

11 February 2022

Susanne Chapman-Ennos  
Tendring District Council  
Council Offices  
Thorpe Road  
Weeley  
Essex  
CO16 9AJ

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Emma Andrews  
E: emma.andrews@savills.com  
DL: +44 (0) 20 3810 9842

By Email

33 Margaret Street W1G 0JD  
T: +44 (0) 20 7499 8644  
F: +44 (0) 20 7495 3773  
savills.com

Dear Susanne

**Hutchison Ports (UK) Limited: Bathside Bay**  
**Application Reference Numbers: 21/01810/VOC and 21/01792/VOC**

My client, Hutchison Ports (UK) Limited ('HPUK') has seen the consultation response from Natural England dated 4 February 2022, which objects to the above applications. An initial response was provided in our letter of 8 February 2022. A meeting was subsequently held with Natural England (which was also attended by Graham Nourse of Tendring District Council (TDC)) on 9 February 2022 to discuss the comments in further detail. This letter provides an update to our 8 February response, reflecting the outcome of the discussion with Natural England on 9 February 2022.

In summary, HPUK's position remains unchanged in that all of the points raised by Natural England in their advice letter have either been addressed by the ES and shadow HRA supporting the applications or should not prevent TDC making a timely positive determination of the applications. This letter expands on our reasoning for this position.

I deal below only with the matters in Natural England's letter that require a response and do not address their comments on Appropriate Assessment or Reasonable Alternatives (items 1 and 2 respectively of their 8 February 2022).

**1. IROPI**

Contrary to Natural England's suggestion, our view is that the ES does provide TDC with a full and up to date understanding of the ecological value of the site and the potential impacts. Further details are provided below (in response to Natural England's comments regarding compensation), but in summary section 7 of the ES provides an updated baseline for the waterbird interest of Bathside Bay and the Stour and Orwell Estuaries SPA and Ramsar site (i.e. core counts from the Wetland Birds Survey (WeBS) for the most recent 5 available years from the British Trust for Ornithology (up to and including the winter of 2019/20) and low water counts for the five winters to 2018/19).

In the meeting on 9 February 2022, Natural England expanded on its advice to TDC that "...*your authority should have a full understanding of the ecological value of the site and the anticipated impacts...*", stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside Bay have been collected as part of the assessment of / monitoring for the Galloper offshore windfarm operations and maintenance facility ('the Galloper O&M facility'). Our understanding is that the data referred to by Natural England are not published or publicly accessible. The data have been requested since the meeting but have not been provided to HPUK and, therefore, it is not clear which data are being referred to or the timeframe covered by the data. On this basis, and given the long-

running and recent data set on which the conclusions of the ES and shadow HRA are based, HPUK feels it is unreasonable for Natural England to infer that the conclusions of the ES and shadow HRA are not robust due to data deficiency. The conclusions are based upon a robust and long running dataset, gathered by a body with long experience of bird assemblages in Harwich Haven and can be considered to benefit from a high degree of scientific certainty. This matter is explored in further detail below in response to the more detailed points raised by Natural England.

Section 8 of the ES reports the findings of the Preliminary Ecological Appraisal undertaken in 2021 and, on the basis of that survey, the ES identifies the mitigation required where necessary.

IROPI is addressed in detail in section 4.5 of the Planning Statement, with supporting information in section 2 of the ES. It can be concluded that IROPI remains in full force for the proposed development.

## 2. Compensation

This section of Natural England's letter raises several points, which we address as follows.

- **Shadow HRA**

Natural England stated that *"We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases"*.

As we explained in our letter of 8 February and in the meeting on 9 February, the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases. Similarly, the shadow HRA does not slice the provision of compensatory habitat into phases. The shadow HRA assesses the whole project (and each element of the project is explicitly referred to in section 25.3.2 which reports the screening for likely significant effect (LSE) stage of the HRA process). The shadow appropriate assessment is reported on the same basis in section 25.3.3. For the avoidance of doubt, the shadow HRA concludes that LSE cannot be excluded for the whole project (i.e. including Phase 1) and therefore carries the whole project into the shadow appropriate assessment stage.

