

Date: 14 October 2009
Our ref: TR/01-2/CON-P1
Your ref: Y06/1647/SH and Y06/1648



Terry Ellames
Major Applications and Projects
Manager
Shepway District Council
Civic Centre, Castle Hill Avenue
Folkestone, Kent
CT20 2QY

Dear Terry

**RE: London Ashford Airport (LAA) Proposal, Lydd, Romney Marsh, Kent
Dungeness, Romney Marsh and Rye Bay Site of Special Scientific Interest (SSSI)
Dungeness Special Area of Conservation (SAC)
Dungeness to Pett Level Special Protection Area (SPA)
Proposed Dungeness to Pett Level Ramsar site
Dungeness National Nature Reserve (NNR)
Rye Harbour Local Nature Reserve (LNR)**

Further to your request please find Natural England response to the document titled '*London Ashford Airport (Lydd) Applicants Initial Response to Shepway District Council's report A/09/05 to all Members of the Council August 2009*' for the London Ashford Airport proposal at Lydd and information requested by yourself on integrity.

Natural England has the following comments:

Role of Natural England

- 1.1 Role of Natural England; Natural England is a statutory consultee and as an organisation Natural England is here to conserve and enhance the natural environment, for its intrinsic value, the wellbeing and enjoyment of people and the economic prosperity that it brings.
- 1.2 In addition, Natural England is the appropriate nature conservation body, as defined by Regulation 4 of the Conservation (Natural Habitats, & c) Regulations 1994. Under Regulation 48, the competent authority (in this case; Shepway District Council) shall have regard to the representations made by Natural England (see para (3) Reg 48).

Approach to proposed designations Ramsar and pSPA

- 2.1 As Natural England has stated previously, although the proposed Ramsar site and additional SPA interests are not subject to the Habitat Regulation tests, they are material considerations in the planning decision.
- 2.2 With the proposed Ramsar site features and the SPA additional features, Natural England considers that there should be a 'shadow' assessment. This would put the applicant and competent authority in a better position in the event that a Ramsar site is designated or an amended SPA is classified prior to any permission being fully implemented. Designations trigger a requirement for review of any unimplemented permissions under Regulation 50.
- 2.3 It is possible that a grant of planning permission, which did not adequately assess the implications for the possible changes to the SPA, could lead to the need to review any planning permission granted for the London Ashford Airport (Lydd) in the future, with the

possibility of the need to modify or revoke the permission which could result in the need for compensation.

- 2.4 The timetable for the designation process is for consultation to begin in January 2010 with a possible announcement of the classification in late 2010 (dependent on outcomes of consultation). Please see the attached Appendix 1: Current and proposed nature conservation features for European and international site designations at Dungeness, Romney Marsh and Rye Bay.

Approach to London Ashford Airport and Dungeness power station proposal

- 3.1 The applicant states that '*Natural England seems to be taking a different approach in relation to discussions with British Energy on the Dungeness power station proposals*'. The Department for Energy and Climate Change (DECC) is undertaking the Strategic Siting Assessment to identify sites which are suitable, or potentially suitable, for the deployment of new nuclear power stations by the end of 2025 which includes assessing the sites using set criteria.
- 3.2 Natural England, as the Government's Advisor on the natural environment, has been consulted by DECC on all nominations which number 11 in total. We have submitted our response to the nominations. These responses from Natural England will be publicly available when DECC publish the results of the Assessments Natural England has assessed each nomination for its potential impacts on the environment with particular regard to designated sites for nature conservation (and landscape where applicable).
- 3.3 DECC is presently reviewing comments and nominations and are producing a draft Nuclear National Policy Statement (NPS) that will include a list of potential sites. This is due for publication in this autumn.
- 3.4 Natural England would therefore contend that in both the LAA proposal and the DECC consultation we have provided advice on the likely effects of proposals with regards to the designated sites.

