

**MILLER STRATEGIC LAND**

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**ADVICE NOTE REGARDING IMPLICATIONS OF CERTAIN BIRD POPULATIONS  
WITHIN GORRICK PLANTATION, NEAR CROWTHORNE, BERKSHIRE**

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**EVAND/SECTG/327106-1**

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## Introduction

- 1 We have been asked to prepare this Note by Miller Strategic Land to address the soundness of Wokingham District Council's position that because of evidence as to the presence of ground nesting bird species at Gorrick Plantation ("Gorrick") for which the Thames Basin Heaths Special Protection Area ("TBHSPA") was designated, that the South East Plan Panel should appropriately apply the cautious approach being put forward in Wokingham District Council's ("Wokingham") submission to the EiP.
- 2 This Note concludes that Wokingham fall into error in their recommended approach to Gorrick on the basis that the Secretary of State has fully complied with all necessary EU requirements as to the designation of the TBHSPA, and moreover the Secretary of State has not fallen into error in not designating Gorrick as part of the TBHSPA. Moreover, Wokingham place reliance upon legal authorities which are distinguishable on their facts.
- 3 Appended to this Note is the following supporting documentation:
  - (a) Schedule 1 - JNCC Selection Guidelines for Special Protection Areas;
  - (b) Schedule 2 – Executive Summary and Extracts from The SPA Review (Stroud et al.2001: UK SPA Network – Its Scope and Content, JNCC);
  - (c) Schedule 3 – UK Special Protection Area and Ramsar (avian) Scientific Working Group Terms of Reference; and
  - (d) Schedule 4 – Natura 2000 Standard Data Form for TBHSPA.

## Wokingham District Council's Argument before the EIP

- 4 Wokingham rely upon an ecological study prepared by 2Js Ecology which concludes that Gorrick holds more than 1% of the biogeographical population of Nightjars in the TBHSPA area. The study concludes that Gorrick thereby supports a substantial population of Annex 1 birds species for which the TBHSPA was established. It concludes that given the numbers and densities of Nightjars at Gorrick, together with prime habitat for the Woodlark on the site, there is a compelling argument that it should be included in the TBHSPA (see report prepared for Wokingham by John Eyre of 2Js Ecology, November 2006).
- 5 The 2Js Ecology study concludes that inclusion of Gorrick within the TBHSPA would help to reduce the fragmentation to which the TBHSPA land area has been historically subjected. The submission of Wokingham (7265) to the South East Plan EiP states that based on the Natural England TBHSPA Draft Delivery Plan, 38% of Wokingham District lies within 5 kilometres of the TBHSPA. Were Gorrick to be included within the TBHSPA, the proportion of Wokingham District within 5 kilometres would increase to around 48%. Such a conclusion has clear implications for Wokingham's ability to accommodate the Draft South East Plan proposed district housing number allocation.

## Gorrick Plantation

- 6 Gorrick is an area of approximately 65 hectares accessed off the B3430 (Nine Mile Ride) situated to the North West of Crowthorne in Berkshire and comprises coniferous woodland habitat. Gorrick is managed by the Forestry Commission. It is of note that aside from not being part of the SPA, Gorrick does not benefit from any national designation i.e. SSSI status. This is important, as it would not normally be the case that an area of land would be put forward for the international protection derived from SPA status without it first enjoying

protection at the national level, and certainly not treated in the cautious manner advocated by Wokingham.

- 7 Gorrick is approximately 2.5 kilometres from the boundary of Broadmoor to Bagshot Woods and Heaths Site of Special Scientific Interest (SSSI) which is the nearest component part of the TBHSPA.

#### **The TBHSPA**

- 8 The TBHSPA straddles the Counties of Berkshire, Hampshire and Surrey. The disparate areas of the designation together comprise a site area of 8,274.72 hectares, and contains internationally important populations of three ground nesting bird species: the Dartford Warbler, the Woodlark and the Nightjar. These species are susceptible to disturbance from recreational use of the heath land habitat comprised within the TBHSPA, and are included in Annex 1 of the European Birds Directive (79/409/EEC).

