



Draft South East Plan Examination in Public

**Written Statement by
the Royal Society for the Protection of Birds**

**Matter 8, Sub-matter 8Hiv & 8Jiv
Combined Thames Basin Heaths SPA**

**Further submission by the RSPB on the
Assessor's Report**

5 March 2007

8Hiv/8Jiv.1 What are the implications of the Assessor's Report, and taking account of the Appropriate Assessment, on the ability of the two sub-regions to achieve the housing provision figures in draft RSS, and on any alternative growth levels and spatial options examined?

Introduction

The appropriate assessment¹ (AA) of the South East Plan (the Plan) identifies the need to mitigate recreational disturbance and other urban effects arising from the cumulative effects of new residential development allocated in the two sub-regions, in order to conclude no adverse effect on the Thames Basin Heaths SPA (the SPA).²

We approach the Assessor's Report (AR) in this context.

General comments on the AR

Natural England (NE) produced the Draft Delivery Plan (DDP) because it recognised:

- All residential developments were combining to cause an adverse effect on the SPA's integrity;
- This needed to be tackled to conserve the SPA while enabling residential development to proceed;
- A strategic solution encompassing an integrated approach to mitigation was necessary, focusing primarily on Sustainable Accessible Natural Green Space (SANGS).

We **support** the AR agreement with these key elements of NE's analysis and further **support**:

- Recognition that populations of the three heathland bird species are relatively unstable and vulnerable;
- Recognition that:
 - Access management forms part of the mitigation strategy alongside SANGS;
 - Habitat management cannot comprise mitigation if required to restore/maintain the SPA under Article 6(2) of the Habitats Directive;
- Careful phasing of housing during the Plan's lifetime to ensure SANGS are fully functional before residential occupation to protect the SPA's integrity;
- The need for a joint Development Plan Document;
- The need for a comprehensive, targeted monitoring programme.

This provides clear guiding principles to deliver the necessary strategic mitigation.

¹ See paragraphs 8.6.8 and 9.6.2 of Document SEP5C – *Appropriate Assessment of the Draft South East Plan: Final Report*. Scott Wilson/Levett-Therivel.

² If a conclusion of no adverse effect cannot be reached, it is open to the decision maker to seek to pass the strict tests in Article 6(4) of the Habitats Directive on no alternative solutions, imperative reasons of overriding public interest and provision of compensatory measures. We **agree** with the Assessor that this option is not applicable in this case (paragraph 4.1.41).

Specific criticisms of the AR

However, fundamental flaws in the AR could render the Plan:

- In breach of the requirements of the Habitats Directive;
- Impractical to implement at both Local Development Framework (LDF) and planning application level.

We set out our criticisms below.

1. The scientific evidence base

(a) The strength of the evidence base

The AR concludes (4.3.17) the substantive research carried out in Dorset did not constitute a sufficiently robust evidence base to conclude a problem existed on the SPA. The RSPB **strongly disagrees**.

The RSPB believes that³, while carried out in Dorset⁴, the on-site, species-specific PhD research on woodlark and Dartford warbler is relevant to the SPA. The AR response to this research suggests a lack of understanding of the appropriate transfer of robust scientific research, akin to saying medical research on people in Sheffield would not apply to people in Surrey.

The reasons for rejecting these studies (4.3.17) (distribution/size of urban patterns and SPA fragments) are irrelevant to on-site studies of, *inter alia*, footpath use by humans and disturbance to birds. For example, the AR (4.4.28) concludes woodlark breeding success (not defined) is not necessarily affected by higher visitor levels. This is wrong. Mallord's⁵ statistically robust, peer-reviewed conclusion is precisely that there is a reduction in overall productivity due to visitor disturbance.

(b) Application of the Footprint Ecology report (FPE) findings

Key conclusions of the AR stem from an unduly negative interpretation of the FPE, with serious ramifications for modification and application of Zone B's boundary⁶ and consequential application of the legal requirements (see Section 2 below).

(i) Relationship between nightjar density and housing density

The AR leans heavily on the FPE finding that a statistically significant negative correlation between nightjar and housing density existed to 800m from the SPA,

³ As was noted at the Technical Meetings.