Submission of Evidence

- 4.1 The applicant has made commitments to provide various documents that would be approved by the Local Planning Authority after planning permission is given (eg Environmental Management Systems, Biodiversity Action Plan, bird surveys, bird control management plan, air quality management strategy, Botanical and Wetland Habitat Strategy). Case law¹ and guidance from the Office of the Deputy Prime Minister² has stressed the need for a full set of environmental information to be available for consideration **prior** to a decision being taken on whether or not to grant planning permission. The application should describe not only the development requiring planning permission but the entire infrastructure required as a result of the development which could have an effect upon the environment.
- 4.2 The applicant has referenced other airports (i.e. Glasgow, Derry and RAF Kinloss) approach to bird control but not submitted the evidence for scrutiny as to relevance for the London Ashford Airport (Lydd) proposal. If these are exemplary airports as regards proximity to bird reserves then providing the evidence from them, interpreted for the London Ashford Airport would aid progress of the application more quickly and help to define more sustainable levels of aircraft movements.

Precautionary Principle

- 5.1 The precautionary principle is enshrined in the Habitats Directive in Article 6 (3) and Regulation 48(5) of the Habitat Regulations as a matter of law. It is the integrity test i.e. that a plan or project cannot proceed if it cannot be ascertained (beyond reasonable scientific doubt) that there will not be an adverse effect is where the principle lies.

¹ Harrison, J in *R. v. Cornwall County Council ex parte Hardy* (2001)

² *Note on Environmental Impact Assessment Directive for Local Planning Authorities* (April 2004)

5.2 The assessment of the impacts of a proposal, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. In the case of doubt, the precautionary principle should be applied, and the competent authority should state it is unable to conclude no adverse effect on integrity of the plan or project on the European Site. In such a case the competent authority can either refuse the permission or follow the procedures under Article 6(4) of the Habitats Directive.

5.3 Natural England has also advised the Council that In the Waddenzee judgement (ECJ Case C-127/02), The European Court of Justice ruled that a plan or project may be authorised only if a competent authority has made certain that the plan or project will not adversely affect the integrity of the site. '*That is the case where no reasonable scientific doubt remains*'. Natural England asserts that the proposals as it currently stands for the London Ashford Airport (Lydd) has scientific doubt and may not be authorised (subject to Article 6(4) tests).

The Council has asked about the definition of Integrity

6.1 The Conservation (Natural Habitats, & c.) Regulations 1994 Part II Paragraph 20 – (1) where it appears to the appropriate nature conservation body that an application for consent under regulation 19(2)(a) relates to an operation which is or forms part of a plan or project which-

- (a) Is not directly connected with or necessary to the management of the site, and
- (b) Is likely to have significant effect on the site (either alone or in combination with other plans or projects),

they shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) In the light of the conclusions of the assessment, they may give consent for the operation only after having ascertained that the plan or project will not adversely affect the **integrity** of the site.

6.2 Lord Nimmo Smith³ in his ruling on the judicial review of the cairngorms funicular railway case adopted the definition of the **integrity** of the European site given in Circular 6/1995 "*The integrity of a site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified*".

On the basis of this supplementary information provided by the applicants, Natural England **maintains its objections** to the proposals based on our previous correspondence.

Yours sincerely



Kristoffer Hewitt
Environmental Planning Adviser

³ World Wildlife Fund UK limited v Secretary of State for Scotland (1999) Env LR 632.

Further Specific Comments from Natural England on the document 'London Ashford Airport (Lydd) Applicant's Initial Response to Shepway District Council's Report A/09/05 to all Members of the Council by Indigo Planning August 2009'

Chapter 1: Executive Summary

Para 1.12: The applicant; LAA has stated that Natural England has provided wrong advice to Shepway District Council regarding the application of the precautionary principle "*as a matter of law*". The precautionary principle is enshrined in the Habitats Directive in Article 6 (3) and Regulation 48 (5) of the Habitat Regulations as a matter of law. It is the integrity test i.e. that a plan or project cannot proceed if it cannot be ascertained (beyond reasonable scientific doubt) that there will not be an adverse effect, where the principle lies.

In the Report 'MANAGING NATURA 2000 SITES, the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (2000) Chapter 5 on Article 6(4) states that *'the preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that there is a high degree of certainty that the initiative in question will not affect this site, the competent authorities can give their consent on the plan or project. In case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed, as in the case of negative conclusions'*.

Para 1.17 to 1.21 Significant Adverse Effects on the SSSI

The applicant fails to provide any new research or evidence and continues to dispute impacts.

