

**LYDD AIRPORT, LYDD, ROMNEY MARSH, KENT**

**CLOSING SUBMISSIONS ON BEHALF OF THE RSPB**

**Approach in this Closing<sup>1</sup>**

1. This Closing follows the structure of the Opening. The Inspector is asked to note from the Opening the extent to which the RSPB: (1) had properly understood the issues in the case at the outset and identified the core issues; and (2) has made good its case as there set out in evidence, cross examination and legal submissions. This Closing should be read alongside the Legal Submissions.
2. NE has presented a detailed assessment of the evidence given in its Closing Speech yesterday which the RSPB respectfully adopts and endorses. In the light of that analysis, and to avoid duplication, I have substantially reduced the detail which would otherwise have been provided in this Closing.
3. The Inspector has indicated strongly that the SoS will not be assisted by evidence and submissions as to the conduct of parties and individuals over the course of this Inquiry<sup>2</sup>. The RSPB therefore does not make any comment on such matters except where directly relevant to the merits. Suffice to say, but for the Inspector's clear direction, the RSPB would have demonstrated that the criticisms of it and its witnesses made during the course of the Inquiry are wholly misplaced.
4. The observations on the evidence below are based on careful notes taken by a number of people. Those observations are however, of course, no substitute for the Inspector's notes. In the event of dispute between the parties the Inspector will of course rely on his notes and recollection. One observation needs to be made though. It is essential to place answers to questions in the context in which they are given. It is impermissible and misleading to take an answer given in one specific context and to apply it as applying to a wholly different context elsewhere. The same point goes for agreements in the SOCG.

**The RSPB role**

5. This has been explained in Opening. The approach of sharing witnesses with NE to avoid duplication and to save time and costs was raised at the Pre-Inquiry Meeting with no objection from LAA. It has been an unexceptional and appropriate way to proceed.

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<sup>1</sup> At the time of drafting these submissions I have not been able to access, download and/or print off the full version of the new s.106 apparently provided electronically on Tuesday. A short addendum note will be prepared on any changes in it (if necessary) as soon as possible.

<sup>2</sup> And for that reason has not permitted the RSPB to respond to various allegations made during the Inquiry.

6. The RSPB has submitted throughout detailed evidence (including careful and detailed analysis of the scientific literature). It has analysed the data available and made observations (over many years) where there are gaps in the information available that need to be filled but which it cannot fill from available surveys/data sources. That is an appropriate approach for a nature conservation body to adopt on applications such as this. Any suggestion that the RSPB had to fill the gaps in LAA's evidence to sustain its objections would be wrong.
7. It is said in LAA's legal submissions that the ES must be adequate because no reg 19 request has been made and that therefore the SoS must have everything he needs to assess the impacts. This is flawed logic and if it was correct would negate the need or justification for production of evidence at a called in inquiry such as this. One could simply read the ES. The RSPB has highlighted where gaps in the evidence or the detail of e.g. the Bird Control Management Plan ("BCMP") make it impossible to correctly address the *Waddenzee* questions or to have the requisite confidence in the absence of SE/AE. It is no answer to any of that analysis to say that if there were such gaps, a reg 19 direction would have to have been issued. The objections and evidence of the RSPB are environmental information which has to be taken into account. The RSPB evidence demonstrates why the information provided does not allow the SoS to reach the conclusions which he needs to be able to reach before making a lawful decision to grant permission.

#### **Asking the right questions**

8. It is fundamental to an assessment of compliance with the Habitats Regulations 2010 for the SoS to ask himself the correct questions (and for the evidence which he is considering and the expert views put to him to have been based on the expert having asked himself the right questions).
9. That means, amongst many other things:
  - a. asking the *Waddenzee* questions in the right way – not is there compelling evidence of a significant effect ("SE")/adverse effect ("AE") but the contrary, can the SoS be certain that there will not be such a impact;
  - b. asking the SE/AE questions by reference to the full impacts of the proposal including changes in Bird Control ("BC") and not just noise disturbance (compare the approach of Dr Roy Armstrong ("RA"));
  - c. understanding what SE/AE mean in terms of how one looks at plans or projects which harm part of the SPA/pSPA (but maybe not directly all of it);
  - d. understanding the approach to and legal consequence of dislodging of a species from one part of the SPA to another or sterilising or damaging part of the SPA;
  - e. understanding the correct approach to fallbacks and their relevance;
  - f. understanding the need to define and assess the maximum parameters of that which the permission will allow/occasion.

10. Legal submissions have been made on all these matters. It will be plain from the analysis below that LAA (and its witnesses) have been asking themselves the wrong questions on all these issues throughout.

## **A: Current Position**

11. The essential starting point for assessment of these proposals is the current position in terms of: (1) the habitats and bird interests; and (2) the nature and level of current aviation activity (including bird control).

### **Current Position – Birds**

#### *Habitat and Bird Interest*

12. In this Closing, unless expressly stated to the contrary references to the SPA/pSPA include the pRamsar and SSSI.
13. The area around LAA<sup>3</sup> is of exceptional value for birds – “enormously important all year round”<sup>4</sup>. See also CD1.23c p5, CD1.14 p189 para 11.4.40 and following; CD1.14 p202 para 11.11 in which the ES recognises the importance of the area. It’s mosaic of habitats<sup>5</sup> comprising the SPA and pSPA to the south and east of the Airfield, the extensive areas of functionally linked land (“FLL”) beyond the SPA/pSPA to the west and north<sup>6</sup> and its generally isolated and tranquil location (with sea bordering the area on two sides) combine to make it a natural haven of exceptional quality for breeding, wintering and migratory birds<sup>7</sup> being amongst the most important locations in the UK for a wide range of species: see evidence in chief of Dr John Day (“JD”) e.g. for wintering waterfowl – “second most important in south east after Chichester Harbour” and third most important in whole south of England (Severn estuary is first).
14. There has been no substantive challenge to any of the information and data set out in:
- Bob Gomes (“BG”) proof<sup>8</sup> and appendices;
  - JD tables 1 and 2<sup>9</sup> and supporting text;
  - JD’s revised table 3<sup>10</sup>;
  - JD and BG’s comments on the importance of the FLL<sup>11</sup>

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<sup>3</sup> See maps at appx 1 BG RSPB/3/C.

<sup>4</sup> JD EiC.

<sup>5</sup> BG para 5.31 – 5.37 – RSPB3/A.

<sup>6</sup> As referred to by BG in section 5 RSPB/3/A and accepted by ND.

<sup>7</sup> See BG RSPB/3/C appx II tables 1 and 2.

<sup>8</sup> RA had “no relevant disagreement” with BG para 5.1 – 5.30 (RSPB3A).

<sup>9</sup> RSPB/4/A p13 – 20 except in respect of aquatic warbler and common sandpiper in respect of which RA produced no data of his own.

<sup>10</sup> RSPB/4/A.1 - which corrected months ago an error which JD immediately accepted when brought to his attention but which RA even in LAA/7/H surprisingly continues to rely on as if it demonstrates some fatal flaw in JD’s analysis - it does not.

<sup>11</sup> See e.g. JD Proof (RSPB/4/A para 7.11 and 7.12 and his evidence in chief explaining these links).

which are derived from a wealth of experience of, and mass of data for, this area and which paint a compelling picture of the importance of this area.

15. RA accepted that there are bird species using all available habitats on and around the SPA and the airport for roosting, feeding, hunting and nesting<sup>12</sup>.
16. That importance of this area is reflected in the wide ranging and expanding designations that apply to much of it. There is, of course, considerable overlap between the various designations (see for example the 2006 SSSI re-notification and expansion and the pSPA) but the expansion of the designations over time is a matter to which the SoS is invited to place considerable weight. It is overwhelming testimony to the importance and success of this area (in its current environment). It also provides a substantial part of the answer to the way LAA put their case on the 1992 decision, consistency of decision making and declining importance of the SPA (RA).
17. The starting point for consideration of a proposal which introduces commercial jet traffic to this location is that it is an area of exceptional importance for birds.

*In decline?*

18. RA seeks to downplay this importance by alleging: (1) inappropriate management (ie. Marsh harrier (“MH”) and terns); (2) that the species here will decline anyway because of climate change; and (3) that the SPA has lost importance over the years. He is wrong on all points and the fact that he has mistakenly made them demonstrates his general approach of highlighting the (claimed) negative rather than to acknowledge the (self-evident) positives:
  - a. the overwhelming weight of the evidence demonstrates that MHs do not predate terns and that tern colonies and MH live side by side in a number of locations. RA claimed detailed knowledge of terns but “struggled to think of any location where terns and MH coexist”. Such examples of co-existence are legion including in respect of sites (e.g. Blakeney Point) in respect of which he claimed knowledge<sup>13</sup>. Anecdotal evidence of a single tern chick being taken [LAA/114<sup>14</sup>] is no substitute for the mass of evidence of peaceful co-existence and reliance on it in an attempt to displace a demonstrable fact demonstrates an approach which is the opposite of scientific;
  - b. the repeated reliance on the Climatic Atlas<sup>15</sup> (looking to possible population trends over the next 70 years caused by climate change based on modelling in respect of which the authors express considerable caveats<sup>16</sup> none of which were acknowledged by RA in his rebuttal) to demonstrate a reducing population of existing species:
    - (i) is misconceived in principle (just because there is another long term threat to the birds here does not make introducing commercial jet aviation acceptable). The

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<sup>12</sup> RSPB4/A p17 para 5.18.

