant place to live, work and invest'.
- 2.10 In light of these conclusions and the agreed position regarding the absence of impact upon the integrity of the SPA/SAC which has been confirmed in the AA Nov 2015 (taking into account where appropriate the availability of mitigation measures), it is considered that the Council has made the correct decision to modify Policy SC4 to reinstate Burley-in-Wharfedale as a Local Growth Centre. The modifications to Policy SC4 are therefore supported on this basis.

² The AA Nov 2015 found that, of the 11 SHLAA trajectory sites considered in Burley-in-Wharfedale: (i) 4 sites should be categorised as "amber" meaning "deliverable with mitigation (either site specific or strategic mitigation)"; (ii) 7 sites (including CEG's site) should be categorised as "green" meaning "deliverable without mitigation (unconstrained)"; and (iii) no sites should be categorised as "red" meaning "unlikely to be deliverable (where significant numbers (of SPA birds) are recorded on-site or likely to be disturbed off-site) and therefore should be avoided".

Policy SC6 – Green Infrastructure

MM 15

- 2.11 It is considered that as drafted, the supporting text to Policy SC6 resulting from MM15, is not consistent with Policy SC8. Policy SC8 is the key policy in the Core Strategy dealing with protection of the South Pennine Moors SPA / SAC, including protection of the SPA/ SAC from recreational impacts and the methods to achieve such protection (by way of developer financial contribution or provision by the developer of on-site or off-site mitigation / other appropriate measures).
- 2.12 Policy SC6 (Green Infrastructure), by contrast, has much wider application covering networks of multifunctional spaces, routes and key areas of green infrastructure. This supporting wording to Policy SC6, which refers to mitigating adverse effects of increased recreation on the South Pennine Moors SPA / SAC, should therefore link back to Policy SC8 so as to clarify the particular methods envisaged to address any adverse impacts on the South Pennine Moors SPA / SAC through increased recreation.
- 2.13 The accompanying note by Freeths LLP and Baker Consultants Ltd, included at Appendix proposes a revised form of words which achieves this link.

Policy SC7 – Green Belt

MMs 17 & 18

- 2.14 CEG support and welcome modifications 17 and 18 which seek to provide further clarity both within Policy SC7 itself and its supporting text on the exceptional circumstances that exist in order to justify a review of Green Belt boundaries across the District.
- 2.15 CEG agree with the Council that exceptional circumstances, as required by paragraph 82 of the National Planning Policy Framework, have been demonstrated and the additional text to be included at paragraph 3.102 of the Core Strategy clearly sets this out. The Council has identified, based upon the conclusions of the SHLAA that, in order to meet the housing requirement as set out in Policy HO1 in full, 11,000 dwellings will need to be accommodated on land presently identified as Green Belt. Notwithstanding wider employment land requirement issues (upon which CEG has not commented), CEG agrees that this alone provides the required exceptional circumstances to review Green Belt boundaries. Indeed, CEG's position is that the quantum of Green Belt land identified by the Council to ensure that the full objectively assessed housing requirements of the District are met, is likely to be a conservative estimate.
- 2.16 As CEG has demonstrated in the case of Burley-in-Wharfedale, and as also demonstrated by the Bradford Growth Assessment (EB/037), there are areas

of available Green Belt capable of contributing to meeting the District's housing requirement in a sustainable manner, without prejudicing its wider strategic purpose or localised function.

Policy SC8 – Protecting the South Pennine Moors and their Zones of Influence

MMs 19 – 37

- 2.17 CEG's comments in respect of the modifications to Policy SC8 and its supporting text are contained within the separate note produced by Freeths LLP and Baker Consultants Ltd and contained at Appendix 1.
- 2.18 In summary, CEG supports the modified wording of Policy SC8 as set out in MM28. The modified wording is in the exact form previously agreed between the Council, Natural England and CEG and reflects the agreed principles between the parties, the relevant legislation and relevant EU and domestic case law.
- 2.19 Whilst CEG support the modified wording of Policy SC8, many of the modifications to the supporting text to Policy SC8 are inconsistent with the agreed modifications to the parent policy, relevant legislation and case law.
- 2.20 The central issue in relation to the supporting text to Policy SC8, and indeed in relation to many of the other modifications highlighted in the joint Freeths LLP and Baker Consultants Ltd document at Appendix 1, is the Council's treatment of land in the 2.5km SPA buffer zone. Policy SC8 is clear that the availability of mitigation measures is a key consideration when assessing whether a development would or would not lead to an adverse effect on the integrity of the SPA or SAC. As acknowledged in the AA Nov 2015, such mitigation measures would include the creation or enhancement of land for foraging SPA qualifying species so as to avoid an adverse effect on the SPA from loss, to development, of foraging habitat within the 2.5km buffer zone. As such, any language in the Core Strategy, which states or suggests that SPA qualifying foraging habitat outside the SPA must be protected or that development on such land must be avoided, is incorrect. This is discussed fully in the accompanying note at Appendix 1, where amended modifications to address these concerns are put forward.

3.0 **Modifications to Section 4 – Sub Area Policies**

Policy WD1 - Wharfedale

MM51 & 52

- 3.1 MMs 51 and 52 relate to the revisions to the overall distribution of housing in Wharfedale (alongside sources of supply), in accordance with the modifications made to Policy HO3. CEG welcome and support these modifications.
- 3.2 In particular CEG support the modified housing figure for Burley-in-Wharfedale of 700 units, alongside the insertion of the additional text into Criterion B that the housing figure will be met by way of a 'significant contribution' from Green Belt changes.
- 3.3 The increased figure is firstly justified in light of the reinstatement of the settlement as a Local Growth Centre and its acknowledgement therefore that it represents a sustainable location to accommodate additional levels of housing beyond its overall population baseline. Importantly the increased housing numbers identified and revised status in the settlement hierarchy reflect the agreement reached between the Council, Natural England and CEG in the 'Note of Agreed Principles' (PS/F014) insofar as the housing targets set out in the Further Engagement Draft of the Core Strategy for Burley-in-Wharfedale (as a minimum) are highly likely to be able to be delivered without any adverse impact on the integrity of the SPA or SAC alone or in combination with other plans or projects. As already noted above, this has, since then, been confirmed in the AA Nov 2015.
- 3.4 The identification of 700 dwellings for Burley-in-Wharfedale, alongside the acknowledgement that a significant contribution will be met on land presently identified as Green Belt is also justified and fully deliverable. Whilst the SHLAA identifies that there are a number of small sites within the current settlement limits capable of contributing towards the requirement, the majority of the target can be met on CEG's landholding to the west of the settlement, which is capable of accommodating in the order of 500 dwellings, alongside other commercial and community uses.
- 3.5 A masterplan, showing how this can be achieved as a sustainable and logical extension of the settlement is contained within the Vision Document which accompanied CEG's representations to the Publication Draft of the Core Strategy. This masterplanning exercise demonstrates how such a scale of development could accommodate a new single form entry primary school as an integral part of the development to meet not only the primary school place requirements of the new housing growth, but to also potentially address existing capacity issues in the area. Were the overall housing target to be reduced, then it would reduce the ability for new development to deliver new