⁴ The RSPB summarised the key findings of the Dorset research at paragraphs 55-75 of TBH 27/1r, in particular paragraphs 71-75.

⁵ Mallord, J. W., Dolman, P. M., Brown, A. F. & Sutherland, J. 2007. Linking recreational disturbance to a ground-nesting passerine. *Journal of Applied Ecology*, 44: 185-195.

⁶ See paragraphs 4.3.22 and 4.7.16.

compared to 5km for Dorset and Dorset and Thames Basin Heaths (TBH) combined. This is used to justify a relaxation of Zone B's boundary and, more critically, to exempt an unknown number of schemes less than 10 dwellings within Zone C.

We consider this application of the findings to be incorrect as:

- The relationship between housing density and nightjars is consistently negative at all measured distances to 5km from the TBH, as it is in Dorset;
- The lack of statistical significance on the TBH above 800m is a function of the smaller sample size;
- This makes it much more likely than not there is a similar effect on TBH as in Dorset i.e. out to 5km. Any conclusion of no likely effect above 800m in TBH would have to assume nightjars react differently to urban effects in Dorset and TBH, for which there is no evidence, or these effects operate differently in the two areas, a proposition which seems to be refuted by the FPE;
- The AR therefore ignores the overall pattern indicated on both TBH and Dorset by the FPE, and places too much weight on arbitrary levels of statistical significance.

(ii) Application of the FPE to define "sensitive areas"

The AR uses the FPE to derive a threshold of 30 visitors/16 hours to define "sensitive areas" of the SPA in respect of effects on breeding nightjar, despite expert advice that the data does not suggest any threshold, rather an increasing negative effect with higher visitor numbers. The AR "sensitive area" threshold can only apply to nightjar distribution in the SPA. It ignores breeding productivity effects, which expert advice (based on Dorset research) made clear could be expected at lower visitor levels. This would constitute an adverse effect on SPA integrity.

There are good reasons to avoid applying a threshold below which no adverse effect of disturbance is expected:

1. The precise shape of the relationship between nightjar density and estimated disturbance level is not known. The AR correctly points out the FPE disturbance estimates are imprecise. It is contradictory for it to then suggest they are so precise they can be used to define (i) the shape of the density/disturbance relationship and (ii) the cut-off between no adverse effect and adverse effect requiring mitigation (e.g. Recommendation (ii)(d) 2nd bullet);
2. From the FPE estimates, the area of land within the SPA with low disturbance levels is large and exhibits a sharp transition to areas with progressively higher disturbance levels. Nightjars occur at highest density in areas with low estimated disturbance. If a threshold is set at a level where disturbance is assumed to have no effect, or is set at too high a level, both the area of SPA and the number of nightjars below this level is large. Hence, a small error in the estimated threshold can potentially influence a large area of SPA and its designated interest;
3. Based on available research, negative effects on productivity could be expected before birds abandon otherwise suitable SPA habitat;

4. It has not been possible to carry out further analysis for woodlark and Dartford warbler. We agree with NE's concerns that these species' subtle habitat requirements may not facilitate this form of analysis.

In addition, we note the following key points:

- The AR fails to prescribe which FPE model will define the sensitive areas. Maps 7 and 8 in TBH 23/10a show model choice has significant implications on the area of SPA "protected" and the hinterland captured;
- The definition of "sensitive areas" will change every time research findings redefines their boundaries in order to avoid an adverse effect on SPA integrity e.g. factoring in adverse effects on the distribution and productivity of other species will expand any "sensitive areas" considerably.

Conclusion

It is the RSPB's view that the ecological evidence demonstrates:

- Cumulative effects of recreational disturbance from residential developments located up to 5km⁷ from the SPA are having an adverse effect on SPA integrity;
- In terms of cumulative recreational pressure, there is no justification to distinguish between residential developments of different sizes or distances from the SPA (up to 5km); and
- Visitor pressure causes nightjars to avoid suitable SPA areas, and recreational disturbance and associated factors reduces productivity in all three species.

