

Date: 03 March 2010
Our ref: TR/01-2/CON-P1
Your ref: Y06/1647/SH and Y06/1648



Terry Ellames
Major Applications and Projects
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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 Wetland of International Importance (Ramsar site)
Dungeness National Nature Reserve (NNR)
Rye Harbour Local Nature Reserve (LNR)**

As requested, I write further on the following matters:

1. The letters from Nigel Deacon and from Prof. Thomas dated 19 February 2010
2. The revised appropriate assessment dated February 2010
3. The correct extent of the proposed Ramsar site
4. The proposed SPA and Ramsar site – planning materiality and weight

In addition I write further to the letter from Jonathan Gordon, LAA to Councillors of 2 March 2010

1. Letters from Nigel Deacon and from Prof. Thomas

Natural England is disappointed that further representations are being provided by the applicant at this very late stage (sent 24 February, received 26 February). We have however considered these and relevant regional and national specialists have been consulted. Natural England can confirm that these letters do not change our advice to the Council, set out in our letters of 26 January 2010 and 11 February 2010.

No further material information has been provided. The bird hazard avoidance study work undertaken by the applicant remains therefore insufficient to assess the effects of the potential bird hazard control methods on the classified SPA and proposed SPA and Ramsar site. To our knowledge, there have not been '*a number of years of study*' as Prof. Thomas asserts; if there have, the results have not been provided to the Council, statutory consultees and the public in accordance with the EIA Regulations.

The Draft Bird Control Management Plan (BCMP) does not limit the potential bird control measures that could (or may have to) be employed to those that have been subject to any or any sufficient assessment of their effects on SPA bird species nor on proposed SPA or Ramsar species. It is draft and subject to amendment in any event.

The types and number of planes are substantively different from the current baseline and it has not been demonstrated that there would be no adverse effect on bird species within the

SPA, either from noise or direct visual impacts. We reject therefore the assertion that aircraft noise is *'no longer an issue of contention'* and would refer the Council to the *Elvington Aerodrome* appeal decision previously supplied.

No further information or evidence assessing the airfields and protected sites referred to by the applicant has been supplied. What we would expect to see by way of such work was set out in our letter of 11 February 2010. We note that the short letter from Prof. Thomas indicates that it is his *'understanding'* that examples of airports around the world close to or within areas protected for birds have been *'set out in detail'* to the Council.

Natural England have not seen any such detail and our position remains that, unless the information set out in our letter of 11 February 2010 is provided by the applicant and then considered in the Council's appropriate assessment, there is insufficient information for the Council to rely upon in coming to any informed decision on comparable airport activities and impacts on protected bird species.

Our advice remains that it is not possible for a decision maker to conclude that the proposed operation of the airfield, including the bird hazard control measures that would need to be employed should permission be granted, would not lead to an adverse affect on the integrity of the SPA or upon that of the SPA as extended or upon the proposed Ramsar site.

2. Revised Appropriate Assessment dated February 2010

The revised appropriate assessment was received only with the Committee papers and Natural England's advice on it has not been sought. Natural England would like to draw Council members' attention to Regulation 48 (3) of the Habitat Regulations, which requires that:

'The competent authority shall for the purpose of [its] assessment consult the appropriate nature conservation body (Natural England) and have regard to any representations made by that body within such reasonable time as the authority may specify.'

Although we have not been allowed sufficient time to consider the revised appropriate assessment under regulation 48(3) and the council cannot therefore have sufficient regard to our advice, we must make the following initial comment on the conclusions of the revised appropriate assessment on adverse impacts on the Dungeness SAC:

The appropriate assessment, which the Officers' Supplementary Report has followed, concludes that APIS assigned critical load for nitrogen deposition should be relied upon until such time as there is an *'agreed amendment'*. Natural England has supplied new evidence produced subsequently to the original APIS work. Natural England contends this evidence, showing a lower critical lower threshold is likely to be more applicable to the sort of habitat found at Dungeness is the best available scientific evidence and should be relied upon.

The appropriate assessment does not therefore adopt the precautionary approach (that is required under European law. Natural England advises that there is insufficient scientific certainty of the air quality impacts of this application for a decision maker to conclude the SAC will not be adversely affected by the proposed developments.