It is assumed that Natural England is referring to paragraph 13 of section 25.3.3 which refers to Phase 1 of BBCT and SBH. That paragraph is included to highlight that no adverse effect on integrity is concluded for the Phase 1 works. As noted above, the shadow HRA process does encompass all phases of works for the BBCT and SBH, and the reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures on their own.

Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition, that is no different to the protection afforded by the existing planning permission.

- **Adverse Effects on the Integrity (AEoI) of the Stour and Orwell Estuaries SPA and Ramsar site and sufficiency of Little Oakley Compensatory Habitat**

Natural England stated that *"We also advise that the supporting evidence for the conclusion of no AEoI does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEoI"*.

The conclusion regarding AEol is only relevant to SPA (and Ramsar site) features, albeit that the SSSI features also form part of the waterbird assemblage of the SPA and Ramsar site. The qualifying interests of all designated sites are, however, included in the assessment reported in section 7 of the ES. Section 25 of the ES presents the shadow HRA.

Notwithstanding the above distinction between the designated sites relevant to the scope of the shadow HRA, the ES does describe the current potential for effects on the SPA, Ramsar site (and SSSI) features within the designated areas adjacent to the Phase 1 works (and the wider BBCT and SBH developments). As such, the potential for impacts upon these features is considered in the ES.

Natural England has drawn attention to overwintering (i.e. non-breeding) species and to breeding species. As noted above, non-breeding waterbird data up to the winter of 2019/20 (the most recent data available from the WeBS surveys) is reported in section 7 of the ES. The Bathside Bay WeBS count sector for which data are included in the ES coincides with the boundaries of the SPA, Ramsar site and SSSI, and this data is presented in the context of the most recent WeBS data for the Stour and Orwell Estuaries (summarised in Table 7.4 of the ES, with a further species-specific analysis in Table 7.5 of the ES). The only breeding qualifying feature of the SPA and Ramsar site is avocet, which does not breed in Bathside Bay or on the land surrounding the Bay. The shadow appropriate assessment concludes that AEol on the SPA and Ramsar site can be excluded for Phase 1, but clearly cannot be excluded for the project as a whole.

The comment made by Natural England in its letter to TDC was discussed further in the meeting on 9 February, specifically the assertion that *“the conclusion of no AEol does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas”*. Natural England’s stated position is that *“the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information”*.

In exploring this point, Natural England referred to the waterbird data collected in connection with the Galloper O&M facility. As noted in Section 1, these data are not published or publicly accessible and, therefore, the ES and shadow HRA were supported by the most recent WeBS data and low water count data, which provide a full and up to date understanding of the ecological value of the site using data that can be verified by third parties (i.e. the assessment does use the *“best reasonably available information”*).

Nevertheless, HPUK does have access to some of the data gathered in connection with the Galloper O&M facility and, given Natural England’s challenge to the sufficiency of the data and the discussion at the meeting, it is assumed this represents (at least some of) the data Natural England is referring to. These data are discussed below.

Waterbird surveys within and adjacent to Bathside Bay were undertaken over the periods October 2018 to June 2019 and October 2019 to March 2020. Two surveys per month were undertaken at low water (over the period -1.5 hours to +1.5 hours around the time of predicted low water) with one survey per month over the mid tide period (from 1.5 hours to 4.5 hours after or before predicted low water). On each survey, counts were divided into one hour time slices (e.g. -1.5 hours to -0.5 hours before low water, -1.5 hours to +0.5 hours around low water, +0.5 hours to +1.5 hours after low water). Bathside Bay was counted in sectors covering the whole of the intertidal area and the shallow subtidal area, but also including any birds observed roosting on the land surrounding the bay.

Using the raw count data from surveys undertaken for the Galloper O&M facility, for each of the low and mid tide counts, the total number of waterbirds recorded has been calculated and the mean peak number of waterbirds identified. The following summarises the conclusions of this analysis:

- a) The low tide mean peak is 1,478 waterbirds. Using the same five year mean peak (2012/13 to 2018/19) low water count data for the estuarine system as presented in the ES (Table 7.7) for context, this represents 2.6% of the Stour and Orwell estuarine system population. This very

closely agrees with the analysis of the low water population supported at Bathside Bay in the context of the estuary system presented in section 7.2.4 of the ES (2.8% of the estuarine population).