2. Exemptions for developments less than 10 dwellings (small developments)

The AR applies flawed analysis of the ecological evidence to reach the following conclusions:

- To justify redefining the outer boundary of Zone B at 1km;
- To make unsubstantiated distinctions between the likely significant effects (LSE) of:
 - small developments⁸ and larger developments;
 - small developments either side of a 1km boundary;
- It is possible to define "sensitive" and "non-sensitive" areas within the SPA for nightjar;
- Within Zone B, small developments only have a LSE and adverse effect if within 1km of a "sensitive area".

Applying the in-combination test

The AR approach has an important bearing on how the Plan and related LDFs assess the in-combination effects of 40,000 homes on the SPA and whether it is possible to ascertain they will have no adverse effect on it. It will certainly induce a substantial increase in "small developments" proposed within 5km of the SPA.

⁷ Linear distance from the edge of the SPA.

⁸ Defined confusingly as "10 or less" or "less than 10" dwellings in different parts of the AR.

It is clear as a matter of law the in-combination test applies at both the LSE and the integrity test stage as the AR appears to accept.

The in-combination test applies both to small and larger developments. Unless and until one is satisfied all small developments in combination will not add anything to the total cumulative effect on the SPA, it is not possible to “exempt” all small developments more than 1km from the SPA from the LSE test, or those beyond 1km of a “sensitive area”.

On the evidence before the Assessor (and prior to any LDF), it is impossible to determine the quantum of housing in small developments between 1-5km from the SPA. It is therefore impossible to conclude they will not have a LSE. If the AR is suggesting no matter how many houses come forward in the small category in the 1–5km zone they will not have an LSE in-combination, then that is plainly unsupported and unsupported by any evidence. It is also logically unsustainable having regard to the AR conclusions on larger developments. If a number of say 40 house sites in combination may (as the AR appears to assume) have a LSE, it inevitably follows that four times that number of 10 house sites in similar locations would also have a LSE. We consider the conclusions of the AR on the small/large sites mutually inconsistent.

The AR recommendation to exempt all small sites from the Habitats Regulations is not legally permissible. The Technical Meetings heard many sites in this area are small infill sites. The logic of the AR approach is that very large numbers of housing on small sites may come forward with no mitigation at all e.g. SANGS. This is simply unacceptable.

The AR achieves flexibility at the expense of satisfying the legal tests and the probable expense of protecting the SPA by means of appropriate mitigation.

Finally, we consider permissions granted on the back of this aspect of the AR will necessarily and inevitably be unlawful.

3. Additional concerns

Given our significant criticisms of the interpretation and application of the ecological evidence base and the consequences of this for Habitats Directive compliance, we have not had space to address the following concerns in detail:

- **Travel versus linear distance:** we support criticisms on this issue made by the Berks, Bucks and Oxon Wildlife Trust (BBOWT) and Natural England.
- **SANGS standards:** we support BBOWT’s concerns that the major reduction in standards is not precautionary enough, especially as it is underpinned by the flawed 10 dwelling threshold, “sensitive areas” and reduced zonal areas (due to use of travel distance) which will combine to reduce the area of SANGS provided. A

higher standard could be used in an initial phase, adjusted (if necessary) following monitoring and review.

- **Interpretation of avoidance versus mitigation:** we consider the criticism of NE unfair. We refer the Panel to paragraphs 83-87 of TBH27/1r for a detailed explanation of how the planning system should work following the European Court of Justice ruling⁹;
- **Dorset Interim Policy Framework (IPF) versus DDP and proportionality:** we reiterate our comments to the Technical Meetings that the IPF is similarly “unbalanced” in favour of access management and education. It currently lacks any assessment of potential open space (see our comments on the draft IPF, Appendix 1).
- **Habitat management:** we disagree with the AR (4.9.3) that NE has no powers to force landowners to meet obligations under the Habitats Directive and refer the Panel to Defra’s note TBH 6/1a.