<sup>13</sup> RSPB100. RA cited Blakeney Point as evidence of a point when it in fact demonstrated the opposite.

<sup>14</sup> CD12.36 contains no evidence of MH predation of terns. The reference at Minsmere appears to be of a classic “umbrella” defence by the terns as is the Amazon photograph.

<sup>15</sup> CD12.32 analysed in his rebuttal.

<sup>16</sup> CD12.32 last three pages and in particular the penultimate paragraph on p.21.

question is what harm will the development cause to the SPA/pSPA now; not what will the value of the SPA be in x years;

- (II) is misconceived in law - to apply his approach would involve a wholesale rewriting of and undermining of basic legislative requirements;
  - (III) is highly partial – taking no account of the other side of the coin – namely those species who will be forced north to the SPA/pSPA by climate change<sup>17</sup>. When a fair exercise is undertaken a completely different picture from that relied on by RA emerges and there is thus “no evidence that birds that might move out in future are any more important than those that may move in” (JD EiC); and
  - (IV) omits consideration of key matters – if climate change is to be putting such pressures on birds, how much more important is it to protect the most important habitats we have so that species put under strain by man’s activities can be protected as far as possible;
- c. in terms of losing species<sup>18</sup> (and the claimed reflection this is on the management of the site), on a proper analysis, it is clear that the populations to which Dr John Allan (“JA”) referred survived longer here than they did elsewhere<sup>19</sup> which is testament to the quality of the SPA/pSPA – “it is accepted that when species are declining they hang on last in the best place.”<sup>20</sup> If they hung on the longest here, that tells one much about the quality of the environment. Thus far from demonstrating a problem with the SPA/pSPA this information confirms its importance to birds.

19. The terns left in 1997 due to amongst other things mammalian predation during the breeding season by badgers and foxes (BG EiC). Since then the habitats have been managed and maintained for that very “flighty” species to return in the future<sup>21</sup>. As JD stated in EiC1 (not challenged) there is currently nothing which would prevent them from returning to Dungeness.

20. Far from declining in importance over time (and since 1992) the SPA has seen new species breeding here (bittern<sup>22</sup>, marsh harrier and purple heron), improved habitats as a result of extensive management by the RSPB and others<sup>23</sup>; and increasing designations (pSPA, pRamsar and extended SSSI<sup>24</sup>) which reflect the success of the SPA and the extending range of its species (JD EiC). JD was not aware of any evidence in decline of assemblage or other species. This is not an area whose importance is in decline.

#### The North West area

21. An even stronger picture is evident in respect of the NW part of the SPA/pSPA. In respect of that area (within Richard Perkins (“RP”) contours – LAA/7/J), we now have CD4.17 which sets

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<sup>17</sup> CD12.38.

<sup>18</sup> RA Reb para 2.6.1 LAA/7/D.

<sup>19</sup> JD EiC1 – never rebutted.

<sup>20</sup> JD EiC.

<sup>21</sup> See RSPB/3/A para 6.1.

<sup>22</sup> Only 47 pairs in the UK at 17 sites one of which is here: JD EiC.

<sup>23</sup> Particularly in the western corridor – Dengemarsh Reedbed Creation Project - BG Proof - RSPB/3/A para 6.4.

<sup>24</sup> See Jo Dear (“JD”) Proof NE/3/A para 79.

out an agreed description of the habitats in areas 1 – 9<sup>25</sup> and A-E<sup>26</sup> and the species of most concern for which those habitats are suitable/used (for breeding or wintering)<sup>27</sup>. That tells a compelling story of a number of habitats suitable and/or used for a wide range of important breeding and wintering species (including a number in the pSPA designation<sup>28</sup>). CD4.17 is, of course, just referring to those defined areas within RP’s contours for aircraft movements using runway 21 and not: (1) the areas just beyond those contours; and (2) other areas in those contours used as FLL. There can be no doubt that even the area just within the contours is an area of exceptional importance for species associated with this SPA/pSPA and the conservation objectives of the pSPA<sup>29</sup>. At its closest point that area is 270m from the end of the runway and the whole of the area is at a perpendicular distance from the southerly flight path (Tim Maskins (“TM”) appx LAA3/C Appx 7) of between 150-300m and 1km<sup>30</sup> and planes will be at a very low altitude (less than 1600 feet) for all (landing) or a significant part (taking off) of that boundary.

22. FLL which many species utilise is within the contours and immediately beyond the contours to the west.

### **Current Aviation Activity**

23. At present the very substantial and important bird populations of the SPA/pSPA live alongside a very low key operation at LAA comprising:
- i. overwhelmingly, small, non-jet planes which have limited off site impacts<sup>31</sup>;
  - ii. a very limited number of larger planes (greater than 5700 kg) amounting to less than 2 per day in 2010 with a vast majority of those being still small planes with very limited off site impacts<sup>32</sup>;
  - iii. very occasional flights by a Gulfstream or similar (such a rarity as to startle both BG<sup>33</sup> and large flocks to the north) despite having the business centre and having promoted<sup>34</sup> business flights for several years;

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<sup>25</sup> These are areas where habitat creation and management has been carried out in recent years and already they have attracted bittern, purple heron and marsh harriers to name but three with a wide variety of other species breeding, feeding and wintering in these locations.

<sup>26</sup> The RSPB relies on the generally description of the immediately surrounding habitat in the appendix to NE/103.

<sup>27</sup> CD4.17 is limited to consideration of those areas and cannot be understood as suggesting that the RSPB is concerned only about those species and only about those locations. Any contrary claim is to ignore the introductory words of CD4.17, the context in which it emerged (LAA/7/G para 4.2 and 8.8, response in NE/103 leading to CD4.17) and its subject matter.

<sup>28</sup> Marsh harrier, avocet, bittern, shoveler (and in the assemblage, pochard, little grebe, wigeon, gadwall, lapwing etc...).

<sup>29</sup> In that regard the way JD described the importance of the Reserve in terms of breeding birds in his first EiC (before LAA recently concentrated its attention on the NW corner) is telling: “Information on significant breeding birds is based on work by the warden, 700 pairs of 65 species in a variety of habitats including reedbeds for bittern, nationally important numbers of MHs, water rail which are a featured species”. The first three species he identifies are present in the NW corner. In terms of the pSPA he was asked – “what does the pSPA designation tell you about the quality of the environment for birds.”

<sup>30</sup> Unchallenged EiC2 of JD.

<sup>31</sup> BG XX.

<sup>32</sup> TM XX and LAA/3/E appx 1.

<sup>33</sup> Para 10.10 RSPB/3/A and BG XX.

- iv. no commercial passenger jets and no prospect of them being attracted<sup>35</sup> without the runway extension;
  - v. occasional use by others (night freight flights whilst Southend under construction<sup>36</sup>; repositioning flights for a short period now largely or completely stopped<sup>37</sup>);
  - vi. limited actual hours of operation: TM further note<sup>38</sup> (with the BC logs<sup>39</sup> and that information demonstrating the exceptionally limited number of flights at or around or before dawn and at or around or after dusk).
  - vii. as a result of that mix of movements and the limited bird strike risk to which they give rise, very limited on site bird control activity amounting to a handful of short vehicle runs each day to scare on airfield birds away;
  - viii. with the exception of pheasants to the north and buying up the field immediately to the west, non-existent off site bird control;
  - ix. no buffer zone required or created;
  - x. no formal safeguarding and no objections based on safeguarding issues; and
  - xi. no apparent habitat intervention in the surrounding area at any time in the past (until the very recent acquisition of the field immediately to the west).
24. On i - vi above, the Inspector is invited to pay close attention to the answers given by TM in XX by the RSPB. On vii - xi, the RSPB invites the inspector to pay close attention to the answers given in XX by TM and Nigel Deacon (“ND”) as to current and future activities. The headline points are summarised below but are no substitute for the detail covered in XX.

*Current and Historic Numbers of Movements and Passengers*

25. From CD4.4 and the XX of TM we now have a relatively clear picture of the current use of the airport<sup>40</sup>. This paints a wholly different picture from that which LAA has assumed as the baseline by, for example, using the Gulfstream noise contour, when flights by that size of plane are so few as to make that a wholly unrepresentative proxy for the current noise environment.
26. About 99% of movements are by planes less than 5700kg<sup>41</sup>. 5700kg is just over the size of a small BE20 twin turbo prop for only 8 passengers. 99% of planes are thus, on any view, small planes. The 99% figure has remained static since at least 2005<sup>42</sup>.
27. There were only 234 movements above that fully laden weight in 2009 – considerably less than one movement per day and the same percentage as in 2005<sup>43</sup>. The temporary growth in

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<sup>34</sup> XX of LC and CD11.10 (and the references in that document referred to in XX of TM and LC).

<sup>35</sup> LAA/4/A para 5.47 - and see the abandonment of the fallback at the time of the ES – namely 300,000 passengers carried in predominantly BAe146 [CD1.17 p35-6 para 3.5.6 and table 3.3]. That was always a non-starter and has now been accepted as such.