- b) The mid tide mean peak is 1,830 waterbirds. There are no directly comparable mid tide data from other sources but, adopting the same analysis presented in item a), this represents 3.2% of the low water estuarine population (five year mean peak (2012/13 to 2018/19)).
- c) As reported in the ES (section 7.2.4), the equivalent comparative data reported in the 2003 ES (which supported the original application) and the 2010 Supplementary Environmental Report (which supported the subsequent extension of time permissions for BBCT and SBH granted in 2013) confirmed that the low water count in Bathside Bay represented up to 2.4% (2003 ES) and 3.6% (2010 SER) respectively.
- d) The above analysis of the data available to HPUK from the Galloper O&M facility surveys confirms the conclusion of the ES that the current low water population aligns closely with the comparative data from the 2003 ES and the 2010 SER (and certainly does not demonstrate that the importance of Bathside Bay has increased in the context of the estuarine system).
- e) A comparison of the Galloper O&M facility data with the WeBS core count data is less valid because the latter data represents waterbird usage around the time of high water. However, when assessed in the context of the WeBS core count data, the mid tide mean peak of 1,830 waterbirds recorded in the Galloper O&M facility data represents approximately 3.3% of the Stour and Orwell estuarine winter peak population (54,781 birds; see Table 7.4 of the ES). Again, this very closely aligns with the conclusion of the analysis of the WeBS data in the ES (paragraph 9 of section 7.2.3) which states that the mean peak of the high tide waterbird assemblage in Bathside Bay (2015/16 to 2019/20) represented 3.4% of the mean peak count in the Stour-Orwell Estuary SPA.
- f) Although not related to the Galloper O&M facility data, with respect to the usage of Bathside Bay at high water we reiterate the point made in our letter of 8 February. The analysis of the high water data shows that the current waterbird assemblage at Bathside Bay is lower than that reported in the 2003 ES. Paragraph 8 of section 7.2.3 of the ES notes that *“Overall, the waterbird assemblage in the Stour-Orwell estuarine system appears to be lower in recent years (43,065 individuals, 2015/16 to 2019/20) than the mean peak of c.57,000 over the 1995/96 to 1999/00 period reported in the 2003 ES and 2010 SER. Reflecting this trend, the mean peak at Bathside Bay (1,473 individuals, 2015/16 to 2019/20) is lower than that reported in the 2003 ES and 2010 SER (c.3,300 individuals, 1995/96 to 1999/00)”*.
- g) It is important to note that the Galloper O&M facility data include counts of waterbirds in the shallow subtidal areas to the north of Bathside Bay. This strengthens the conclusion that the waterbird population based on the results of the Galloper O&M facility counts, when assessed in the context of the estuarine system, is no greater than that reported and assessed in the ES and shadow HRA.

With regard to sufficiency of the Little Oakley managed realignment site, Natural England states that *“we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay”*. This was also one of the key points discussed at the meeting.

In response, and informed by the above analysis, we conclude the following, which tend to enhance the certainty of the conclusions that HPUK's expert team have established:

- i. The waterbird data presented in the ES, and which supports the shadow HRA, represents the best reasonably available information.
- ii. All the data, including that collected for the Galloper O&M facility, demonstrate that the importance of Bathside Bay in the context of the estuarine system is, at most, comparable to that prevailing at the time of the 2003 ES and 2010 SER that supported the positive decisions on the previous applications.
- iii. Based on current ecological value of Bathside Bay, there is no reason to suggest that the Little Oakley managed realignment site does not represent sufficient compensatory measures.
- iv. The Galloper O&M facility data includes waterbirds in the shallow subtidal area to the north of Bathside Bay. Because the inclusion of that area in the counts does not change the conclusion regarding the importance of the populations at Bathside Bay, the conclusions of the shadow HRA are unchanged and the sufficiency of the managed realignment site is maintained.

In the meeting on 9 February, Natural England stated that the shadow HRA does not draw all of the information together to enable the competent authority to undertake its HRA. We strongly disagree with this point given that section 25 of the ES:

- presents the current conservation objectives and qualifying features of the relevant designated sites.
- provides a LSE screening assessment for the whole project.
- presents a shadow appropriate assessment in the context of Natural England's Advice on Operations and supplementary advice on conservation objectives.
- includes assessment of the potential effects on the qualifying features of the relevant designated sites, supported by the best available evidence (as discussed above).