Effects on proposed designations pRamsar and pSPA

The response by the applicant demonstrates that they are failing to recognise responsibilities that sufficiently recognise the special interest of the pRamsar and pSPA. Under the Habitat Regulations (Reg 50), the Council would have a duty to review current permissions.

Para 1.25 Hammonds Corner

The applicant confuses responsibilities under protected species legislation and the legislation regarding Sites of Special Scientific Interest. This undermines the application and the validity of the representation.

1.26 Natural England considers that the proposed measures by LAA need to be clearer and avoid contradictions.

Chapter 4: LAA's Response to the Reasons for Refusal

Whether the SSSI would be subject to significant adverse effects

Natural England objects to the runway extension on the basis that the geomorphological survey demonstrates that in the area of the proposed runway extension is of national importance: 'the stratigraphy found by the runway may not be unique within Dungeness (i.e. it may be repeated in other areas), but is clearly of SSSI quality and is a notified interest feature. Dungeness as a whole has a unique geomorphology which is rare nationally, in Europe and on a global scale. Given this any permanent loss is considered significant.

Chapter 5: Adoption of the Appropriate Assessment

5.8 The applicant states that there are precedents of small areas of other UK SACs being directly impacted without affecting site integrity. If that is the case then Natural England would wish to improve advice and ensure consistency therefore if this evidence relevant to the application that relates to this issue, the applicant needs to provide the information.

5.12 The applicant states that Airports – Glasgow, Derry and RAF Kinloss co-exist with adjacent protected bird reserves. If these are exemplary airports as regards proximity to bird reserves then providing the evidence interpreted for the London Ashford Airport (Lydd) would assist in making progress with this application and defining more sustainable levels of aircraft for Dungeness to Pett Level SPA. The three Special Protection Areas that are nearest to the three airports referred to are:

(i) The Inner Clyde Estuary SPA which is located to the west of Glasgow in central west Scotland. Although the Clyde Estuary is heavily industrialised along much of its length, upstream of Gourrock Bay and Helensburgh there are very extensive intertidal sand- and mud-flats. These have an abundant invertebrate fauna, the species composition of which has been changing consequent to recent improvements in the quality of water within the estuary. The Inner Clyde Estuary is important for a range of wintering waterbirds, notably Redshank *Tringa totanus*.

(ii) Lough Foyle SPA lies on the north-west coast of Northern Ireland and straddles the international border with the Irish Republic. The site comprises a large, shallow sea lough that includes the estuaries of the rivers Foyle, Faughan and Roe. The site contains extensive intertidal mud-flats and sand-flats (with Mussel *Mytilus edulis* beds), saltmarsh and associated brackish ditches. The diversity of coastal habitats has resulted in the lough being of major importance for a diverse assemblage of waterbirds both during the spring and autumn migration periods, and in winter. These include swans, geese, ducks and waders. The lough is especially notable in supporting a high proportion of the international population of Canada/Ireland Light-bellied Brent Goose *Banta bernicla hrota*.

(iii) The Moray and Nairn Coast SPA is located on the south coast of the Moray Firth in north-east Scotland. The site comprises the intertidal flats, saltmarsh and sand dunes of Findhorn Bay and Culbin Bar, and the alluvial deposits and associated woodland of the Lower River Spey and Spey Bay. It is of outstanding nature conservation and scientific importance for coastal and riverine habitats and supports a range of wetland birds throughout the year. In summer it supports nesting Osprey *Pandion haliaetus*, whilst in winter it supports large numbers of Iceland/Greenland Pink-footed Goose *Anser brachyrhynchus*, Icelandic Greylag Goose *Anser anser* and other waterbirds, especially ducks, sea-ducks and waders. The geese feed away from the SPA on surrounding agricultural land during the day. The sea-ducks feed, loaf and roost over inundated intertidal areas within the site, but also away from the SPA in the open waters of the Moray Firth.

There are lessons to be learned from these SPAs and associated airports and from other cases such as the international incident involving geese and a passenger plane at Hudson River, New York, USA where bird numbers were considerably lower than at Dungeness SPA. The situation near Heathrow airport (near the South West London Water Bodies SPA) is also relevant where habitat is managed to reduce risk from birds. In addition, learning from the Little Cheyne Court Windfarm development in reducing bird strike and agreeing management with landowners would provide more confidence that the proposals could be successful.