3. The correct extent of the proposed Ramsar site

We note that the extent of the proposed Ramsar site as shown in the revised appropriate assessment is incorrect and is actually as shown on the attached plan. Natural England

has considered the revised appropriate assessment on this matter and advises that the conclusion at paragraph 8.1.13 of the revised appropriate assessment that *'it cannot be concluded that either project would not have an adverse effect upon the integrity of the pSPA and pRamsar'* would remain a valid conclusion in respect of the correct proposed Ramsar site boundary.

4. The proposed SPA and Ramsar site – planning materiality and weight

We would be grateful if clarification to paragraph 7.30 of the officers' report is provided to members; specifically the sentence *"LAA has pointed out to the Council that the possibility of designation of the proposed SPA post the grant of planning permission should the development not be completed, is not a material planning consideration that should be taken into account in the determining the applications now and refers to the case of Alnwick DC and Secretary of State for the Environment, Transport and the Regions"*.

This is not correct - the Alnwick case does not state what the report suggests and the applicants would not be correct to contend this.

The Alnwick case concerned a decision by the Secretary of State to modify a planning permission under s100 TCPA 1990, thereby bringing into play the compensation provisions in s107. In that case the court held that, in so far as financial consequences do not relate to the use and development of land, they are not capable of amounting to material considerations.

The only relevance of this judgment to Shepway's determination of LAA's applications is that, if the Council grants permission and has to review the consents following classification, it will not be able to use the payment of any compensation as a factor in its decision making on the review(s). In any event, the Council would be constrained by, and limited to, the provisions of the Habitat Regulations and could not, therefore, consider the implications to the Council of any necessary payment of compensation.

In other words, the Council would need to review any permission for its effects on the SPA interest features irrespective of what any potential compensation may cost them. It is not clear therefore why the applicant wishes the Council to rely on the judgment.

Classifications as material considerations

As noted in our letter of 26 January 2010, the proposed additions and extensions to the SPA and the proposed Ramsar site meet the qualifying criteria for classification (as per the JNCC guidelines previously supplied).

Classifications will extend legal protection to the identified qualifying habitats and species which they are not currently afforded pending classification. In the circumstances, Natural England would re-iterate that it is our clear position that, not only are the proposed classifications material considerations before the Council, they are planning considerations that should be accorded significant weight. It is this consideration - and not any relating to the compensation provisions in the Habitat Regulations (or in the TCPA 1990) - that we suggest members should be concerned with.

As the applicant's position set out above could give the false impression to members that there is caselaw suggesting that the classifications would not constitute material planning considerations before them, we should be grateful if you would draw members' attention to the contents of this letter.

5. Letter from Jonathan Gordon, LAA to Councillors 02 March 2010

Natural England is very concerned that representations are being made by the airport direct to Councillors on the night before the committee meeting and that these representations have been forwarded to Natural England not by the council but by a third party.

We are especially concerned that the representations purport to state the legislative position under the Conservation (Natural Habitats &c) Regulations 1994 ("the Habitats Regulations"). They **do not** represent the correct decision making framework that the members have to operate within.

It is also of note that these representations from the airport's Chief Executive contradict the advice of the airport's own legal advisers supplied to the Council with the December 2009 Additional Information.

The correct legal position has already been set out by Natural England but, for the sake of clarity, is briefly repeated again here:

Regulation 48(5) of the Habitat Regulations requires that the competent authority (in this case the Council as decision maker) "*shall agree to the plan or project only after having ascertained that it will not affect the integrity of the European site.*"

The European Court has made it clear, in the *Waddenzee* decision previously referred to in our advice, that Article 6(3) of the Habitats Directive (transposed into national law by the Habitats Regulations) requires that approval should only be granted:

*"where there is **no reasonable scientific doubt** that it would not adversely affect the integrity of the site."* (our emphasis.)

Natural England advises that, for the reasons already supplied, the Council does not have the requisite scientific evidence before it for it to come to this conclusion in its function as the competent authority under regulation 48 of the Habitat Regulations. Therefore subject to the tests under Regulation 49 the application should be refused.

We should be grateful for confirmation that members have been provided a copy of this letter and that their attention will be drawn to its contents prior to any decision being made in Committee this evening.

Yours sincerely



On behalf of
Louise Bardsley
Senior Specialist Government team, Sussex, Surrey and Kent