In light of the above, and given Natural England does not present any specific evidence to suggest a contrary position, it is difficult to understand the rationale for Natural England's statement regarding the sufficiency of compensatory provision represented by the proposed managed realignment at Little Oakley. Based upon the data supplied by HPUK and the absence of contradictory data, a high degree of scientific confidence can be placed in the information supplied in the application when concluding as to the sufficiency of compensatory habitat.

#### • **Completeness of the Appropriate Assessment**

We do not understand the relevance of references to compensation at a ratio of 1:1 or below. HPUK has always proposed a ratio of provision well in excess of 1:1, which was based upon the need to accommodate larger assemblages as originally assessed. The approach that HPUK has taken is appropriate having regard to the up to date assessment reported in the application, and when the further justification of that information as reported above is taken into account. This is considered further below.

The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1 and not, as Natural England suggests, less than 1:1.

Natural England states that *“It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network”*. We emphasise that the managed realignment proposal was developed specifically to account for uncertainty in effectiveness, and this has been expressly acknowledged from the outset. Therefore, no criticism should be made of measures that are already designed to take account of the need for confidence in relation to effectiveness. Indeed, the 2003 ES for the Little Oakley managed realignment states:

*“...there is likely to be some uncertainty in the confidence with which the compensatory habitat will be able to support the affected qualifying features. In order to address these uncertainties, the ratio of compensatory habitat to that which is lost may be increased; the magnitude of increase is subject to the level of uncertainty involved, time lag and spatial displacement....it is proposed to create a larger area of intertidal than would be required in a like-for-like situation (i.e. a 1:1 replacement of intertidal area). Hence, the proposal is to create approximately 105ha of intertidal area as opposed to the 69ha that would be lost at Bathside Bay”*.

The Inspector’s report in respect of the BBCT Inquiry (23 March 2005) records, at paragraphs 2.57 to 2.67, the agreed position on nature conservation between various parties, including Natural England (at the time, English Nature). Paragraphs 2.66 and 2.67 record:

*“2.66 EN is of the opinion that, should BBCT and the managed realignment be allowed, the package of compensatory measures agreed would be both appropriate and necessary to secure the coherence of Natura 2000 (the Europe-wide network of SPAs and Special Areas of Conservation). This is without prejudice to the decision of the SoSs under reg.49 of the Conservation (Natural Habitats, &c.) Regulations 1994.*

*2.67 EN and the RSPB agree the contents of the CMMA. This document deals with the implications of BBCT for the designated status of the Stour and Orwell Estuarine system, as well as for protected species. It describes the proposed mitigation and compensatory measures and their objectives and details proposals for monitoring the Stour and Orwell estuarine system with respect to nature conservation. Proposals for monitoring the development of habitats and the numbers and distribution of water-birds within the proposed managed realignment scheme, as well as the effects of the managed realignment on the designated status of the Walton Backwaters, (Hamford Water SPA, Ramsar site and SSSI), are also detailed”*.

At paragraphs 18.146-18.165 the Inspector sets out his conclusions on the Little Oakley compensation scheme including his overall conclusion (accepted by the Secretary of State) that it *“would represent the necessary compensatory measures that would need to be taken to ensure protection of the overall coherence of Natura 2000, in accordance with Reg. 53 of the Habitat Regulations”*.

HPUK considers that the above position applies with equal force to the present day. This matter is addressed in detail in section 25.6 of the ES, which considers the characteristics of the compensatory habitat in light of current Defra and Natural England guidance (February 2021) titled *Habitats regulations assessments: protecting a European site*.

HPUK notes that Natural England has not given any express reason for diverging from its publicly expressed position in 2004. Importantly, Natural England has also reaffirmed this position, most recently on 14 February 2013 when the planning permissions for BBCT and the SBH were renewed (application reference numbers: 10/00292/FUL and 10/00203/FUL). Again, there is no specific reason given for any divergence from Natural England’s 2013 view.

- **Defra Best Practice Guidance**

HPUK's view is that the draft principles referred to in Natural England's letter are satisfied by the managed realignment proposals.