community infrastructure such as a primary school, thereby placing increased pressure on existing facilities.

- 3.6 Additionally, 700 new dwellings can be accommodated in a way that would not prejudice the purpose and strategic function of the Green Belt in this part of the District. The Bradford Growth Assessment (EB/037) concludes that the Green Belt around Burley does not serve more than a local function, whilst an extension of the settlement in a westerly direction to accommodate the majority of the housing target is achievable without resulting in issues of coalescence with other settlements. This is further demonstrated in the Vision Document submitted alongside CEG's representations to the Publication Draft.
- 3.7 Finally, as CEG's previous evidence has demonstrated, there are no other insurmountable technical barriers preventing Burley-in-Wharfedale accommodating the level of housing now proposed in the modified Core Strategy. The identified figure of 700 is therefore fully justified, is viable and deliverable and it can therefore be concluded that the proposed modifications are sound.

MM53

- 3.8 Whilst the modifications to Policy WD1 in respect of housing numbers and levels of growth are supported, CEG do however have significant concerns regarding the modifications to Part D of the Policy relating to environmental matters and the protection offered to the South Pennine Moors SPA and SAC. For the reason set out in paragraph 2.17 above, it is considered that modified Part D(2) is inconsistent with the revised approach now taken within Policy SC8 (as modified) and with relevant legislation and EU / domestic case law underpinning Policy SC8. This therefore requires further modification in order to reflect the revised (and correct) approach.
- 3.9 The Freeths LLP and Baker Consultants Ltd note at Appendix deals with this matter in full and includes a suggested revised wording to Part D to ensure consistency with Policy SC8.

4.0 **Modifications to Section 5.3 – Housing Policies**

Policy HO1 – Scale of Housing Required

MMs 72-73

- 4.1 CEG has no specific comments to make in respect of the proposed modifications to Policy HO1, given that they do not alter the overall housing requirement.
- 4.2 CEG maintain that for the reasons set out in our previous representations and in particular our Examination Hearing Statement on Matter 4a (Ref. PS/D025h), the housing requirement set out in Policy HO1 is too low and there is clear justification for it to be increased. At the very least, the evidence demonstrates that, in order for this aspect of the Core Strategy to be considered sound, there should be no reduction in the overall housing requirement.

MM76

- 4.3 In overall terms CEG supports this modification which removes reference from Paragraph 5.3.56 to significant parts of the District being ruled out from accommodating significant additional development due to the resultant impacts upon the South Pennine Moors SPA/SAC. As referred to elsewhere in this response to the Main Modifications, it has been acknowledged by the Council and Natural England in relation to Burley-in-Wharfedale, as confirmed by the 'Note of Agreed Principles' (Ref. PS/F014), and subsequently confirmed by the AA Nov 2015 in relation to Burley-in-Wharfedale and other areas, that the SPA / SAC is unlikely to represent a significant constraint to development and therefore this aspect of the modification is consistent with that conclusion.

Policy HO3 – Distribution of Housing Requirement

MMs 86-88

- 4.4 CEG support all of the modifications to Policy HO3. The increased figure of 700 units identified for Burley-in-Wharfedale is fully justified and required in order for the Core Strategy to be considered sound. CEG's position on this matter is set out fully in respect of the modifications to Policy WD1, where this modified distribution has been translated into the area based policy.

Policy HO4 – Phasing and Release of Housing Sites.

MMS 89-92

- 4.5 CEG’s position in respect of the phasing and release of housing sites is set out in the NLP Hearing Statement to Matter 7b and in response to the Council’s Homework Item 3 (FS/082e). CEG maintain that in light of the overall housing requirement, the persistent shortfall in delivery in recent years and the clear absence of a 5 year housing land supply, there is no justification for the Core Strategy to contain a policy which effectively holds back the delivery of deliverable and sustainable sites until a much later part of the plan period. Paragraph 47 of the NPPF is clear that “*development which is sustainable can be approved without delay*”. It is in this context that CEG remain of the view that Policy HO4 should be deleted.
- 4.6 If the Inspector does not agree with this position, we do however consider that the proposed modifications to HO4 do at least address CEG’s concerns that large or complex sites should be brought forward in the identified first phase, to give them the maximum opportunity of being able to deliver in full during the plan period.
- 4.7 In this respect and notwithstanding the wider concerns about the need for the policy, CEG welcomes the inclusion of Criterion D as part of MM91, the text of which explicitly refers to large or complex being identified in the first phase. This additional criterion is therefore justified insofar as it will allow such sites to deliver in full in the plan period and therefore ensure that the overall housing requirement of the District is fully met. It will also assist in facilitating early delivery of infrastructure associated with such sites.

5.0 **Modifications to Section 5.4 – Environment Policies**

Policy EN1 – Open Space

MMs 113-114

- 5.1 CEG consider that further modifications are required to Policy EN1, to ensure that it is consistent with the revised approach taken by Policy SC8. Detailed comments on this matter are set out in the note by Freeths LLP and Baker Consulting at Appendix 1, which sets out an amended modification to address this issue.