5.16 The proposed new features (see attached Appendix) for Dungeness SPA and Ramsar designations include a far wider and varied number of species that need addressing to ensure that their requirements do not conflict with the need for bird strike avoidance measures for London Ashford Airport.

5.20 The applicant states that it is very simple to create of shingle habitat on the airfield and it has been achieved recently in partnership with Natural England under a current management agreement. Natural England has no management agreement with LAA and vegetated shingle habitat re-creation is very difficult, a long-term project and so far not effectively proven over the timescales needed for a project such as that proposed by LAA. Natural England's advise that evidence about effective restoration techniques is very limited.

Previous experimental restoration work

[i] has been done on more mobile shingle not mature ridges, Research carried out at Sizewell since the 1980s is not transferable to Dungeness as only addressed 6 species

[ii] typical of pioneer and beach vegetation types and did not cover the restoration of communities. The researchers concluded that restoration is largely cosmetic and has many pitfalls. Methods need to be ecologically sound and sustainable. Overall the experimental work took 14 years, with 7 years for seed storage and individual plants grown on for planting out. The techniques were labour-intensive, with 11,000 plants used for a narrow 1km stretch of dune/shingle, >60,000 seeds used in experimental trial plots and required preliminary investigations into germination ecology of 6 species. Locally-collected seed used with unknown implications for donor areas. Some limited work on translocation of more mature vegetation turves has occurred at Dungeness, but again this was small-scale trials and requires further scientific evaluation.

References;

i Walmsley, C.A. & Davy, A.J., 2001. Habitat creation and restoration of damaged shingle communities. In: Ecology & Geomorphology of Coastal Shingle eds. J.R. Packham, R.E. Randall, R.S.K. Barnes & A. Neal, Westbury Academic and Scientific Publishing, 409-420.

ii *Crambe maritima*, *Eryngium maritimum*, *Glaucium flavum*, *Honckenya peploides*, *Lathyrus japonicus* and *Rumex crispus*.

Chapter 6: Further inaccuracies and misinterpretations in the Officer's report

6.5 e. Natural England considers that the information supplied by the applicant is insufficient and that there is reasonable scientific doubt as to the efficacy of the proposed measures.

6.7 Natural England is the appropriate nature conservation body, as defined by Regulation 4 of the Conservation (Natural Habitats, & c) Regulations 1994. Under Regulation 48, the competent authority (in this case; Shepway District Council) shall have regard to the representations made by Natural England (see para (3) Reg 48). In the Judicial Review Dilly Lane Case, Hampshire (May 2008), Justice Sullivan stated that the Secretary of State was entitled to give "great weight" to Natural England's views.

6.9 Natural England gave a list and explanation of appropriate planning cases to the LAA proposals in our correspondence to the Council dated 8 Jun 09 and the current situation with the Dungeness Power station is that the Department for Energy and Climate Change (DECC) is undertaking the Strategic Siting Assessment to identify sites which are suitable or potentially suitable for the deployment of new nuclear power stations by the end of 2025 which includes assessing the sites using set criteria.

Natural England, as the Government's Advisor on the natural environment, has been consulted by DECC on all nominations which number 11 in total. We have submitted our response to the nominations. These responses from Natural England will be publicly available when DECC publish the results of the Assessments Natural England has assessed each nomination for its potential impacts on the environment with particular regard to designated sites for nature conservation.

DECC is presently reviewing comments and nominations and are producing a draft Nuclear National Policy Statement (NPS) that will include a list of potential sites. This is due for publication in this autumn.

Appendix 1: Current and proposed European and international site designations at Dungeness, Romney Marsh and Rye Bay