4. **Implications of the AR on the ability of the two sub-regions to achieve the housing provision figures in the draft RSS**

The RSPB believes the housing provisions could be achieved but considers the AR places considerable legal and practical barriers in the way:

- Use of 1km distance and “sensitive areas” to exempt small developments is unsound, being based on a flawed application of the ecological evidence;
- The resulting, unsubstantiated exemption of an unquantified number of “small developments” fails the in-combination test and would place the Plan in breach of the Habitats Directive.

Therefore, we **recommend** that, to comply with the legal requirements (based on sound application of the ecological evidence), both small and larger developments within 5km of the SPA should be mitigated on an equal basis.

⁹ European Court of Justice ruling C-6/04 *European Commission vs. United Kingdom*, 20 October 2005.

APPENDIX 1

Copy of RSPB letter dated 24 November 2006 to Poole Borough Council

Comments on the:

*The Dorset Heathlands Interim Planning Framework 2006-2009
Public Consultation Document, 23 October 2006*

Nigel Jacobs
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24 November 2006

Dear Mr Jacobs

The Dorset Heathlands Interim Planning Framework 2006-2009
Public Consultation Document 23 October 2006
Response of the RSPB

The RSPB welcomes this opportunity to comment formally on the Dorset Heathlands Interim Planning Framework 2006-2009 (*the Interim Framework*). We have been actively engaged in its development over the past several months, since the issues that it seeks to address are core to our interests. We would like to thank you for the small extension in time to enable us to submit our comments. Our key comments are summarised in this letter and more detailed comments on both the principles and details provided in the attached Appendix. The majority of our comments relate to the background paper as this provides the context and rationale for the Interim Framework. However, they are also relevant to the main document, on which we also make a number of specific comments.

The RSPB supports the principle of an interim framework in order to ensure new residential development is consented in compliance with the Habitats Regulations. We agree that, in the absence of a strategy that secures measures to reduce and avoid harm, it is not possible to conclude that the combined effects of ongoing housing development in proximity to the Dorset Heathlands SPA and Ramsar site and the Dorset Heaths SAC (*the international heathland sites*) would not adversely affect the integrity of those sites. Therefore the RSPB welcomes this initiative and we applaud the effort that has been invested by each of the local Authorities, Dorset County Council and English Nature/Natural England in getting it to this stage.

We support the 4-pronged and interdependent approach to the mitigation strategy:

- Provision of alternative natural green space;
- Access management;
- Visitor use management; and
- Public education.

However, we consider the whole strategy needs considerable tightening up in several places if it is to provide the necessary certainty that the desired mitigation can be secured in compliance with the Habitats Regulations in perpetuity.

We remain very concerned over the consent of residential development in the absence of an agreed mitigation strategy. Based on our reading of the legal opinion contained in the Peer Review of the Thames Basin Heaths Delivery Plan, this would appear at risk of being in breach of the Habitats Regulations. Therefore, we seek clarification on:

- The legal basis of this approach;
- The number of residential dwellings that have been consented since English Nature issued its advice (contained in Annex 1 to the Background Paper) and those predicted to be consented ahead of adoption of the Interim Framework by the relevant planning authorities.

Furthermore, based on ongoing and emerging work on the Thames Basin Heaths, we consider several major pieces of work are still required to ensure the Interim Framework (and any long term strategy developed under the auspices of the South West Plan and related local development frameworks) can be implemented robustly, including:

- A comprehensive audit of existing and potential open space;
- Agreed open space standards;
- An agreed comprehensive monitoring package which includes:
 - Standardised visitor use surveys of the SPA and alternative open space, to establish baseline conditions and act as a basis for future monitoring of the success of mitigation;
 - Agreed biological monitoring frameworks, eg. Annex I bird surveys at agreed intervals;
 - Standardised monitoring of urban effects and the related effects of the interim framework e.g.
 - Locations of cats observed on the international heathland sites
 - Location and area mapping of all fire incidents.

I hope that you find this response helpful. We would very much welcome further involvement in progressing the document to adoption.

Yours sincerely

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Conservation Officer

cc Dr Andrew Nicholson, Natural England
Rob Cameron, Natural England
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