#### **The Designation Procedure for Special Protection Areas in the United Kingdom**

- 9 The TBHSPA has been designated in the usual manner for an SPA in the United Kingdom. The designation process is grounded in EU law.
- 10 The Wild Birds Directive (79/409/EEC) places a requirement upon Member States "to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1." Article 3(1) (**our emphasis**).
- 11 Article 4 (1) sets out the matters which should be taken into account by Member States in designating special protection areas. Such areas should be designated in order to ensure the survival and reproduction of Annex 1 bird species in their area of distribution. Member States should classify the most suitable territories in number and size for the conservation of those species, taking into account their protection requirements.
- 12 Article 4(4) is also of note insofar as "outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats".
- 13 In addition to the Birds Directive, the Habitats Directive (92/43/EEC) requires Member States to introduce a range of measures including the production of a report every six years on the implementation of the Directive through the designation of Special Areas of Conservation (SACs).
- 14 The designation of SACs and SPAs together form a network of protected areas known as Natura 2000.
- 15 The Habitats Regulations 1994 ("Regulations") transpose the Birds and Habitats Directives into UK law. There is no suggestion that the Regulations have not properly transposed the Wild Birds or Habitats Directives into UK law.
- 16 Regulation 7(1) of the Regulations provides for the Secretary of State, on the basis of criteria set out in Annex 3 to the Habitats Directive, to propose a list of sites which comprise populations of Annex 1 species and Annex 2 natural habitat. The criteria are applied by the Joint Nature Conservancy Council which advises the Secretary of State (see selection criteria at Schedule 1 of this Note).
- 17 PPS9 states at paragraph 6 that statutory protection is not provided by the Habitats Regulations until such time as the location of an SPA or pSPA is agreed with the Commission. However, pending such consideration by the Commission, they should be

treated in the same manner as if they enjoyed such statutory protection in the making of planning decisions.

- 18 The Commission required the first such list of Annex 1 and Annex II sites to be communicated to the Commission on or before 5 June 1995. The Government consulted on the first such list of sites in March 1995. As a result of the 1995 consultation exercise a list of 113 sites were submitted to the European Commission as candidate SACs, together with 68 pSPAs.

#### Reviewing SPA Designations

- 19 Regulation 7(3) of the Regulations provides for the Secretary of State, where appropriate, to propose a modification of the lists submitted to the Commission in the light of the results of any relevant surveillance, as referred to in Article 11 of the Habitats Directive.
- 20 Such surveillance takes the form of periodic reviews of the Natura 2000 network of sites, which in the UK are undertaken by the JNCC, which advises the Secretary of State upon any additional habitat designations, working in cooperation with the national nature conservation advisers, i.e. Scottish Natural Heritage and Natural England.
- 21 The last such periodic review occurred in 2001, and culminated in the publication of what is commonly known as the SPA Review (Stroud et al.2001: UK SPA Network - Its Scope and Content, JNCC) (see extract at Schedule 2 of this Note). The next review is scheduled to commence in 2008 (see paragraph 23 below).
- 22 The SPA Review contains SPA citations which in some circumstances differ from the currently classified Commission SPA citation and Natura 2000 Standard Data Form. According to Government Policy, the citations in the review are fully protected as SPA or pSPA. As a result of the review, the legal documents for many classified SPAs in the UK network now require amending to incorporate changes to qualifying species, a process which is ongoing.
- 23 Upon completion of the SPA Review, DEFRA convened an advisory group to take forward further consideration of the SPA network development, the UK SPA and RAMSAR (Avian) Scientific Working Group (SPA SWG) (see terms of reference at Schedule 3 of this Note). SPA SWG will commence taking forward scientific analysis to confirm the next SPA Review in 2008.
- 24 The last SPA to be subject to a boundary extension in the England was the Stour and Orwell Estuaries SPA (UK 9009121) on 19 May 2005. The last new SPA to be confirmed in England was the TBH SPA designated in 2005 (UK 9012141) (see Natura 2000 Standard Data Form at Schedule 4 of this Note).
- 25 In the Executive Summary of the SPA review it is stated that SPAs are not meant to incorporate all habitats which contain Annex 1 species. In point of fact "the SPA network is of large size [and] contains a wide variety of habitats and includes sites spread throughout the UK. The network is logically and scientifically derived, collectively robust, and will make an enduring contribution to the conservation of Britain's birds".
- 26 The Executive Summary continues; "the SPA network presented here provides for the site based requirements of Birds Directive Annex 1 and migratory species regularly occurring in the UK. It will enable the UK to meet fully its obligations under the Directive to conserve its internationally important bird fauna".

- 27 Accordingly, the JNCC takes the view that the existence of Annex 1 species should not alone determine SPA status, but rather SPA designations are meant to comprise an objective scientifically justified area selected upon a broader range of criteria than merely the pre-existence of species populations (see Schedule 1 of this Note for the JNCC's selection criteria). These criteria include, alongside population data, information as to species range, breeding success, history of occupancy, the site's "naturalness" and whether the site constitutes a severe weather refuge.
- 28 Commencing in 2008 a further review will take place under the auspices of SPA DWG and the JNCC, as occurred in 2001. At that time it may well be that Gorrick is considered for inclusion within a wider TBHSPA boundary, but that will have to be considered on its facts and the detailed selection criteria at that time. In the interim it is not the case that the Secretary of State is in breach of EU law, in not designating Gorrick as part of the TBHSPA and moreover Gorrick should not be treated as a special circumstance, whether by Wokingham or the Panel. Such an approach would be incorrect and not substantiated in legal or policy terms. The only rider to this is that the Panel should not treat Gorrick in any manner that might clearly be shown to result in deterioration of habitat for Annex 1 species outside of the TBHSPA having regard to the Article 4 (4) duty in the Wild Bird Directive (see paragraph 12 of this Note). However, designation of Gorrick as SANGs does not automatically lead to such a conclusion so long as the site were properly managed in terms of public recreational access as occurs elsewhere within the TBHSPA.