Designation	Status	Interest Features
Dungeness SAC	Designated 1 April 2005 – area 3,223.56 ha	<ul style="list-style-type: none"> • Perennial vegetation of stony banks • Annual vegetation of drift lines • Great crested newts <i>Triturus cristatus</i>
Dungeness to Pett Level SPA	Classified 2 August 1999 – area 1,474.04 ha	<ul style="list-style-type: none"> • Breeding: Mediterranean gull <i>Larus melanocephalus</i>, common tern <i>Sterna hirundo</i> and little tern <i>Sterna albifrons</i>. • Wintering: Bewick's swan <i>Cygnus columbianus bewickii</i> and shoveler <i>Anas clypeata</i>
	Additional areas and interest features under consideration for potential SPA status – not yet recommended to government. Total area of proposed extended SPA would be approx 5,000 ha.	<ul style="list-style-type: none"> • Breeding: avocet <i>Recurvirostra avosetta</i>, sandwich tern <i>Sterna sandvicensis</i>. • Wintering: bittern <i>Botaurus stellaris</i>, hen harrier <i>Circus cyaneus</i>, golden plover <i>Pluvialis apricaria</i>, ruff <i>Philomachus pugnax</i>. • Passage: aquatic warbler <i>Acrocephalus paludicola</i>. • An assemblage of over 20,000 waterbirds during the non-breeding season, including: Bewick's swan <i>Cygnus columbianus bewickii</i>, European white-fronted goose <i>Anser albifrons albifrons</i>, wigeon <i>Anas penelope</i>, gadwall <i>Anas strepera</i>, shoveler <i>Anas clypeata</i>, pochard <i>Aythya ferina</i>, little grebe <i>Tachybaptus ruficollis</i>, great crested grebe <i>Podiceps cristatus</i>, cormorant <i>Phalacrocorax carbo</i>, bittern <i>Botaurus stellaris</i>, coot <i>Fulica atra</i>, lapwing <i>Vanellus vanellus</i>, golden plover <i>Pluvialis apricaria</i>, sanderling <i>Calidris alba</i>, whimbrel <i>Numenius phaeopus</i>, ruff <i>Philomachus pugnax</i> and common sandpiper <i>Actitis hypoleucos</i>.

Designation	Status	Interest Features
Dungeness, Romney March and Rye Bay Ramsar site.	A Dungeness to Pett Level pRamsar site was consulted on in 1993. In 1999, the proposal was 'set aside' for designation at some future time, partly to allow consideration of any extensions to include medicinal leeches. The proposal has now been revised but has not yet been recommended to government. Total area of proposed Ramsar site would be approx. 6,500 ha.	<p>Criterion 1 'A wetland should be considered internationally important if it contains a representative, rare, or unique example of a natural or near-natural wetland type found within the appropriate biogeographic region.'</p> <p>The following habitats are under consideration for selection under criterion 1:</p> <ul style="list-style-type: none"> • Vegetated shingle (Ramsar wetland type E – sand, shingle or pebble shores) • Natural freshwater pits (Ramsar wetland type K – coastal freshwater lagoons) • Saline lagoons (Ramsar wetland type J – coastal brackish/saline lagoons) • <i>Basin fens (Ramsar wetland type U – non-forested peatlands)</i> <p>Criterion 2 'A wetland should be considered internationally important if it supports vulnerable, endangered, or critically endangered species or threatened ecological communities.'</p> <p>The following threatened ecological communities are under consideration for selection under criterion 2: Communities associated with wetland habitats, including grazing marshes and ditches, saltmarsh, natural freshwater pits, saline lagoons, fens, ponds, gravel pits and margins of water bodies. These communities include at least 25 species of nationally scarce/red-list vascular plants and at least 192 species of Red Data Book/nationally scarce invertebrates.</p> <p>The following vulnerable, endangered or critically endangered species are also under consideration for selection under criterion 2: Greater water-parsnip <i>Sium latifolium</i>, Jersey cudweed <i>Gnaphalium luteoalbum</i>, Warne's thread-moss <i>Bryum warneum</i>, water vole <i>Arvicola terrestris</i>, aquatic warbler <i>Acrocephalus paludicola</i>, great crested newt <i>Triturus cristatus</i>, medicinal leech <i>Hirudo medicinalis</i>, De Folin's lagoon snail <i>Caecum amoricum</i>, a ground beetle <i>Omophron limbatum</i>, marsh mallow moth <i>Hydraecia osseola hucherardi</i>.</p> <p>Criterion 5 'A wetland should be considered internationally important if it regularly supports 20,000 or more waterbirds.' The site regularly supports over 20,000 waterbirds in the non-breeding season.</p> <p>Criterion 6 'A wetland should be considered internationally important if it regularly supports 1% of the individuals in a population of one species or subspecies of waterbird.' The site regularly supports internationally important wintering numbers of shoveler <i>Anas clypeata</i> and mute swan <i>Cygnus olor</i>.</p>