Policy EN2 – Biodiversity and Geodiversity

MM120

- 5.2 CEG consider that modified Part E of Policy EN2 is not consistent with national planning policy guidance (paragraph 113 of the NPPF), or indeed the other parts of EN2. These concerns are explained further in the note by Freeths LLP and Baker Consultants Ltd at Appendix 1 and again put forward an alternative form of wording to address this issue.

Appendix 1 Comments on Main Modifications by Freeths LLP and Baker Consultants Ltd

FREETHS

APPENDIX 1

CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL'S CORE STRATEGY DPD PROPOSED MAIN MODIFICATIONS

RESPONSE FROM CEG LAND PROMOTIONS LTD

INTRODUCTION

1. City of Bradford Metropolitan District Council ("**Council**") commenced its consultation on its Proposed Main Modifications ("**MMs**") to the Core Strategy Development Plan Document ("**Core Strategy**") on 25 November 2015. The consultation runs until 20 January 2016.
2. This document contains comments on behalf of CEG Land Promotions Ltd ("**CEG**") on:
 - 2.1. a number of MMs of the Core Strategy focussing on matters relating to protection of the natural environment; and
 - 2.2. the Council's Habitat Regulations Assessment for the Bradford Core Strategy (Proposed Modifications) dated November 2015 ("**AA Nov 2015**").

CEG'S COMMENTS ON MMs OF THE CORE STRATEGY FOCUSING ON MATTERS RELATING TO PROTECTION OF THE NATURAL ENVIRONMENT

3. CEG made extensive submissions to the Examination (see in particular its written submissions dated February 2015) relating to the Council's legally flawed Appropriate Assessment dated December 2014 ("**AA Dec 2014**") and the related unsound Policies SC8, HO3 and SC4 of the Core Strategy Publication Draft.
4. During the Examination the Inspector requested CEG, the Council and Natural England to work together to attempt to resolve these issues.
5. Meetings between these parties took place and significant progress was made which resulted in:
 - 5.1. a Note of Agreed Principles to Address the Council's Habitat Regulations Assessment, signed by the Council, Natural England and CEG on 9 March 2015. The Note set out the agreed need for a full review of the AA Dec 2014 and the detailed basis for that review, so as to correct the errors contained in the AA Dec 2014;
 - 5.2. a revised form of Policy SC8 as agreed between the Council, Natural England and CEG; and
 - 5.3. significant progress towards reaching agreement on amendments to Policy EN2, although disagreement on two points remained.
6. The Council has now published its MMs which CEG has reviewed. The Table at Annex 1 to this document contains CEG's detailed comments on certain MMs relating to the natural environment which give rise to concern.

FREETHS

7. Policy SC8 is the key policy in the Core Strategy directed at protecting the South Pennine Moors SPA and SAC. CEG is therefore very pleased to note that MM28 relating to Policy SC8 is in the exact form agreed between CEG, Natural England and the Council.
8. Policy SC8 reflects the agreed principles, which are underpinned by legislation¹, European and domestic caselaw², and the Council's AA Nov 2015³, that:
 - 8.1. the legal protection of a SPA is directed at the integrity of the SPA itself, rather than at supporting habitat outside the SPA used by the SPA qualifying bird features; and
 - 8.2. mitigation measures are of key relevance when assessing impacts on SPA integrity and include measures to provide alternative supporting foraging habitat for SPA qualifying species, so as to avoid an adverse effect on SPA integrity through loss to development outside the SPA of foraging habitat used by such birds.
9. It is obviously essential that the Supporting Text accompanying Policy SC8 is consistent with Policy SC8 itself. It is also essential that, where other Policies or their Supporting Text make reference to protection of the South Pennine Moors SPA or SAC, there is complete consistency between with the key Policy SC8 and the principles above.
10. There are however a number of MMs of significant concern to CEG since they are not consistent with Policy SC8 and / or the principles set out above. These MMs relate to both Policies and / or Supporting Text. They are MM19, MM31, MM33, MM53, MM113, M114 (and in addition, albeit of less relevance and concern to CEG, policies MM48, MM58, MM131, MM132 and MM146). CEG has presented amendments in the Table at Annex 1 to rectify these inconsistencies. Full justification for each of CEG's amendments is provided in the Table. It is essential that these amendments are adopted.
11. There are also a number of MMs where clarification is needed to avoid confusion over their meaning. These are MM15, MM23 and MM30. CEG has again provided relevant amendments in the Table at Annex 1.
12. Policy EN2 on Biodiversity and Geodiversity (MM120) requires amendment to paragraph E to ensure consistency with paragraph 113 of the NPPF and with the other paragraphs within Policy EN2. CEG has again provided full details in the Table at Annex 1.

CEG'S COMMENTS ON THE COUNCIL'S AA NOV 2015

13. Since concluding the Note of Agreed Principles to Address the Council's Habitat Regulations Assessment, signed by the Council, Natural England and CEG on 9 March 2015, the Council has conducted a review of AA Dec 2014 in two phases.
14. CEG was invited to provide comments on the first phase only of the Council's review. CEG was disappointed not to be permitted to comment on the second phase of the review.
15. The Council's AA Nov 2015 is the product of this review.

¹ Regulations 61 and 62 Conservation of Habitats and Species Regulations 2010 and Article 6.3 and Article 6.4 EU Habitats Directive

² eg C-521/12 *T. C. Briels and Others v Minister van Infrastructuur en Milieu; R (Hart DC) v SSCLG* [2008] EWHC 1204; *Hargreaves v. SSCLG* [2011] EWHC 1999 (Admin); *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174

³ For example see paragraph 6.2.61 AA Nov 2015

FREETHS

16. CEG is pleased to note that the AA Nov 2015 is a much improved document compared with AA Dec 2014. In particular:
 - 16.1. A number of the significant concerns raised by CEG in its February 2015 submissions have now been addressed by the Council; and
 - 16.2. Natural England's advice to the Council has also now been considered by the Council and implemented more carefully.
17. Annex 2 contains a list of the key improvements which CEG has noted in the Council's AA Nov 2015.
18. Certain aspects of the AA Nov 2015 still give rise to an exaggerated assessment of predicted impacts from development on the South Pennine Moors Phase 2 SPA (these are set out at Annex 3 attached) and CEG also has a number of other minor criticisms (set out at Annex 4 attached). Nevertheless, given:
 - 18.1. the significant improvements which have been made by the Council in the AA Nov 2015;
 - 18.2. the relatively flexible Policy response to the AA Nov 2015 as set out in the Core Strategy, in particular as found in Policy SC8 (albeit that the concerns raised by CEG above (particularly at paragraph 10 above) must be addressed); and
 - 18.3. the high level nature of the Core Strategy together with the requirement for further HRAs in relation to lower tier plans and also at the project level, all of which is acknowledged in the AA Nov 2015,

CEG regards the AA Nov 2015 as adequate as an assessment of the Core Strategy and sees no need for any further amendments to it prior to adoption of the Core Strategy.