<sup>36</sup> First raised by TM in EIC.

<sup>37</sup> XX TM.

<sup>38</sup> LAA/3/F.

<sup>39</sup> CD12.30, 12.31 and 12.35a and 12.35b.

<sup>40</sup> See also LAA/3E appx 1, LAA102, CD1.25c p9 table 2.2.4 (2005 data), CD1.14 p31, CD16.15 CAA stats.

<sup>41</sup> CD4.4 p5 para 3.7.

<sup>42</sup> CD4.4 p5 para 3.10.

2010 (to 586) was very largely attributable (244 of the increase) to the repositioning flights principally of a single aircraft which is now stationed at Birmingham<sup>44</sup> with no evidence of an ongoing demand for such repositioning here. The highest it was put is that “it might come back”<sup>45</sup> Even in 2010, there was only about 1.6 movements greater than 5700kg per day.

28. There is no evidence of any upward trend in the number of planes over 5700kg since the very substantial investment and upgrade works finishing in 2005 – 7 and marketed since 2006. Efforts to secure new business for the long term have evidently failed after short periods<sup>46</sup>.
29. The only passenger service is on a plane of less than 5700kg and greater than 3000kg – to Le Touquet. That service is in decline in terms of the size of plane operating the route, number of passengers and number of flights<sup>47</sup>. The number of passengers has declined from a tiny base in 2005 (2817) to just 529 in 2009<sup>48</sup> – about 0.1% of the number which will be carried under the Proposals. There is a clear downward trend in passenger numbers.
30. Even including all movements above 3000kg (“fairly tiddly”), there were only about 2 per day in 2010. There is no upward trend in such movements.
31. Even for those movements over 5700kg, they are overwhelming dominated by planes at the smaller end of the size scale above 5700kg: see XX of TM by reference to CD4.1 p18 table. Even for those movements of “larger” planes, the vast majority were at the bottom end of the “larger” plane range scale.
32. In 2010 there were only about 114 movements (about 1 every three days) of planes bigger than a Gulfstream V: XX of TM by the RSPB (which is still of course much smaller than a B737 and A319).
33. We have heard much talk of the Gulfstream and it has been repeatedly used as some sort of benchmark against which to judge the acceptability of the proposals. Its contours are used to demonstrate that birds are tolerant of planes and that they breed within its 88db contour. The reliance on these movements is surprising. There were only 22 such movements in 2010 (LAA/102) – one every 15 days; and in 2009 the total number of flights by all types of business jets (overwhelmingly concentrated in the smaller categories) was 92 – one every three days or so. They are hardly representative of the day to day environment created by current activities.
34. Just as this Inquiry started, a parcel service relocated from Southend during works there and carried out night flights at Lydd. If Lydd was an attractive location for such services (other than on a temporary basis) it is impossible to understand why there were not established

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<sup>43</sup> CD4.4 para 3.15 and 3.17.

<sup>44</sup> TM XX by the RSPB.

<sup>45</sup> TM XX by RSPB.

<sup>46</sup> LC XX by RSPB.

<sup>47</sup> LAA/102 p3 refers to the Piper 31 – 350 8 – 10 seater.

<sup>48</sup> CD4.4 para 3.12 and 3.13.



permanent operators here. The reality is that, Lydd is used when all else fails. There is no documentary evidence of any long term intent by the operator to continue the service.

35. We thus have a overwhelmingly compelling picture on LAA's own information of:
- a. An airfield whose movements are dominated by very small non-jet aircraft;
  - b. A very limited number of larger planes (greater than 3000kg or 5700kg) amounting to no more than 2 per day;
  - c. for planes at the larger end of the current use, movements of about 1 every three days;
  - d. no evidence of upward trends – the only one relied on by TM was from 2009 to 2010 but that very small change is explicable by reference to one off factors which have ceased and for which there is no evidence of continuing demand;
  - e. downward movement in business aviation flights between 2006 and 2009<sup>49</sup> and no evidence of a sustained or sustainable recovery since;
  - f. evidence of downward trends in passenger numbers, movements, and plane size;
  - g. very limited movements outside normal operating hours – with out of normal hours movements - 7pm – 8.30am – totalling only 244<sup>50</sup> in 2010 (about two thirds of a movement per day). It is impossible to conclude that there are any substantial evening (including dusk), early morning (including dawn) or night flights.
36. That is the baseline against which the SoS is required, as a matter of law, to assess these applications. It is incomparable with the baseline with which the SoS in 1992 was faced<sup>51</sup>. Lydd has nothing like the level of activity it had then – the aviation market generally and LAA specifically has moved on and Lydd has for obvious locational reasons reduced in activity. Any comparison between the decision in 1992 and the circumstances here is therefore meaningless. The circumstances in which permission is sought are wholly different.
37. I return to the claimed fall back below but given that:
- a. the airport has done all it can to make itself attractive for such uses within the constraints of the existing runway and marketed itself for business use; and
  - b. as we are regularly reminded, there are no current restrictions on hours of operations at present which is claimed to be a major operational advantage over other business airports elsewhere – e.g. Biggin Hill
- the current position on the ground is stark evidence indeed. Had Lydd had potential to grow substantially it has had that potential since at least 2006 and there would be some indication now in the data that that potential was being realised. There is none.

#### Existing bird control

38. The existing bird control (“BC”) measures at the airfield reflect this low level of aviation activity primarily by small low risk planes.

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<sup>49</sup> LAAG/10E p16.

<sup>50</sup> TM XX by the RSPB.

<sup>51</sup> As demonstrated by the explanation of the existing position in the IR and DL (CD8.27).

39. The BC Logs are plainly the best evidence (and the only documentary evidence) of current BC activity at Lydd<sup>52</sup>.
40. Those logs show quite how lacking in intensity is the current bird control effort.
41. The BC runs in the morning, sometimes after lunch, and in the evening are supplemented by runs just before (at most about 15 minutes) “high risk” movements.
42. Such high risks movements are very limited: only 18 such movements in the whole of October 2010 and on many days there were none. Looking at the BC logs broadly shows about 2 high risk movements per day. ND did not contend, and TM produced no evidence, to the contrary. BC is intermittent and extremely limited – it is plainly nowhere near continuous (as it will have to be under the proposals).
43. Save for the field to the west (now apparently acquired) there is no evidence of any off site bird scarring. Nor is there evidence of substantial bird scaring at the boundary to scare off birds from the surrounding land (in particular under the flight paths to the south). No buffer zone is created or maintained to the south or north. The Inspector will have his own notes of the XX of ND.
44. Until very recently, there is no evidence of habitat management or any safeguarding. Only recently has there been any suggestion of formal safeguarding.
45. For years, the airfield (professionally advised<sup>53</sup>, no doubt professionally managed<sup>54</sup> and operating under CAA regulations) has operated this very low intensity bird control regime. The only legitimate inference is that that is because that level of BC has been considered appropriate for the level of aviation activity, the nature of the planes using the airfield and the lack of any substantial commercial passenger traffic. It is fit for purpose in the current circumstances.
46. In short, the current level of BC activity is that which those charged with safety here (and their advisers) have considered necessary and appropriate in the light of the various guidance available.
47. It is claimed that a combination of the CAA audit and the spotlight thrown on the BC by this inquiry, has led to a ramping up of activity. There is no evidence in the BC logs of any such ramping up of activity. Simple analysis of the BC logs (as put to ND in XX) shows no ramping up and there is no convincing oral evidence of such ramping up. The CAA audit has not been produced. From the answers of ND it is plain that it was directed at safeguarding and not BC

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<sup>52</sup> The significance of these documents having been raised in XX by the RSPB and NE at the earliest possible stage (within hours of their receipt) plainly gave LAA every opportunity to demonstrate with evidence if the BC logs had substantially understated activity.

<sup>53</sup> ND since 2005 LAA/6/A para 1.4 - if there had been a significant problem he would have raised it.

<sup>54</sup> TM since 2004, TM XX by the RSPB who was satisfied that the measures had reduced risks ALARP given the nature of the operations.

*per se*. There has, in any event, been no 2010 Regs compliant assessment of any claimed “ramping up” of BC activity to anything like that anticipated in the BCMP. The LAA is not allowed to carry out a plan or project (new and much more intense programme of BC) without going through the reg 61 process.

48. It is further claimed that a substantial ramping up of activity to comply with current guidance is already necessary. Such a claim flies in the face of the compelling evidence of operations over many years which the operations manager described as appropriate. The claim:
- a. reads guidance as if it was law – to be applied irrespective as to the circumstances of the case (when in fact all the guidance is clear that it is flexible to be applied by reference to what is reasonable. What is reasonable of course turns on the facts of the case);
  - b. asks the Inspector and the SoS to assume that Lydd has been operating sub-standard for a prolonged period; and
  - c. appears to rely on the stark proposition that any commercial passenger movements (even if in very small planes, very intermittently) necessarily triggered the full weight of guidance and standards applicable to even the biggest commercial airports – a simply wrong approach to the guidance.