#### **Legal Authority Relied Upon by Wokingham**

- 29 From the analysis undertaken above, it is clear that the United Kingdom Government has put in place a systematic scientifically derived procedure for classifying SPAs.
- 30 By contrast, Wokingham seek to rely upon several authorities where national decision makers have failed in that objective, such that the national states concerns have been shown to have undermined their designation process for SPAs.
- 31 In *Commission v The Netherlands C-3/96* the Commission sought to challenge the failure of the Netherlands Government to classify the Friesian Ijsselmeer Coast and the Hooze Platen on the Western Scheldt as an SPA. The Netherlands Government was found to have disregarded completely the number and area of territories listed as important for the integrity of the Natura 2000 Network in the Commission's study published in 1999, the Inventory of Important Bird Areas in the EC (July 1989) (IBA 89).
- 32 Moreover, the Netherlands Government argued that through the adoption of other special conservation methods, it had been possible not to designate the areas concerned as SPA. It also relied upon economic and recreational counter-requirements which augured against making the relevant designation.
- 33 The ECJ found that where it appeared that a Member State had classified as SPAs sites, the number and total area of which were manifestly less than the number and total area of the sites considered to be the most suitable for conservation of the species in question, it would be possible to find that the Member State had failed to fulfil its obligation under Article 4 (1) of the Wild Birds Directive.
- 34 It was important to note that the Netherlands Government had failed to produce a single document from the national procedure for classifying SPAs which indicated the criteria by which it designated SPAs in the Netherlands. Further, its reliance upon economic and recreational requirements was inconsistent with its assertion that it applied exclusively scientifically derived ornithological criteria when designating SPAs.

- 35 Accordingly, the Netherlands Government was clearly in default of EU law.
- 36 However, the Court made clear that "the situation would be different if the Kingdom of the Netherlands had produced scientific evidence in particular to show that the obligation in question could be fulfilled by classifying as SPAs territories whose number and total area were less than those resulting from IBA 89." (Paragraph 69 of the Judgment).
- 37 In that regard, it was the absence of objective and clear assessment criteria for the designation of SPAs which undermined the Netherlands Government's reasoned justification for the number and area of its SPA designations that provided value to IBA 89.
- 38 In **Basses Corbieres C-374/98**, the French government was successfully prosecuted by the Commission before the ECJ. The area in question containing the protected biotope (a species of eagle) fell outside of any special conservation measures whatsoever and therefore there was no need to consider whether other parts of the Basses Corbieres area were suitable for classification as SPAs, as it was clear that the French Republic had failed to fulfil its obligations under Article 4 (1) of the Wild Birds Directive by not taking any special conservation measures. Again, it is important to note that IBA 89 was prayed in aid of the reasons justifying the inclusion of the area in question within an SPA designation with reliance placed upon **Case C-3/96 Commission -v- Netherlands**.
- 39 In **Commission -v- Kingdom of Spain C-355/90**, the Commission sought to prosecute Spain before the ECJ for failure to properly designate the Santona Marshes as an SPA, its geographical extent having been delineated by economic imperatives alongside scientifically derived ornithological criteria. By not classifying the Santona Marshes as an SPA and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, contrary to the provisions of Article 4 of the Wild Birds Directive, Spain had clearly failed to fulfil its obligations under EU law.
- 40 The aforementioned authorities are clearly distinguishable from the present case where the geographical extent of the TBHSPA has been assessed upon objective and transparent ornithological criteria, such that sufficient qualitative and quantitative habitat is available to protect the biotope in question. Moreover, the extent of the quantitative designation is subject to a transparent systematic periodic review, free from economic or other extraneous constraints. In the circumstances, as at today's date, Gorrick should not be treated as a special circumstance outside the TBHSPA designation.

## Conclusion

- 41 PPS9 paragraph 6 is clear that only areas of land pending agreement with the Commission as SPAs or pSPAs should be treated as though they benefited from similar statutory protection. In the absence of Gorrick being subject to such consideration, or even enjoying national designation, and given a logically and scientifically derived habitat protected within the TBHSPA to accord with the Government's EU obligations, the approach being advocated by Wokingham is unsubstantiated, notwithstanding the presence of Annex I species with Gorrick. In due course it may be that upon the next review of the UK's SPA designations that Gorrick is subject to an amendment to the TBHSPA boundary, but as at today's date, the Panel should consider the current situation based upon the last SPA review findings.

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