Freeths LLP
Baker Consultants Ltd
20 January 2016

FREETHS

ANNEX 1

TABLE OF CEG'S PROPOSED AMENDMENTS ON MMs RELATING TO THE NATURAL ENVIRONMENT

	Main Modification No.	Main Modification as proposed by the Council with CEG's amendments <i>(as shown in red, large, italicised text)</i>	Justification for CEG's amendments
1.	MM15 Pg 53 Paragraph 3.93. Supporting text to Policy SC6 (Green Infrastructure).	Amend paragraph 3.93 as follows: 'As a strategic core policy GI provides a common thread that links other important issues in the Core Strategy; local resilience to climate change (in relation to the provision of flood water storage, sustainable drainage and urban cooling), sustainable transport and housing, tourism, health and well-being and making space for water. Particular aspects of GI have been developed in the environment theme policies relating to biodiversity, recreation and open space, heritage, design and landscape. <u>Providing high quality areas of natural greenspace on a suitable scale <i>in accordance with Policy SC8</i> will assist in mitigating the adverse effects of increased recreation on the South Pennine Moors SPA/SAC.</u>	Policy SC8 (Protecting the South Pennine Moors and their zone of influence) is the key policy in the Core Strategy dealing with protection of the South Pennine Moors SPA / SAC, including protection of the SPA / SAC from recreational impacts and the methods to achieve such protection (by way of developer financial contribution or provision by the developer of on-site or off-site mitigation / other appropriate measures). Policy SC6 (Green Infrastructure), by contrast, has much wider application covering networks of multifunctional spaces, routes and key areas of green infrastructure. This supporting wording to Policy SC6, which refers to mitigating adverse effects of increased recreation on the South Pennine Moors SPA / SAC, should therefore link back to Policy SC8 so as to clarify the particular methods envisaged to address any adverse impacts on the South Pennine Moors SPA / SAC through increased recreation. CEG's amendment achieves this link.
2.	MM19 Pg 58 Paragraph 3.104. Supporting text to Policy SC8 (Protecting the South Pennine Moors and their zone of influence).	Amend paragraph 3.104 as follows '3.104 <u>Assessment under the Habitats Regulations is an integral part of preparing a plan and is necessary to ensure that the plan in question does not lead to adverse effects on the <i>ecological integrity of any European site internationally important habitats or species assemblages within or close to the district.</i></u> The NPPF recognises the importance of the Habitat Regulations by stating in paragraph 119 that the presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined. The Appropriate Assessment of the Further Engagement Draft Core Strategy, required under the Habitat Regulations, assessed the potential impacts of policies	Policy SC8 (Protecting the South Pennine Moors and their zone of influence) is the key policy in the Core Strategy dealing with protection of the South Pennine Moors SPA / SAC, including protection of the SPA / SAC from recreational impacts. Policy SC8 is consistent with and underpinned by regulation 61(5) Conservation of Habitats and Species Regulations 2010 (which in turn implements, in England, Article 6(3) of the EU Habitats Directive in relation to "projects"). Regulation 61(5) is the key regulation providing protection to European sites, stating that, following an "appropriate assessment" under regulation 61(1), " <u>...the competent authority may agree to the plan or project only after having ascertained that <i>it will not adversely affect the integrity of the European site...</i></u> " (underlining added). CEG's proposed amendment ensures consistency between this

FREETHS

	Main Modification No.	Main Modification as proposed by the Council with CEG's amendments <i>(as shown in red, large, italicised text)</i>	Justification for CEG's amendments
		and proposals in the plan on four nature conservation sites of European importance, the North and South Pennine Moors SAC and SPA.'	<p>supporting text and both Policy SC8 and regulation 61(5). It is clear from regulation 61(5) and Policy SC8 that the legal protection of a European site is directed at the integrity of the European site itself (which is designated for certain qualifying species or habitats). It is not directed at internationally important habitats or species assemblages independent of any European site, which is the incorrect implication of the Council's present wording.</p> <p>CEG notes that, in contrast to this MM19 (and MM33 – see below), the Council has in fact <u>correctly</u> summarised the regulation 61 legal requirement in other parts of the supporting text to Policy SC8, for example in MM24, MM25, MM26, MM29. Therefore MM19 would appear to be an oversight which requires correction.</p>
3.	MM23 Pg 59 Paragraph 3.108 Supporting text to Policy SC8 (Protecting the South Pennine Moors and their zone of influence).	Amend paragraph 3.108 (and renumber) as follows: 'The zone lying within 2.5km of the South Pennine Moors SPA and SAC was identified in the HRA Report as the area <i>outside the SPA</i> most frequently utilised by SPA qualifying species. and where supporting high quality habitat of particular importance was to be found. To improve understanding of the use of the moorland fringe by birds of the SPA, surveys were undertaken to record bird activity. And the distribution of potentially important supporting habitats. While caution needs to be applied to the baseline survey and assessment work that has been carried out to date in relation to definitively identifying areas of importance for foraging birds, it is considered to be adequate for the purposes of a strategic plan. Sites have been identified which may be of importance and further assessment can take place at the allocations stage.'	CEG's amendment to this Policy SC8 supporting text is for clarity. Without the amendment the text suggests that the 2.5km zone is more frequently used by SPA qualifying species than the SPA itself, which is very unlikely and not the meaning intended.
4.	MM30 Pg 60 Supporting text to Policy SC8 (Protecting the South Pennine Moors and their zone of influence).	Indicators under policy SC8 be amended, as follows: Area of upland fringe habitat protected and created. <u>Further survey work has taken place and an approach to mitigation in relation to sites used for foraging <i>by South Pennine Moors SPA qualifying bird species</i> has been identified.</u> <u>An SPD relating to management and mitigation measures and funding has been produced and adopted.</u>	CEG's amendment to this Policy SC8 supporting text is for clarity.