#### The Consequent Environment

49. The consequence of the level of aviation activity and the minimal level of BC is that the environment around the airport is tranquil<sup>55</sup> with very low ambient noise levels (as demonstrated by RP’s evidence and XX) and with only very rare high noise level events with the mass of the aviation activity (small planes) not making a substantial impact on the noise environment – as LAA positively asserts<sup>56</sup>. Such is the current position on the ground that BG (who has been immersed in this area for many years) was startled by the noise from the Gulfstream V (para 10.10 RSPB/3/A) thus demonstrating: (1) how rare such events are; and (2) how much of a contrast such movements are with the current norm.
50. RA (before any site visit to the Reserve) assumed substantial noise impacts from the firing ranges and the pheasant shoots to the north. There is no evidence of substantial noise impacts from those activities. Human disturbance is very limited. Public access to sensitive parts of the Reserve are strictly controlled and Mr Thompson does not allow public access to his land. Fishing within the SPA/pSPA is not as intense as LAA appears to have assumed.

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<sup>55</sup> In this Closing, the RSPB does not deal with the general tranquillity issue and impact on users of its Reserve. That has been dealt with in evidence (RSPB/3/A and BG EIC and XX). All the observations on the changes in the environment in this Closing however equally apply to and make good those tranquillity concerns.

<sup>56</sup> In terms of the current aviation activities, there are no noise contours for the vast mass of movements, or even for those above 5700kg. Contours have been provided for the Gulfstream but at only one movement every 15 days or so it is hardly representative of the aviation noise created.

51. The short point is that in the current circumstances, the bird interest and the current activities on the airfield can and do peacefully co-exist with the pSPA/SPA thriving.

#### Conclusion on current position

52. Thus the correct starting point is that this is a low intensity airfield with a vast majority of its flights being very small aircraft with little noise impact, and with a very low number (even after many years of development) of heavier movements causing higher noise levels and requiring very limited BC. The current level of use is a reflection of demand for these sorts of facilities in this sort of location.
53. In that environment, the bird population is able to thrive across the whole of the SPA/pSPA (each part of it) and there is no evidence of any significant disturbance effects or impacts.
54. There is no warrant on the evidence:
  - a. to use the Gulfstream V noise contours as somehow representative of the existing circumstances; or
  - b. to read from the co-existence of species in this environment across to their expected response in the development scenario.

### **B: The Fallback**

#### Legal Position

55. The SoS has confirmed that fallbacks are not relevant at the SE and AE stage. That approach is correct for essentially the reasons articulated by counsel for the SoS in *Britannia at [85]*. The judge's tentative view to the contrary in that case does not grapple with the clear words of the legislation and ignores the structure of the legislation (under which existing permissions with all their realistic potential will have had to have been reviewed to ensure compliance with the Habitats Directive<sup>57</sup>).

#### The Original Fallback

56. The fallback assessed in the ES was of 300,000 passengers in (loud) planes such as BAe146<sup>58</sup>. Between 2007 and the end of 2010, the RSPB repeatedly pressed on the patent inappropriateness of that fallback on the facts (never mind its legal points on the relevance of fallback). That fallback has now been abandoned.
57. That has a number of consequences including that:
  - a. there is now not even a suggestion of a fallback which would take the airfield back to anything like the position it was in in 1992 – it is implicitly accepted that things have moved on substantially since 1992;
  - b. there is no fallback with significant passenger transport movements. The level of commercial passenger traffic in any fallback will be about 0.1% of that proposed here

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<sup>57</sup> CD5.2.

<sup>58</sup> CD1.17, pg 25-36, para 3.5.6 table 3.3.

(see above). The proposal thus introduces hundreds of thousands of passengers to LAA (which will naturally have a dramatic impact on future decision making in respect of e.g. the justification for any necessary BC measures given public safety concerns);

- c. the BC necessary for that fallback is not now necessary; and
- d. the analysis of noise impacts in CD1.23i has been overtaken by the abandonment of this fallback. That analysis concluded that there would be no moderate adverse impact to the south (compare that with the “moderate adverse” which it found to the east) because and only because of the comparison it made with the 300,000/BAE146 fallback<sup>59</sup>. That fallback no longer exists. On the logic in the ES and its application to the current facts, there is no doubt that it would have found a “moderate adverse” impact just from aviation noise along the western corridor to the south.

#### The New Fallback – business and other aviation

58. The new fallback (not assessed in the ES) is of increasing business (and other non-commercial passenger) uses. On the facts, that fallback should be accorded no weight. On the law, it is legally irrelevant to the SPA/pSPA analysis as explained in the Legal Submissions and because there has been no reg 61 compliant process by LAA in respect of the “Plan” to develop business use. LAA could not carry out that plan or project now without carrying out a regulation 61 compliant assessment of it.
59. The RSPB has cross-examined Louise Congdon (“LC”) in detail. It is not proposed to recite the full detail of the evidence as it now stands. However, the following headline points show how limited the weight which can be attached to this claimed fallback:
  - a. LAA itself has made clear what it will do in the absence of permission<sup>60</sup> – that stance is wholly inconsistent with the claimed fallback;
  - b. LC herself is not putting forward a positive case that the fallback will occur – just that it “might”<sup>61</sup>;
  - c. the current “very high quality”<sup>62</sup> facilities to meet the needs of business travellers and other users have been on offer for several years<sup>63</sup> following substantial investment and have been heavily marketed<sup>64</sup>. It is said that they make the airfield appropriate technically and operationally for this type of aviation activity. Yet the figures speak for themselves. No substantial business or other traffic has been attracted. The recession does not explain this. The facilities were available at a time of massive growth in aviation – 2006 – 2008 – no growth was experienced here;
  - d. this is hardly surprising – there is self-evidently no substantial catchment for business aviation which would not be better served by airports elsewhere (closer to the M25 esp Biggin Hill and Farnborough). LC was driven to relying on business people who *live* in

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<sup>59</sup> Given that fallback to very loud planes and the requirement for planes in the development scenario to turn right on the southerly take off (compare the position with which we are faced) it was concluded that the noise environment to the south would not deteriorate as compared with the fallback.

<sup>60</sup> LAA/4/C appendix B apparently from December 2010.

<sup>61</sup> See the references put in XX and relied on in evidence including LAA/4/A para 4.23-4, 6.5, 7.7.

<sup>62</sup> LC XX.

<sup>63</sup> The VIP facilities were opened in July 2005 – CD11.10 p28.

<sup>64</sup> See e.g. trips to international conferences – TM XX.

Sussex and Kent - using Lydd in the future as their business aviation gateway. Those people currently live in that area and presumably know of the current “offer” at Lydd. The extent to which they regard Lydd as an appropriate location to meet their business aviation needs is reflected in the tiny number of business flights. There is no reliable evidence of demand for business aviation at this airport. There is in short no good reason for business people to be flying in large numbers to or from this location;

- e. the analysis then relies on the claimed advantages of Lydd as against other business aviation facilities. Those advantages exist now in particular the ability to land at night. The minute level of usage demonstrates what weight should be attached to this benefit. If night landings were enough to entice people from more convenient airports to here, that would be happening now. It is not;
  - f. the analysis then moves on to the “filling up” of other business aviation facilities. It is quite plain that there is (even on LC’s analysis) very substantial current capacity at business aviation facilities far better located to major transport infrastructure and business areas than Lydd. It will be many years before this capacity is used up even on the very optimistic growth assumptions used as to the continuing growth in business traffic. It is only when that capacity is exhausted that people may contemplate landing at such a remote destination from their business needs. There is no realistic prospect in the short to medium term of business aviation growing substantially with the current facilities. There is no justification here for looking to a fallback over a longer time frame.
60. The number of business jets assumed in LC’s fallback (8395) represents a 4000% increase on the existing. Applying a 5% growth figure to existing number of business movements (195) would result in a level of business aviation in 20 years of just 500 movements (about a 15<sup>th</sup> of the 8395 assumed in LC fallback). The fallback is thus necessarily wholly predicated on overspill from other airports (which has been dealt with above). LC did not seek to justify the 8395 in the fallback scenario making clear that she had simply used the same figure as for *the development scenario*. The RSPB fundamentally does not accept that in the no development world there is any realistic prospect of substantial growth in business aviation here in the future.
61. The remaining elements of the fallback are of very limited significance in terms of numbers of flights, and are not supported by market evidence.
62. The implications of the fallback in terms of BC measures and noise do not therefore fall to be considered. However, for the avoidance of doubt:
- a. It is quite plain that the extent and nature of BC measures will be heavily influenced by the nature of the air traffic and in particular the number of passengers. A key factor in what is as low as reasonably practicable (“ALARP”) is the potential number of casualties. It is obvious that the airlines and the regulators would require and LAA would make much greater efforts when commercial passenger jets carrying 100 – 150 passengers were operating than in the claimed fallback;

- b. The vulnerability of B737 is different from and greater than for standard business jets<sup>65</sup>;
- c. JA's unchallenged evidence was that business movements could increase by 750 per annum without a requirement for a change in the BC regime (not continuous); and
- d. The noise contours, flight trajectory and height of planes at and around the SPA/pSPA are very different for business jets than the larger of the commercial passenger jets proposed here.