- **Coastal Concordat**

Prior to the implementation of Phase 2 of BBCT there will be a need to secure appropriate marine consents. At that point HPUK will engage with the Marine Management Organisation (MMO) and the relevant information will be supplied to support those applications.

- **Delivery of Suitable Compensation**

If the Application is granted, Regulation 68 of the Habitats Regulations ("Regulation 68") requires that the LPA *"secure any necessary compensatory measures are taken to ensure that the overall coherence of [the national site network]"*.

The question as to whether the proposed compensation at Little Oakley is suitable has already been addressed above, as has NE's comment in relation to the draft best practice guidance. HPUK is proposing that the compensatory measures will be secured by a combination of the following:

- a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and
- b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear.

It is then important that the compensatory habitat is identified – as it has been throughout. However, nothing in Regulation 68 nor in the guidance issued by the Department for Environment, Food & Rural Affairs requires that planning permission for the compensatory development at Little Oakley must be in place at the time that this planning application is determined. The requirement under Regulation 68 is simply that compensatory measures are "secured", and the LPA can be satisfied that this is the case on the basis of the two legal agreements referred to above. HPUK will be precluded from commencing that part of the development that is predicted to cause an adverse effect on the integrity of the SPA and Ramsar site until it has let a contract for the construction of the managed realignment scheme, and it will then be obliged to carry it out under the terms of the 2004 CMMA/CMMD.

On this basis, HPUK strongly disagrees with NE's statement that *"limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making"*. This is because the sufficiency is shown and has long been accepted and that there is an entirely normal and conventional mechanism in place to secure their delivery. Decision making may safely proceed.

### 3. Landscape

With reference to Natural England's comment that 'impacts to the setting of the AONB require due consideration':

Para. [12.1.3.19](#) of the LVIA review outlines the 2015 Partnership Position Statement in relation to development within the setting of the AONB. The LVIA review considers, on the basis of this statement, that the site is within the setting. It should be noted that this Statement pre-dates the 2020 extension of the AONB, although the Statement itself does not define the geographical extent of the setting (para. [12.3.2.5](#)).

The LVIA review concludes that development will not result in any direct landscape effects on areas within the AONB, including those within the 2020 extension. Effects will arise on the setting through noise and movement (perceptual effects on landscape character) and through a change in view (visual effects). The 2003 LVIA states that an 'in overall terms' the effect on the AONB is 'locally Moderate'; the LVIA review concludes (para. [12.3.2.10](#)) that *"it is considered that the effect of Moderate significance on the AONB can be regarded as being applicable to the impact on the AONB setting"*.

This conclusion takes account of the perceptual influence of the development on the designation, but also the acknowledged presence of existing port infrastructure in views from the AONB, which have increased around Felixstowe since 2003. It is supported by an analysis of the 2003 viewpoints within both the pre- and post-extension boundary of the AONB. Viewpoint 7 (Shotley Promenade) is located within the latter; the 2003 assessment noted visual effects of major significance, which are considered to adequately represent those at this closest point of the designation.

With reference to NE's comment on the validity of the 2003 findings in relation to changes in industry guidance and planning policy:

Changes in planning policy, including the NPPF and references to designations including AONB, are noted the LVIA review. This includes the 2012 National Policy Statement for Ports, which states that whilst 'due regard' should be given to designations such as AONBs, but *"the fact that a proposed project will be visible from a designated area should not in itself be a reason for refusing consent"*.

The LVIA review acknowledges the changes in guidance since the publication of the original assessment. However, as stated in Section 12.3, the overall conclusion is that the 2003 findings are robust and based on a rigorous, comprehensive baseline analysis. Whilst there have been minor changes in terminology and semantics, the overall methodology and conclusions—including significant effects reported for a number of receptors—remain sound. This 2021 review also considers changes to the baseline since 2003, which encompasses elements ranging from increased port infrastructure, additional housing development and enhanced levels of screening by vegetation that has matured over time.

Based on our comments set out above, we consider that Tendring District Council can and should proceed to a positive determination of these planning applications which, as recognised by Natural England in our recent meeting, the Council has the discretion to do.

Should you have any queries on or wish to discuss any of the points within this letter, please do not hesitate to contact my colleague John Bowles or me by return.

Yours sincerely



Emma Andrews  
Director