FREETHS

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		<p>Areas of appropriate alternative natural greenspace protected have been identified for protection.</p> <p>Additional areas of appropriate alternative natural greenspace created and maintained have been identified and created.</p> <p><u>A management plan has been produced for the South Pennine Moors SPA/SAC.</u></p>	
5.	<p>MM31 Pg 61 Paragraph 3.113</p> <p>Supporting text to Policy SC8 (Protecting the South Pennine Moors and their zone of influence).</p>	<p>Amend paragraph 3.113 (and renumber) as follows:</p> <p>'The detailed review of available evidence presented in the HRA Report indicates that a precautionary spatial strategy would the approach should in the first instance seek to restrict residential development within 400m of the SAC/SPA boundary in order to avoid the risk of urban edge effects, <i><u>unless as an exception the development and / or its use would not have an adverse effect upon the integrity of the SPA or SAC, as set out in Zone A.</u></i> This is because, in most cases it will not be possible to be reasonably certain that such adverse effects could be avoided or alleviated at this distance.'</p>	<p>This is supporting text for Policy SC8 and so must be consistent with Policy SC8.</p> <p>CEG's amendment is added to achieve consistency with the seventh paragraph of Policy SC8. This states "In Zone A no development involving a net increase in dwellings would be permitted unless, as an exception, the development and/or its use would not have an adverse effect upon the integrity of the SPA or the SAC".</p>
6.	<p>MM33 Pg 61 Paragraph 3.116</p> <p>Supporting text to Policy SC8 (Protecting the South Pennine Moors and their zone of influence).</p>	<p>Amend paragraph 3.116 (and renumber) as follows:</p> <p>Early analysis of bird and habitat data has led to the identification of broad areas where development should be avoided. In circumstances where a need for local green belt releases has been identified and where a proportion of land adjoining the settlement lies within the 2.5km zone, the HRA Report recommends that areas of land will need to be identified that feature neither high numbers of birds nor good quality habitats. Consideration will be given to the benefits of identifying compensatory areas of land and <u>Within Zone B, consideration needs to be given to whether land being proposed for development affects the foraging habitat of SPA qualifying bird species, which may involve the collection and assessment of additional data.</u> Further work will seek to ensure that <i><u>mitigation measures are adopted to avoid an adverse effect on the integrity of the SPA through loss of such</u></i> areas</p>	<p>Policy SC8 is the key policy in the Core Strategy for the protection of the South Pennine Moors SPA / SAC, underpinned by regulations 61 and 62 of the Conservation of Habitats and Species Regulations 2010 (which in turn implement, in England, Article 6(3) of the EU Habitats Directive in relation to "projects"). This supporting text must therefore be consistent with both Policy SC8 and regulations 61 and 62.</p> <p>Policy SC8 correctly reflects the legal protection afforded to the South Pennine Moors SPA and SAC under regulations 61 and 62 by confirming that, subject to the derogation tests of Article 6(4) Habitats Directive, a development will not be permitted where a likely adverse effect on the integrity of the SPA or SAC cannot be effectively mitigated. Policy SC8 shows that the required protection is of the "integrity" of the SPA / SAC and that mitigation measures are of key relevance when assessing impacts on site integrity. This is in full accordance with caselaw from both the Court of Justice of the European Union and domestic courts eg C-521/12 <i>T. C. Briels and Others v Minister van Infrastructuur en Milieu</i>; R (Hart DC) v SSCLG [2008] EWHC 1204;</p>

FREETHS

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	<p>regularly used by these birds can be protected from development and its associated impacts. <u>Taking forward an approach to identify and deliver mitigation measures, where required within this zone, will form an important element in future planning.</u></p>	<p><i>Hargreaves v. SSCLG</i> [2011] EWHC1999 (Admin); <i>Smyth v Secretary of State for Communities and Local Government</i> [2015] EWCA Civ 174. It is also in accordance with the Council's AA Nov 2015 which recognises the key role of mitigation measures in avoiding an adverse effect on site integrity (see for example para 6.2.61: "Avoidance/mitigation would include the choice of sites being identified for development, providing equivalent replacement habitat so that the overall resource available to the birds is not diminished, improved management of a site to increase bird use or timing of works outside of the period in which sites are frequently used").</p> <p>The Council's statement that "work will seek to ensure that areas used regularly by these birds can be protected from development and its associated impacts" is at odds with this. It fails to recognise that the legal protection is directed at SPA "site integrity" (rather than at supporting foraging habitat) and that an adverse effect on SPA integrity from loss of supporting foraging habitat for SPA qualifying bird species can be mitigated against, such as through provision of new or enhanced supporting foraging habitat.</p> <p>CEG's amendments therefore bring the supporting text in line with Policy SC8, regulation 61, the relevant caselaw and the Council's own AA Nov 2015.</p> <p>CEG notes that, in contrast to this MM33 (and MM19 – see above), the Council has in fact <u>correctly</u> summarised the legal requirement in other parts of the supporting text to Policy SC8, for example in MM24, MM25, MM26, MM29. Therefore MM33 would appear to amount to an oversight which requires correction.</p>