### **C. The Development Proposals and the Physical Environment created**

- 63. I will assess both proposals together. The key focus of the RSPB throughout has been on the development facilitating commercial passenger jet transport on a longer runway. Whilst of course the 500,000 permission generates more noise events, and potential for disturbance, it is not different in kind from the 300,000 runway only permission and there is no suggestion that it would require less BC activity.
- 64. The number and nature of flights has been examined in XX of TM in detail. On any view there will be a dramatic increase in flights by planes of more than 5700kg (from the current low levels) and the introduction of a significant number of movements by passenger jets (from the 737 down).
- 65. There are no conditions preventing operation at or around dusk or dawn or during the "birds night" the only limit being 11pm – 7.00am, limiting planes to the quietest modern planes (737/800 rather than 737/300); and the conditions envisage use of the southern flight path along the western boundary of the SPA/pSPA.

### **D. The Physical Environment created by the Development Proposals and Impacts**

- 66. There are two main issues. The first (and foremost<sup>66</sup>) is the BC requirements for the development proposals. The second is the aviation noise and visual disturbance associated with the development.

#### **Bird Control**

##### **Bird Strike Risk**

- 67. The essential starting point is the bird strike risk posed to (passenger jet) aircraft in this location given that the airfield is adjacent to attractive habitats for hazardous birds.
- 68. The hazard is explained by JA and is largely common ground. JA and ND agree about the central importance of managing the bird strike risk ("BSR"). Both agree that the risk can be managed if there is BC of sufficient frequency and intensity over a sufficiently wide area.

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<sup>65</sup> See XX of TM by the RSPB and the factors which influence climb rates, time in the Zone etc...

<sup>66</sup> As made clear in Opening.

69. The question is and, from the RSPB's perspective, always has been, what will managing the risk in the new context mean for the ambit and contents of the BCMP and the consequent impact on the SPA/pSPA.
70. That will, of course, depend on a careful assessment of the BSR which needs to be avoided/mitigated and the steps to mitigate that risk.
71. There are two main elements to the BSR: (1) birds in the vicinity of the airfield and its approaches; and (2) overflying birds.
72. The area around the airfield (and the airfield itself) provides attractive habitat for a wide range of hazardous species (e.g. waterfowl, geese, swans, lapwing, gulls, golden plover and corvids) and has many of the characteristics identified in e.g. CAP 772<sup>67</sup> as being particularly important in BSR terms (flight lines between roosts and FLL; large open water bodies).
73. Using a height of 1000 feet as being the extent of the zone of BSR ("the Zone") would mean that planes are in the relevant Zone all the way down the western boundary of the SPA/pSPA) and across a similar distance to the north. This is a huge area which hazardous species currently use to a very substantial extent both on the ground and in the air.
74. The evidence on functional links between the areas with which we are concerned is clear<sup>68</sup> (and unchallenged) and supported by evidence from LAA itself<sup>69</sup>. In respect of waterbirds (highlighted by CAP 772) there is much evidence of them roosting in the SPA/pSPA (the mosaic of waterbodies and fringes) to the south and east of the airfield and using the FLL to north and west for feeding. That basic pattern requires them to traverse the flight lines of planes in the Zone (including for various species at night and for many at dawn<sup>70</sup> and dusk). Similar patterns are evident in respect of a very wide range of species using a wide range of FLL in addition to habitats in the SPA/pSPA.
75. That is all simply a function of the location of the airfield - in the middle of a mosaic of habitats hosting the hugely important and very large populations already addressed. One simply has to view a map whilst reading JD and BG's evidence to understand the force of the general point.
76. The point has been put beyond argument by the Vantage Point Survey ("VPS") work of JA. It is not suggested that they provide a complete picture - what they do do is to demonstrate that which JD and BG have included in their written and oral evidence. The extent of the inter-relationship of areas and the number of birds using habitats close to the airfield results in a

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<sup>67</sup> CD16.2 see e.g. chapter 3 paras 3.1, 4.6.1, 5.1.

<sup>68</sup> See references above. It is not necessary to recite JD and BG's careful evidence on the extent and nature of the functional links and what this means in terms of bird movements. The picture it paints is overwhelmingly clear.

<sup>69</sup> See e.g. the CD1.14 section 11.4 p.166ff.

<sup>70</sup> By this I mean an hour either side of dawn and an hour either side of dusk. Dusk will almost always be before 11pm (the condition on flying times) and dawn will often be after 7am. Night is not limited to 11am to 7pm: XX1 of RA by RSPB.



mass of bird activity in and around the airfield – “astoundingly high”<sup>71</sup>. No similar (or contradictory) studies which can be relied on have been submitted by LAA<sup>72</sup>.

77. NE has carried out a detailed analysis of the evidence on specific species in its closing. In evidence and XX, the RSPB has made many of those points and now adopts (without repetition) NE’s summary of that evidence.

The extent of BCMP measures required

78. Legal submissions have been made that: (1) the BCMP is an integral part of these proposals; and (2) that its maximum parameters have to be considered and assessed now. It is impossible to answer the SE and AE questions without a clear understanding of what BC measures may be required as a consequence of the proposals – their nature, intensity, frequency and location. That assessment has to happen now. It is axiomatic that *prior* assessment of impacts is required before permission is granted. The assessment cannot be put off to later. It is to be noted that the S106 contemplates the possibility of BC activities having a SE on the SPA/pSPA.
79. In terms of the evidence, as CAP 772 makes clear, in order to define the extent of BC, it is necessary to have appropriately detailed evidence as to the BSR and what can/should be done to mitigate the risk. Essential elements in the evidence base are numbers of hazardous bird, their locations and flight lines<sup>73</sup>.
80. The lack of information on such matters from LAA here is stark. There is no 13km survey available to us, and there are no accurate records of movements<sup>74</sup> or numbers from LAA at all. No attempt has been made to set out maximum, minimum or central estimates of what would be required in order to mitigate BSR. LAA has not done that which CAP 772 identifies as basic steps and has therefore not even got to first base in assessing the level of BC which will be required.
81. The import of this was accepted by ND in XX. He recognised that it is simply not possible to define now on current information the level of BC which would be required. He could not say what disruption of bird movements would be needed or how that would be done, or what degree of scaring would be required to create necessary buffer zones. He could though confirm that nothing would be ruled out.
82. This is fundamental. LAA’s own witness cannot ascertain the degree of disturbance to birds that will be required under the BCMP. What he has assumed (no doubt correctly from the perspective of someone concerned with aviation safety and BSR) is that this work can all be done later. But to be satisfied on the SE and AE questions (from a bird’s perspective) the work

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<sup>71</sup> JA in EIC – from an acknowledged expert on BSR who has studied airports across the world this is exceptional evidence. The numbers on 15<sup>th</sup> September were “jaw dropping” and he had never, in all his career, seen so many birds aloft as on that day.

<sup>72</sup> The records of swan movements in the BC logs for example are clearly incomplete and cannot be relied on for the reasons given by JA in EIC.

<sup>73</sup> CD16.2 chp 3 para 2.2.

<sup>74</sup> Only Bewick’s Swan movements have been studied and even this study is flawed.

has to be done in advance of permission and not after it. There is no sustainable reason why the work on upper parameters could not have been done at this stage.

83. This is the basic flaw in LAA's case which has been highlighted from the outset, repeated clearly in Opening and no legal or factual answer to it has been provided.
84. The approach of LAA has led to the structure of the BCMP and the S.106. In short those documents provide no detail as to the intensity and frequency of the measures which may be taken under it (or the maximum parameters of those measures). The BCMP sets out a range of possible on and off airfield measures - a list which is not disputed but which encompasses a vast and unlimited array of potential permutations as to what will have to be done to disturb birds in an undefined area in order to reduce BSR ALARP (in accordance with the CAP guidance<sup>75</sup>). Necessary BC measures – for which there is no alternative and which are necessary for public safety – will have to be approved under the BCMP irrespective as to impacts even if SE or AE – by virtue of s.16 of the WCA 1981 or alternatively under the IROPI formulation – even though there has never been an IROPI justification of this development. One can immediately see why alarm bells ring at the RSPB.
85. The range of measures provided for and envisaged in the BCMP are dramatically wider than those currently undertaken (or on any fair understanding of the evidence and guidance – now required to be undertaken) with the current level of activity<sup>76</sup>. Yet RA in reaching his conclusions on SE and AE (the only person to reach such conclusions on behalf of LAA<sup>77</sup>) assumed that there would be no change in BC activity – “everything already happens and I therefore do not need to assess it”<sup>78</sup>. He has therefore left out of his analysis all the consequences of increased BC – leaving a massive and we say legally and factually fatal hole in LAA's case.
86. These permissions will necessitate BC measures of unspecified intensity, frequency, nature and scope over an undefined area with no upper limit on what may be done. That the measures have to be in “substantial compliance” with the draft BCMP<sup>79</sup> tells one nothing as to their maximum intensity, frequency, nature and scope. This is why the RSPB maintains on the merits that the SoS cannot properly assess impacts on the information available and on the legal structure proposed and therefore cannot lawfully grant permission. The RSPB's point is (and always has been) clear and straightforward.
87. Of course, once permission is granted, a major new factor enters the planning equation – safety of 500,000 air passengers. That is one reason why the assessment has to be done in advance.

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<sup>75</sup> See CD16.2 chp 1 para 1.1 - 1.3, 2.2 – 2.3 and chp 2.