FREETHS

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7.	MM53 Pg 91 Sub Area Policy WD1 (Wharfedale) Criterion D (2)	Add further sentence at end of Criterion D (2) as follows: <u>Avoid, through mitigation measures, adverse effects on SPA site integrity from the loss of important foraging land for SPA qualifying bird species within the SPA's 2.5km zone of influence, and reduce mitigate the impacts on SPA site integrity of increasing visitor numbers.</u>	<p>Policy SC8 is the key policy in the Core Strategy for the protection of the South Pennine Moors SPA / SAC.</p> <p>Policy WD1 (Wharfedale), by contrast, is a general policy covering five policy areas for the Wharfedale area, one of which is "Environment" (the other four relate to strategic pattern of development, new housing, economic development and transport).</p> <p>The "Environment" limb of WD1 must therefore, in relation to SPA protection, reflect the approach of key Policy SC8.</p> <p>CEG's comments made at MM33 apply equally here ie:</p> <p>Policy SC8 correctly reflects the legal protection afforded to the South Pennine Moors SPA and SAC under regulations 61 and 62, by confirming that, subject to the derogation tests of Article 6(4) Habitats Directive, a development will not be permitted where a likely adverse effect on the integrity of the SPA or SAC cannot be effectively mitigated. Policy SC8 shows that the required protection is of the "integrity" of the SPA and that mitigation measures are of key relevance when assessing impacts on integrity. This is in full accordance with caselaw from both the Court of Justice of the European Union and domestic courts eg C-521/12 <i>T. C. Briels and Others v Minister van Infrastructuur en Milieu</i>; <i>R (Hart DC) v SSCLG</i> [2008] EWHC 1204; <i>Hargreaves v. SSCLG</i> [2011] EWHC1999 (Admin); <i>Smyth v Secretary of State for Communities and Local Government</i> [2015] EWCA Civ 174. It is also in accordance with the Council's AA Nov 2015 which recognises the key role of mitigation measures in avoiding an adverse effect on site integrity (see for example para 6.2.61: "Avoidance/mitigation would include the choice of sites being identified for development, providing equivalent replacement habitat so that the overall resource available to the birds is not diminished, improved management of a site to increase bird use or timing of works outside of the period in which sites are frequently used").</p>

FREETHS

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			<p>The Council's amendment to Policy WD1, requiring that loss of important foraging land must be <u>avoided</u>, is at odds with this. It fails to recognise that protection is directed at SPA "site integrity" (not at supporting foraging habitat) and that an adverse effect on SPA integrity from loss of supporting foraging habitat for qualifying bird species can be avoided through mitigation measures such as provision of new or enhanced supporting foraging habitat.</p> <p>CEG's amendments therefore bring the text in line with Policy SC8, regulation 61, the relevant caselaw and the Council's AA Nov 2015.</p> <p>Note that similar amendments are also needed to correct the same error in relation to:</p> <p>MM48 (Sub Area Policy AD1: Airedale – as per MM53 above) MM58 (Sub Area Policy PN1: South Pennine Towns and Villages – as per MM53 above) MM131 (Policy EN9: New and Extended Minerals Extraction Sites – here there should be no separate reference to "important foraging land within the SPA's zone of influence") MM132 (Policy EN9: New and Extended Minerals Extraction Sites – here there should be no separate reference to "important foraging land within the SPA's zone of influence") MM146 (Policy WM1: Waste Management – here there should be no separate reference to "important foraging land within the SPA's zone of influence")</p>
8.	MM113 Pg 210 Supporting text to Policy EN1 (Protection and Improvements in provision of Open Space and Recreational Facilities)	Amend paragraph as follows: Data has been collected from surveys about visits to areas of the South Pennine Moors that lie within Bradford. The visitor data relates to key factors such as frequency of visit, timing, access point, range of activities, mode of transport and distance travelled. Once this has been fully analysed, it will help to assess how potential impacts from an increasing number of visitors can be managed and the extent to which alternative areas of natural greenspace can divert pressure to less sensitive areas. <u>An SPD will be produced to identify contributions and secure mitigation measures, in relation to provision of natural greenspace, where this is</u>	Policy SC8 (Protecting the South Pennine Moors and their zone of influence) is the key policy in the Core Strategy dealing with protection of the South Pennine Moors SPA / SAC, including protection of the SPA / SAC from recreational impacts. Policy EN1 (Protection and Improvements in provision of Open Space and Recreational Facilities), by contrast, is a more general policy with wider application covering open space, recreation facilities and local greenspace. Therefore reference, in the supporting text for Policy EN1, to matters concerning the South Pennine Moors SPA / SAC protection must be consistent with the more detailed and specific Policy SC8. The final paragraph of Policy SC8 states (see MM28): " <i>To mitigate impacts on the SPA and SAC due to the increase in population, an SPD</i> "

FREETHS

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		<p><i>required to mitigate the effects of increased recreation pressure upon the South Pennine Moors SPA/SAC in accordance with the final paragraph of Policy SC8.</i></p>	<p>will set out a mechanism for the calculation of the financial contributions by reference to development types, the level of predicted recreational impact on the SPA or SAC, and the measures upon which such contributions will be spent". The new supporting text proposed by the Council in MM113 is not consistent with the final paragraph of Policy SC8. It is also not consistent with the Council's MM37. MM37, consistent with Policy SC8, envisages the SPD setting out a financial contribution calculation mechanism, but with the <i>evidence base</i> for the SPD considering the identification and delivery of opportunities for additional greenspaces etc. CEG's amendment achieves the consistency required.</p>
9.	<p>MM114 Pg 211</p> <p>Policy EN1 (Protection and Improvements in provision of Open Space and Recreational Facilities)</p>	<p>Add new criterion, as follows:</p> <p><u>Mitigating Recreational Pressure on the South Pennine Moors SPA and SAC</u></p> <p><u>C. Residential developments which contribute to recreational pressure upon the South Pennine Moors SPA and SAC will be required to mitigate these effects <i>in accordance with Policy SC8 through provision of new recreational natural greenspaces or improvements to existing open spaces.</i></u></p>	<p>Policy SC8 is the key policy in the Core Strategy for the protection of the South Pennine Moors SPA / SAC.</p> <p>Policy EN1 (Protection and Improvements in provision of Open Space and Recreational Facilities), by contrast, is a more general policy with wider application covering open space, recreation facilities and local greenspace. Therefore reference in Policy EN1 to matters concerning the South Pennine Moors SPA / SAC protection must be consistent with the more detailed and specific Policy SC8.</p> <p>Policy SC8 sets out the particular methods envisaged to address any adverse impacts on the South Pennine Moors SPA / SAC through increased recreation. The methods envisaged by Policy SC8 are by way of developer financial contribution or provision by the developer of on-site or off-site mitigation / other appropriate measures. Policy EN1 should therefore either track exactly the wording of Policy SC8 "<i>In Zoneand review of measures</i>"; or simply cross refer to Policy SC8. CEG's amendment simply cross refers to Policy SC8 to ensure consistency.</p>

FREETHS

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10.	MM120 Pg 221 Policy EN2 (Biodiversity and Geodiversity)	<p>Amend criterion reference to reflect new Criterion B and amend text as follows</p> <p>'Enhancement</p> <p>D-E. Plans, policies and proposals should contribute positively towards the overall enhancement of the District's biodiversity resource.</p> <p>They should seek to protect and enhance species of local, national and international importance and to reverse the decline in these species.</p> <p>The Council will seek to promote the creation, expansion and improved management of important habitats within the district and more ecologically connected patchworks of grasslands, woodlands and wetlands. Opportunities for specific habitat creation within development proposals will be sought, including provision for future management.</p> <p><u>The Council will seek to establish coherent ecological networks that are resilient to current and future pressures. Development which would cause serious fragmentation of habitats, wildlife corridors or have a significantly adverse impact on biodiversity networks or connectivity will be resisted <i>unless it can clearly be demonstrated that there are reasons for the proposal which outweigh the need to safeguard the substantive nature conservation value of the features of interest.</i></u></p> <p>Habitats of the moorland will be enhanced and landowners or occupiers will be actively encouraged to manage important areas for bird foraging to ensure continued provision of suitable habitat.</p> <p><u>Where supported by evidence</u> Tthe Council will recognise the importance of foraging/ commuting areas for protected and SPA/SSSI <u>species qualifying features</u> outside the statutory designated area as a material consideration in the preparation of development plans and in the determination of planning applications. Where <u>supported by evidence</u>, foraging sites, currently outside the SPA/SAC <u>and SSSI</u> will be considered for designation <u>as a Locally Designated Site.</u></p>	<p>Paragraph 113 of the NPPF requires criteria based polices reflecting the hierarchy of sites.</p> <p>All four of paragraphs A, B, C and D of Policy EN2 reflect the need in certain circumstances for development interests to override natural environment interests:</p> <p>Paragraph A deals with the most protected European sites and recognises the derogation tests in Article 6(4) Habitats Directive which allow the conservation interests of European sites to be overridden in limited circumstances.</p> <p>Paragraph B deals with SSSIs and Paragraph C deals with Locally Designated Sites and both recognise the need in certain circumstances for development interests to override conservation interests.</p> <p>Paragraph D envisages provision of compensatory measures in certain circumstances which, in the case of some species (European Protected Species such as bats and great crested newts), reflects a derogation from legal protection in cases where an overriding public interest (economic or otherwise) is demonstrated.</p> <p>It is odd therefore that Paragraph E, which deals with "Enhancement", perversely does not recognise the concept of development "overriding" natural environment protection. Paragraph E states that in cases of serious fragmentation of habitats, wildlife corridors or significant adverse effects on biodiversity networks or connectivity development will always be resisted.</p> <p>CEG's proposed amendment ensures consistency between paragraph E of Policy EN2 on the one hand and (i) paragraph 113 NPPF; and (ii) the earlier paragraphs A-D of Policy EN2 on the other.</p> <p>If CEG's amendment is not made this could lead to perverse consequences eg if serious fragmentation of habitats were to result from a proposed development within a SSSI but the benefits of the development outweighed the impacts on the SSSI then, based on the Council's present drafting, Paragraph A would permit the development to proceed but Paragraph E would prevent it.</p>

FREETHS

ANNEX 2

THE COUNCIL'S REVIEW OF ITS AA DEC 2014 AS PRESENTED IN ITS AA NOV 2015: IMPROVEMENTS MADE BY THE COUNCIL

1. CEG notes that the Council has made the following significant improvements to its assessment of impacts of the Core Strategy on the South Pennine Moors Phase 2 SPA in its AA Nov 2015:
2. The Council now recognises that birds breeding outside the South Pennine Moors Phase 2 SPA cannot form part of the SPA's breeding bird assemblage. Birds showing breeding behaviour outside this SPA have therefore now (correctly) been ignored by the Council when assessing impacts on the integrity of the SPA (see para 6.2.12 AA Nov 2015).
3. The Council now recognises the key role that mitigation measures play in securing avoidance of an adverse effect on integrity of a European site. See, for example, the third sentence of para 6.2.61 AA Nov 2015 which correctly states that: "*avoidance / mitigation would include the choice of sites being identified for development providing equivalent replacement habitat so that the overall resource available to the birds is not diminished, improved management of a site to increase bird use or timing of works outside of the period in which sites are frequently used*". This approach is consistent with legislation⁴ and with both domestic and Court of Justice of the European Union caselaw⁵.
4. The Council has now acknowledged that birds such as curlew and lapwing are part of the breeding bird assemblage referred to in the 1998 citation rather than being South Pennine Moors SPA 2 SPA qualifying species of bird protected in their own right (see para 4.1.36 AA Nov 2015).
5. The Council has now conducted the assessment which Natural England had previously required, namely an exercise in considering and distinguishing between SHLAA 2 sites which are: (i) unlikely to be deliverable ("red"); (ii) deliverable with mitigation ("amber"); and (iii) deliverable without mitigation ("green") (see para 6.2.50 AA Nov 2015).
6. The Council no longer relies on mere habitat types (without scientific basis) as a basis for SHLAA 2 sites to be excluded from development (ie although habitat types are mentioned in paras 6.2.46 to 6.2.49 AA Nov 2015, the categorisation of SHLAAs into red, amber and green is not linked to habitat alone: see paras 6.2.50 to 6.2.56 AA Nov 2015).
7. The Council now takes into account significantly improved breeding bird data ie the 2014 breeding bird data provided by Natural England.
8. The Council reports that it has taken advice from Natural England (see 6.2.31 AA Nov 2015) and as such has assessed the presence of SPA breeding bird species on / near to SHLAA 2 sites as against the population of the South Pennine Moors Phase 2 SPA *as a whole* (see Tables 6.6, 6.9 and 6.10), as opposed to against small areas only of the South Pennine Moors Phase 2 SPA such as Rombalds Moor. In its comments on the Council's Phase 1 review, CEG had also pointed out to the Council that this was a key requirement.
9. The Council now presents an assessment of the described impacts on the integrity of the European sites (see Chapter 8).