<sup>76</sup> Even ignoring the basic point that such activity is only intermittent now and will have to be continuous in the future.

<sup>77</sup> ND not doing so and the evidence of others on this matter being parasitic on RA's view.

<sup>78</sup> XX1 by the RSPB.

<sup>79</sup> LAA/6/C, appx 2.

88. LAA has picked on (and we think entirely misquoted) a claimed comment of JA as to the need for offsite measures. Their emphasis on this in refusing to provide further definition of the maximum extent of the BC measures is misplaced for three main reasons:
- a. Such an approach is plainly contrary to ND's evidence<sup>80</sup>, the SoCG<sup>81</sup>, the ES<sup>82</sup>, the BHRA<sup>83</sup> and the s.106<sup>84</sup>. It is plain that LAA requires and has given itself through the s.106 very substantial flexibility re: offsite measures;
  - b. even if BC could be limited to on site bird control that tells one nothing as to the intensity of the required effort or the effects. We know from the bird scaring trials<sup>85</sup> that disturbance effects occurred at distances of up to a km from the source of the BC activity. That would take in large swathes of the SPA/pSPA. The required buffer would intrude into the pSPA. Even if the BC activity was to be limited to within the airport boundary the maximum parameters of that BC would have to be specified at this stage (for the reasons already given in legal submissions) and the impacts of that maximum assessed;
  - c. if the position was that BC could be limited to the airport then the s.106 could easily provide that there would be no offsite BC. That of course is not on offer and would be wholly inconsistent with the BHRA and BCMP which recognises the likely need for offsite BC and the s.106 which makes provision for such measures.
89. The overall position is thus as follows:
- a. There is very wide ranging bird activity which poses a BSR in the area;
  - b. The current level of aviation activity necessitate only the current low level of BC activity;
  - c. Under the development scenario, the evidence is clear that much wider measures will be required;
  - d. It is not possible at this stage to determine the extent, nature, frequency and intensity of measures necessary to reduce the risk ALARP largely because no studies have been done on movements, numbers and locations such as to allow a bespoke package of measures to be designed;
  - e. on any view, the measures taken will be of a different order/scale to those which accompany current operations<sup>86</sup>. By way of example only, BC will become continuous and in respect of the north west corner of the pSPA/SPA this is well within the area where continuous maintenance of a buffer will be required and JA was clear that there will be a need for the southerly flight corridor (immediately to the west of the pSPA/SPA) to be kept clear of hazardous species;
  - f. The maximum scope of the BCMP is not defined and much flexibility is retained in the s.106 which effectively leaves this crucial and central question over for later (post-permission) consideration. That is to turn the statutory scheme on its head;

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<sup>80</sup> LAA/6/D p11 paras 2.11 and 2.19 – and see also his XX by RSPB that he would not rule out the 0.5km buffer to the south and in XX by NE that he could not rule out any actions for dealing with hazardous birds.

<sup>81</sup> CD4.5 para 4.2.4.

<sup>82</sup> CD1.14 p193 – 4, 198; CD1.23c p6; CD1.33d p13.

<sup>83</sup> LAA/6/C Appx 1 p25 – 26.

<sup>84</sup> As gone through in conditions session last week.

<sup>85</sup> LAA/6/C, appx 5 and see CD1.45.

<sup>86</sup> The evidence from JA on this was clear and compelling. He ruled nothing out and highlighted the range of measures which may be required.

- g. LAA has not carried out any assessment of the maximum or even the likely impact of those measures (because of RA's wrong assumption noted above);
  - h. the Inspector and the SoS do not have the basic necessary information to assess impacts;
  - i. what can be said with confidence is that the range of measures in the BCMP have the potential to be very wide (if necessary to make BSR ALARP) and that once these permissions have been granted there will, in practical reality, be nothing the RSPB or NE can do to prevent such measures as are necessary for public safety. LAA will say such measures are essential and thus, even if causing AE, can be carried out under s.16 WCA or IROPI tests;
  - j. the SoS therefore has to ask himself whether he can be certain on the information available that on no permissible permutation of the BCMP will there be an AE on the SPA/pSPA. On the information available there can be no rational basis for so concluding.
90. In addition to all this we have safeguarding. The RSPB has been very active in improving wetland habitats in the SPA/pSPA and continues to be so. Its efforts have contributed to the new species which now use the SPA/pSPA. It is those sorts of habitats which are identified as a particular risk in the BHRA<sup>87</sup>. The "no anticipated objection" approach does not apply to the SPA/pSPA and thus the reserve. It is plain that whether or not safeguarding is required to be operated now (it has not actually been operated historically) once commercial passenger jets are introduced LAA will and will have to take a much more rigorous approach to any similar developments in the future as ND accepted and the more likely such objections are to be sustained – public safety trumping other considerations. The increased air operations will therefore adversely impact on the ability of the RSPB to make such improvements on the reserve as may be appropriate/necessary in the future (including as a result of harm caused by the airport).
91. It will be said that if BC measures are necessary which will lead to SE or AE then the S.106 has mechanisms which kick in to secure remedial works. For reasons given in the Conditions session, those provisions are inadequate – they do not secure in a timely way or at all the remedial works; they have insufficient loopbacks (so that obligations can disappear if for example, measures are not practical). They do not in any event answer the basic point above – the need for maximum parameters to be determined and assessed at the outset.
92. It is submitted that all the above is highly material to the SE and AE questions.
93. However, in his proofs, RA did not consider BC measures in any detail and in XX<sup>88</sup>, he confirmed that this was because there was a lack of requirement for any increased bird control<sup>89</sup>. The consequence is that in his assessment of SE and AE he did not take into account the impacts of increased bird control. He looked only at disturbance from noise/visual - see below. It follows that the SoS has no analysis of the likelihood of SE/AE from LAA on a correct

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<sup>87</sup> LAA/6/C appx 1 para 11.2.3a.

<sup>88</sup> XX1 by the RSPB.

<sup>89</sup> When pushed, he confirmed that that was his position – "yes absolutely". He had understood that there would be no change in the level of BC.

understanding of the BC measures which will be required. RA has left out of account the major part of the equation – the impacts of changed BC. There is no expert evidence before the SoS on a correct factual basis as to the absence of SE and AE (of the BC measures and the noise issue combined). In such circumstances it is impossible for LAA to satisfy the *Waddenzee* formulation on its own evidence. It has simply failed to address the correct question on a correct understanding of the facts (in stark contrast to the position of JD).

94. It goes without saying that habitat management, buffer zones, bird scaring, disruption of flight lines have the potential to adversely affect SPA/pSPA populations across the SPA/pSPA. The purpose of such measures would be to stop birds doing what they do now where they now do it. The extent of such adverse effect will depend on the detail – detail the SoS still does not have.

### **Noise and visual disturbance**<sup>90</sup>

95. The current noise environment has been addressed above. The data in the ES<sup>91</sup> amply justified the conclusion they set out that the current activity at the airport does not significantly influence the existing noise environment<sup>92</sup>.
96. By contrast the development scenario will significantly impact LAeq 16 hours and according to Bureau Veritas for the Council will result in a “huge change in the noise environment at Lydd”<sup>93</sup>. That is even before we consider peak noise levels.
97. The future noise contours for a 737 have changed during the course of this case (RSPB/4/D para 5.14) without explanation and are not accepted for the reasons he has given. What is clear even on LAA’s evidence is that the noise contours for the regular 737 flights (several a day) will be much wider and higher than the highest experienced in the no development scenario (the extremely occasional Gulfstream<sup>94</sup>) – broadly an increase of about 9db<sup>95</sup> (but likely to be dependent on the assumptions made and the inputs into the model).

### *Assessment of consequences*

98. There are no bespoke or directly applicable studies covering the circumstances here or the range of species here. In those circumstances, the Appropriate Assessment (AA) process requires one to consider the best scientific knowledge available. There has been no written

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<sup>90</sup> These are by common consent considered together and this Closing refers to them only as Noise disturbance but that includes all visual aspects covered in the evidence of JD.

<sup>91</sup> CD1.41b p8 para 4.2.3.

<sup>92</sup> With the development of course we get a substantial increase even in the LAeq 16 hour – CD1.41a.

<sup>93</sup> SDC/102B appx 4 para 21.

<sup>94</sup> BAe146 being phased out and no contours for any other plane bigger or louder than the Gulfstream. The Gulfstream contour currently arises once every 15 or so days.

<sup>95</sup> See XX of RP in respect of the noise levels at Lade Pit and SPA boundary to the south for a Gulfstream and a B737.

rebuttal of the summary of the scientific literature in JD chapter 10 (RSPB/4/A) and no criticism of the Drewitt paper<sup>96</sup> which pulls together all the academic literature.