⁴ Regulations 61 and 62 Conservation of Habitats and Species Regulations 2010 and Article 6.3 Habitats Directive

⁵ eg C-521/12 *T. C. Briels and Others v Minister van Infrastructuur en Milieu; R (Hart DC) v SSCLG* [2008] EWHC 1204; *Hargreaves v. SSCLG* [2011] EWHC 1999 (Admin); *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174

FREETHS

ANNEX 3

THE COUNCIL'S REVIEW OF ITS AA DEC 2014 AS PRESENTED IN ITS AA NOV 2015: FACTORS CONTRIBUTING TO AN EXAGGERATED ASSESSMENT OF PREDICTED IMPACTS FROM DEVELOPMENT ON THE SOUTH PENNINE MOORS PHASE 2 SPA

1. Despite the improvements noted above, CEG notes that the Council's assessment of predicted impacts on the South Pennine Moors Phase 2 SPA remains exaggerated for the following reasons. These do not affect CEG's judgment that the AA Nov 2015 is adequate for the purpose of an assessment of the Core Strategy, but they are relevant for the Council to consider when undertaking further assessments, for example of lower tier plans:
2. CEG reiterates that the "breeding bird assemblage" is not a qualifying feature of the South Pennine Moors SPA, given that this feature was removed as a qualifying feature for this SPA by JNCC following its SPA review in 2001. There is no dispute between Natural England and JNCC that the 2001 review should be implemented. Natural England has nevertheless delayed this implementation over 14 years. The Council should not have included the breeding bird assemblage as a SPA qualifying feature in its AA Nov 2015. Natural England's advice to this effect is in conflict with JNCC's website. CEG reserved its position on this point in its agreement with the Council and Natural England on 9 March 2015; and this continues to be CEG's position.
3. CEG also reiterates that the boundary of the South Pennine Moors SPA as determined by JNCC in 2001 is very significantly larger than the boundary of the South Pennine Moors Phase 2 SPA. The AA Nov 2015 should have relied on the larger boundary of the South Pennine Moors SPA. Natural England's advice to this effect is again in conflict with JNCC's website. CEG reserves its position here too.
4. The Council has now (correctly) ignored birds noted on land outside the South Pennine Moors Phase 2 SPA when those birds are engaged in breeding behaviour (on the basis that these cannot be part of this SPA's breeding bird assemblage since they are breeding outside this SPA). However the Council has continued to assume that birds on land surveyed outside this SPA are part of this SPA's breeding bird assemblage even when engaged in behaviours other than foraging ie standing, preening or roosting on the basis that "*birds demonstrating these behaviours may be breeding within the SPA boundary*" (see para 6.2.12 AA Nov 2015). This is despite the fact that the acknowledged role of supporting habitat is to provide foraging locations for the qualifying species (see para 6.2.1 AA Nov 2015).
5. Despite now acknowledging the "breeding bird assemblage" (see para 4.1.36 AA Nov 2015), the Council continues to treat each species, said to form part of the breeding bird assemblage, as a SPA qualifying feature in its own right (see Table 6.3, Table 6.4, Table 6.6, Table 6.9, Table 6.10, 7.2.1 and 7.2.10). There has been no explicit assessment of the impact on the "breeding bird assemblage" population as a whole.
6. The Council has failed to take into account the *entire* feeding resource present around the SPA when assessing impacts of development on the integrity of the SPA, which also exaggerates the assessment of impacts provided.

FREETHS

ANNEX 4







THE COUNCIL'S REVIEW OF ITS AA DEC 2014 AS PRESENTED IN ITS AA NOV 2015: FURTHER CRITICISMS NOTED BY CEG

1. CEG has a number of further criticisms of the AA Nov 2015. These do not affect CEG's judgment that the AA Nov 2015 is adequate for the purpose of an assessment of the Core Strategy, but they are relevant for the Council to consider when undertaking further assessments, for example of lower tier plans:
2. The OS MasterMap polygons, referred to as being the method by which the use of land by foraging SPA birds has been estimated (see para 6.2.32 AA Nov 2015), have not been provided. It is therefore not possible to know exactly which 2013 bird data points have been included as relevant or to understand in full the assessment method. Full details of the data underpinning a HRA should be provided. It is disappointing that greater clarity has not been provided.
3. The AA Nov 2015 continues to refer to "The Solent Waders and Brent Goose Strategy", despite noting the "*clear differences*" between the use of land by the birds of the Solent and the Pennine Moors (6.2.28 AA Nov 2015). This is an inappropriate model for use in the South Pennines.
4. The AA Nov 2015 considers impacts not only as against the South Pennine Moors Phase 2 SPA breeding bird population as a whole (which is correct) but also as against the breeding bird population of sub-areas of this SPA ie Rombalds Moor and South West Bradford. These sub-areas of this SPA are irrelevant.
5. The Council sets out in the AA Nov 2015 a mitigation policy approach for development going forward which is of concern. For example:
 - 5.1. Para 2.2.3 AA Nov 2015 states that additional mitigation measures must be considered at the integrity test (Stage 2) but should not be relied upon during screening. This is incorrect and at odds with caselaw such as *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) and *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174.
 - 5.2. Para 6.2.61 AA Nov 2015 states that where identifying mitigation measures would allow development to take place, measures should be in place *prior* to development commencing. This cannot and should not be regarded as a fixed requirement. This must be considered on a case by case basis.
 - 5.3. Para 6.2.62 AA Nov 2015 sets out a number of suggested principles which should be taken into account during the selection and design of replacement sites as mitigation. The principles listed are replacement with equivalent area (ha) of foraging land; replacement site to be comparable distance from SPA (certainly within 2.5km zone); and replacement site to be of comparable quality regarding food abundance, habitat type / quality, topography, sight lines and the absence of current or foreseeable access / disturbance. Again, these cannot and should not be regarded as fixed requirements. Appropriate mitigation must be considered on a case by case basis.
6. The Council has chosen not to publish NE's recent advice to the Council, as referred to at para 6.2.31 AA Nov 2015, which is disappointing.



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