99. JD has carried out a very careful and detailed assessment of the range of aviation and bird disturbance academic literature relied on in the ES<sup>97</sup> and ND's evidence<sup>98</sup> supplemented by his own references. It has been in his proof for many months and was not challenged at all during his first XX.
100. The following factors in terms of disturbance from aviation emerge from that literature review<sup>99</sup>:
- a. Lateral distance – with the literature demonstrating this to be a or even the key determinant of bird response with distances of 1 – 1.6km identified in a range of papers (up to 6km) leading to a proposed management response that planes do not fly within 1.6km of reserves or the habitats of important birds. All of the western corridor of the SPA/pSPA is within 1km of the southerly flight path;
  - b. Altitude – with the literature demonstrating this to be a significant factor (not limited to direct overflying) with management advice that planes do not fly at less than 1600 feet above or close to protected habitats. The planes on any of the southerly approaches and take off routes will be well below this height whilst nearest to the SPA/pSPA;
  - c. The difference in noise level between peak and ambient is a significant factor – one is not concerned just with peak levels. The difference between ambient and peak here is stark even on RP's assessment;
  - d. Peak noise level is a factor. The scientific literature shows responses by different species in different circumstances at different peak noise levels. What is plain is that disturbance effects are not limited to military planes or to above 85db. There is no scientific basis for the recent adoption by RA of 85db in this case<sup>100</sup> and JD explanation as to why 85db was not appropriate by reference to the literature was compelling. It is quite plain that he understood the papers better than anyone on LAA's side. A range of peak noise levels from 60 – 65db up is demonstrated in the literature. Reliance on 85db without scientific justification and based on an apparent assumption that it was only military flights which had been demonstrated to cause disturbance is the opposite of a precautionary approach; and
  - e. Different species (even closely related) show different propensity to habituate.
101. None of those factors are analysed or assessed by RA. He instead simply looks to noise contours.
102. All of the above factors have been considered by JD in his analysis. Further all the factors relevant to bird disturbance and indicating a potential for such disturbance are present here to varying degrees. All the ingredients for disturbance effects ("DE")/disturbance impacts

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<sup>96</sup> RSPB 4C/ appx IV tab 5.

<sup>97</sup> CD1.23i.

<sup>98</sup> LAA/6/C, Appendix 4.

<sup>99</sup> JD EiC2.

<sup>100</sup> RA XX2 by RSPB.

("DI") are present here. No wonder even the ES would have recognised a moderate adverse effect here but for the 300,000 BAe146 fallback.

103. There is thus a *prime facie* case from the science that aviation noise will lead to bird disturbance here especially in the north-west area of the SPA/pSPA – an area the importance of which has been addressed above.
104. JD has been careful throughout not to equate DE with DI. He considers the relevant academic papers making the link and the factors that influence that link in his proof and rebuttal. Matters the scientific papers consider in making the link between disturbance and DI include feeding rates, breeding success and productivity. RA has not considered any of those factors here. JD identified a range of literature (including that referenced in the ES and LAA/6/C appendix 4) which demonstrates DI from disturbance. It is correct of course that there is limited direct research on DI from aviation disturbance but: (1) that does not mean that research in a non-aviation context cannot be relied on; and (2) in any event, the lack of research shows the need for further study.
105. ND recognised there was a gap in the information. He recognised that mere presence did not demonstrate a lack of DI<sup>101</sup> and that further work was necessary to fill that gap. His answer was LAA/6/C appendix 3. It sought to demonstrate that there was no correlation between growth in aviation and bird numbers in the vicinity. It was admitted to be a simplistic exercise and, in the light of the answers given in XX of it, it cannot sensibly be accorded any weight in a scientific assessment of DI. But the fact the exercise was done is telling: ND recognised the obvious - that presence of birds does not equate to lack of DI.
106. RA's logic is that birds presence equates to tolerance and lack of DE which in turn equates to lack of DI<sup>102</sup>. There is not a single shred of scientific material which supports that chain of logic. Indeed if that logic had any merit, it would obviate the need for studies of DE and DI. Presence alone would be determinative as to the absence of such DE or DI. The thesis he puts forward is also directly contrary to his emphasis throughout that we must look at DI – that even DE does not mean DI. It necessarily follows from the papers on which he places such weight that presence alone tells one nothing or next to nothing about DE and DI.
107. Yet that is what his evidence on species specific impacts<sup>103</sup> amounts to. The approach in his evidence can therefore be accorded no weight because it simply does not ask the right question.
108. In the light of that basic point a detailed examination of his evidence is not necessary. The Inspector is however respectfully invited to review his notes of XX1 and XX2 by the RSPB. In summary, RA's most recent evidence consisted of:
  - a. assertion of presence - unevicenced in many cases<sup>104</sup> and where it is evidenced the evidence is in numerous cases so bland or general as to be meaningless and not

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<sup>101</sup> See XX by the RSPB.

<sup>102</sup> Accepted in XX2 by the RSPB.

<sup>103</sup> In LAA/7/D and E and G.

demonstrating that which he claims (e.g. Bittern somewhere at Valley Lake – a huge reserve split into three parts some parts well away from the airport, Terns at RAF Kinloss) or wrong (Bewick's Swans at Derry<sup>105</sup>; Bitterns breeding near runways); or reliant on different species (which is only of scientific relevance if he also demonstrates that similar species behave similarly which he has not done) or reliant on presence of that species at Lydd now (which is of no scientific relevance given the wholly different circumstances which will pertain under the development scenario compared to now); or information from other people as to presence (with no detail as to location and no references);

- b. no consideration of DE. No records of any systematic observations of any species reaction to significant noise events. Even lacking in details of casual observations in respect of most species;
  - c. no consideration whatsoever of DI – population trends or factors which would impact on population – the very factor he says the up to date literature demonstrates has to be addressed; and
  - d. an assumption that if there is DE they can simply move elsewhere in the SPA without any analysis of the spare carrying capacity in the winter bottlenecks and assuming that the ability to move elsewhere means no impact on the SPA – which is wrong as a matter of law.
109. Fundamentally presence does not equate to lack of DI as JD explained. Birds may have to tolerate particular locations because they have nowhere else better to go. Their continued presence simply tells one that there is no spare carrying capacity at better sites elsewhere. It tells one nothing about the success or long term sustainability of the population in that location. It is therefore impossible to move from “presence” to being satisfied in a *Waddenzee* sense that there will be no SE and no AE.
110. There is further a strange contradiction in RA's evidence. On the one hand removal of night flights is described as a “massive advantage”, the cap on helicopter movements is a benefit as is the predictability of movements precisely because they were said to reduce DI (his words). Whilst on a correct understanding of the proposals these benefits disappeared<sup>106</sup>, the relevant point here is how can removal or reduction of flight movements be a massive advantage but the introduction of flight movements be of no significance. The reality is that the science and RA recognises that in circumstances such as this the potential for DI from aviation disturbance is real.
111. Taking a step back, all the factors identified in the literature as relevant to DE are present here to a significant degree very close to the edge of the pSPA/SPA and well within the parameters where the scientific papers advise against introducing aviation activity – in terms of height –

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<sup>104</sup> Assertions that x species is known to nest near many airports are so vague and general as to provide no basis for assessment. He had full opportunity (and more) to set out his full case in documents (well outside normal directions) and yet he still provided extremely scant evidence on which his assertions were based.

<sup>105</sup> If the RSPB warden says they are not there “they are not there” – JD in Eic2. RA tried to get round this compelling evidence by questioning the qualifications of the RSPB warden to spot Bewick's swans.

<sup>106</sup> See RA XX1 by the RSPB.



1600 feet, lateral distance – 1.6km – or where the peak noise and noise over background is at a level where DE can be expected. There are a wide range of species (some very rare and/or secretive) and no directly relevant evidence that they rapidly habituate to and cope unaffected with disturbance from aviation. Applying a precautionary approach on what possible basis can the SoS be satisfied that there will be no SE on the information available? The answer is plain he cannot be so satisfied. One therefore needs to move to the next stage of the process – namely AA. But again, on the scientific literature alone the SoS can have no confidence on lack of AE on integrity.

112. To make good its case on lack of AE, LAA had to produce evidence as to how species actually respond to disturbance (DE) and/or a scientifically and statistically valid exercise to demonstrate whether or not a correlation exists between disturbance and bird population (DI). RA's assertions of no impact are on analysis nothing more than assertion based on flimsy evidence and his analysis has none of the attributes of a scientific assessment.
113. Applying a correct legal approach to SE and AE (based on *Waddenzee*) it is plain that one cannot be satisfied that there will not be a SE from noise disturbance and there is plainly substantial potential (and therefore very real scientific doubt as to the absence of AE) for there to be adverse effects on conservation objectives of the SPA/pSPA by reason of the noise disturbance and the evidence comes nowhere near resolving those doubts.
114. LAA may rely on what they claim is (1) the small area of land affected by high noise levels; (2) the relatively limited number of plane movements involved; and (3) the B737 test flight. On (1), the area of the contours is not accepted, the threshold of 85dB L<sub>Amax</sub> is not justified, a whole range of factors other than simply peak noise contours have been shown in the literature to be important factors. If one were to draw a 1.6km lateral separation, or contours by reference to exceedance over background or a 65db or a 70 db contour a wholly different picture would emerge. On (2), there is no evidence in the literature that DI are necessarily avoided by relatively low frequency of events. Indeed on the habituation approach, the fewer movements the less potential to habituate. The SoS is being asked to make a bold assumption here that he can be certain that disturbance from x movements per day will not affect any of the conservation objectives of the SPA/pSPA. It is submitted that there is no possible basis for him to make such an assumption. On (3), the trial occurred in February – as bird numbers would be falling. Whilst BG did not notice any disturbance effect he was looking towards the runway and away from the Reserve. The plane did not (as we understand it) fly along the southern flight path and the characteristics of the flight in terms of load, point of rotation etc... were very different from a flight to the south of Spain. The test flight was not designed to test impacts on the SPA. Had it been LAA could have carried out systematic observations and got the plane to mimic what will actually happen under the development scenario. They did neither. This test flight is no good evidence of a lack of DI on species in the SPA/pSPA.

#### **The overall position**

115. The overall position is as follows. Into this highly protected area currently characterised by low noise levels, very limited bird control and no evidence of adverse impacts of current aviation

activity on birds (with the exception of the only recorded observation of the Gulfstream) the following will occur:

- (a) there will be a step change in a whole range of BC activity both on and off the airfield of indeterminate frequency, duration, intensity and nature specifically designed to keep hazardous birds well away from the airfield and the Zone with a need to disrupt flight lines including of SPA/pSPA species and the creation of a buffer immediately alongside (and given the range of DE from bird scaring covering) much of the north west part of the SPA as well as a ½km buffer around the remainder of the airfield - with potential impacts on e.g. Lade Pit. Absent specification it is impossible to determine the impacts of that bird control but on the information available it is likely to have to be extensive and specifically directed at SPA/pSPA species and habitats in (and functionally linked to) the SPA. It is impossible to conclude that there will be no SE or AE on Integrity;
- (b) on top of that there will be a number of wholly new passenger jet movements of large planes at low altitudes, a very short lateral distance from the SPA/pSPA with high peak noise levels and significantly above background. All the factors important to DE will be present and the plane movements will be well within areas where advice in the science is that they should not be. It is impossible to conclude no SE on the scientific information available. At the AA stage, one has the science summarised by Drewitt and JD on the one hand and the assertion of RA on the other. The high hurdle in *Waddenzee* is not met.
- (c) Taking those elements together (an exercise nobody for LAA has done) there can be no confidence whatsoever that there will not be AE on integrity as properly understood from the case law.

### **Climate change**

116. The development will facilitate a net addition in UK aviation. All the difference between the existing level of usage and that facilitated by the development is in addition to current aviation movements in the UK<sup>107</sup>. Flights displaced from e.g. Gatwick will be replaced by other flights there (potentially by bigger, more carbon intensive planes). This is thus a new additional carbon entrenching piece of infrastructure which will generate substantial levels of greenhouse gas (“GHG”).
117. The RSPB has for many years been arguing that the ATWP<sup>108</sup> (and policies based on and derived from it) are fundamentally out of date on climate change (“CC”) grounds principally because of the stark disparity between the growth in aviation provided for in the ATWP and the level of growth which is consistent with wider CC goals (as embodied in the Climate Change Act 2008<sup>109</sup> and the 2050 Target).
118. That position has now been adopted by the Government<sup>110</sup>. The Government agrees with the fundamental plank of the RSPB’s analysis as set out in the CC Written Reps<sup>111</sup>. The new

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<sup>107</sup> Confirmed by LC in XX by the RSPB.

<sup>108</sup> CD5.24.

<sup>109</sup> CD5.14.

<sup>110</sup> CD5.36 ,page 4, second para.

<sup>111</sup> RSPB/5/A.

government has abandoned the (disingenuous) “facing both ways” approach of the previous government.

119. LJ Sullivan, in refusing PTA on London City (because of the very narrow ambit of the point taken there – which is a different and much more limited point than that taken here) stated as follows<sup>112</sup>:

***“the interaction between climate change policy and aviation policy is, in principle, an issue of wide public importance...”***

***any future decision maker dealing with a proposed increase in airport capacity will have to consider the CCC’s December 2009 Report, any further reports by the CCC and the Statements of Government policy in March 2011.”***

120. This confirms the materiality of GHG emissions from flights to decision making on aviation expansion. It confirms the consistent approach of the RSPB.
121. The March 2011 position is clear. The ATWP is fundamentally out of date in the way it addressed climate change. Future growth of aviation can only occur once the contradiction highlighted in the RSPB Written Reps is resolved.
122. Despite LCs attempts<sup>113</sup> to draw some comfort from the subsequent consultation process there is no comfort there on CC issues and no indication there that growth can occur at regional airports without consideration of CC issue.
123. The result of the above for this application is that:
- a. The ATWP is not the final policy word on the subject of aviation expansion here. The ATWP is fundamentally out of date and is to be reconsidered including a fundamental reconsideration of the level of growth which is consistent with wider climate change goals. The SoS may not proceed as if the 2011 Policy Statement<sup>114</sup> had not occurred or on the basis that the ATWP remains the main source of policy – it has been overtaken by events on CC grounds;
  - b. the GHG emissions from flights are a material consideration and have to be grappled with. It is no answer to that to say the emissions will be small as a percentage of UK emissions or of UK aviation emissions. That will always be the case with any particular infrastructure project. One does not *refuse* windfarm proposals on the basis that their contribution to CC goals is a very small percentage of what the UK needs to achieve; by analogy one cannot *grant* here on the basis that the growth in emissions will be a small percentage of total emissions. The correct position to take is that CC emissions from flights here are a major disadvantage of these aviation proposals, there will be a dramatic increase in emissions from aviation at Lydd (although the quantum has not been set out in the documents), there is no current policy support for aviation growth

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<sup>112</sup> The whole of the short reasoning needs to be understood and I have just highlighted the key point for present purposes.

<sup>113</sup> LAA/4/L.

<sup>114</sup> CD5.38.

bringing with it very high percentage increases in emissions – the government has made it clear that future growth is dependent on cutting emissions – not increasing them; the general policy support for growth here in so far as it derives from or originates from the ATWP has to be read in the light of the March 2011 announcement<sup>115</sup> and therefore there is a very significant additional disbenefit of these proposals not made acceptable by policy – namely GHG emissions from aviation.

124. For all these reasons: (1) the SoS may not grant permissions; and/or (2) should not grant the permissions on the merits.

David Forsdick

Landmark Chambers

14<sup>th</sup> September 2011

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<sup>115</sup> CD5.36.

**(RSPB Closing) Section 106, BCMP  
(insert after para 84)**

- 84a The BCMP submitted under sch 1 clause 10.1 will have to, amongst other things, set out proposed offsite bird control measures likely to be deployed and their, likely duration, scope and location (CD17.23, sch 1, clause 10.1.7) as well as details on all the other matters there listed. It will put the flesh on the bones of the draft BCMP<sup>1</sup>. The parties and/or the expert will have to approve the BCMP if it is in substantial compliance with the draft BCMP, but of course the draft provides no detail as to the frequency, intensity, nature and location of the bird control.
- 84b The dispute resolution clause (clause 11, pg 19) does not give the expert the ability to refuse to approve the BCMP if it is in substantial compliance with the draft and provides no guidance as to how the expert is to make his/her determination or the factors that he/she can take into account. Plainly, under the structure he/she will have to approve measures to the extent that they are demonstrated to be desirable for public safety including even shooting of birds outwith the general licence (section 16 (1)(i), WCA 1981 as amended<sup>2</sup>).
- 84c Remedial measures are not provided for at that stage.
- 84d The next stage is monitoring of the BCMP, clause 11.2.8 (sch 1) of which includes a scheme of remedial measures to prevent significant adverse effects from the operation of the runway, presumably including any significant effects generated by the BCMP. That review will be submitted to the panel (sch 1, clause 12.2). If approved and if relevant consents are obtained, the remedial measures will if practicable have to be implemented.
- 84e Two substantive points arise. (1) These remedial measures are to compensate for impacts caused by the operation of the runway and the BCMP. They are not and cannot be measures to avoid the impact arising in the first place (compare the position in *Hart* where the measures were closely defined at the outset and assessment of them showed that they would prevent harm which would otherwise arise occur). It is obvious that the BCMP will require results in terms of reducing BSR in particular locations to avoid hazardous species being in those locations. There will therefore have to be impacts in those locations. That is the whole purpose of the BC regime. It therefore follows that the remedial works are compensation for harm not mitigation to avoid the harm, but that is at the IROPI stage of the analysis not the adverse effect stage. The Applicant has not sought to satisfy the alternative solutions and IROPI requirements. The legal effect of this structure is therefore to bypass the IROPI and alternative solutions requirements and is therefore unlawful. (2) Further the remedial measures may or may not be on the SPA/pSPA and to the extent they are designed to remedy harm to the SPA/pSPA by measures off the SPA/pSPA are in any event compensation (see *Dibden*).
- 84f In any event the remedial scheme is wholly inchoate at this stage and cannot be assessed. Compare e.g. the "SANGs"<sup>3</sup> in Thames Basin Heath, the recharge in *Dibden*, the compensaton package at *Bathside Bay*, all of which were subject of evidence at an Inquiry, in *Bathside Bay* agreed to be appropriate, the RSPB tested and assessed it and it worked. In *Dibden*, the RSPB tested and assessed it and did not and permission was refused on that basis. And in any substantial application in TBH, developers have had to demonstrate with details precisely what their measures will be.

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<sup>1</sup> LAA/6/C, appx 2

<sup>2</sup> CD5.12.

<sup>3</sup> Suitable alternative natural green space.