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Your ref: EN010012



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BY EMAIL ONLY

Dear Mr Leigh

Planning Act 2008 and The Infrastructure Planning (Examination Procedure) Rules 2010

Application by NNB Generation Company (SZC) Limited (“the Applicant”) for an Order granting Development Consent for the proposed Sizewell C Nuclear Power Station (“the proposed Development”)

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

The following constitutes Natural England’s statutory response to the Secretary of State for Business, Energy, and Industrial Strategy’s request for information, dated 31st March 2022.

1. Natural England’s response

1.1. Secretary of State request: Paragraph 8.1 – ‘*Natural England* is invited to provide an update on the progress of its review of the Applicant’s draft protected species licences, and its views on the prospect of it being able to issue Letters of No Impediment for the following protected species:

- *Bats*
- *Breeding birds*
- *Natterjack toad*
- *Great crested newt*

- *Water vole*
- *Otter*
- *Badger*
- *Deptford Pink*

1.2. **Natural England response** – Natural England can advise that Letters of No Impediment (LONI) have now been issued to the Applicant for Natterjack toad, water vole and otter. The Applicant has chosen to utilise District Level Licensing for great crested newt, the first payment of which has been made, and a LONI has also been issued to the Applicant for this species.

We continue to assess the draft licence application for badger and are awaiting amendments from the Applicant for the Deptford pink draft licence applications. We advise that a LONI for bats may take longer, as we continue to work with the Applicant to resolve issues.

We wish to highlight that we do not issue protected species licences for breeding birds.

1.3. **Secretary of State request: Paragraph 8.5 – ‘*Natural England* is invited to provide comment on the mitigation measures for impacts from drilling mud and bentonite break out presented in the Applicant’s Deadline 10 Submission – 8.11/10.2 Code of Construction Practice [REP10-072].’**

1.4. **Natural England response** – Natural England provide the following comments in relation to the mitigation measures for impacts from drilling mud and bentonite break outs, as presented in the Applicant’s Code of Construction Practice [REP10-072]

- We request clarification on what is meant by ‘recovery system’. Is this the same as a drilling mud return system and storage for bentonite? If so, we request further clarification on the measures put in place to ensure no drilling mud is lost as part of this process. There is currently insufficient detail provided to ensure impacts are avoided and/or reduced.
- We request clarification on how constant pressure will be maintained, as increases in pressure is not our sole concern.
- We request further detail on the procedures that are in place if a frack-out does occur, beyond simply the Ecological Clerk of Works calling Natural England within 24 hours. Will further instruction be sought from Natural England? Will drilling stop immediately and the cause investigated? Will drilling continue but with a modified methodology? Is it feasible to contain the bentonite, and if so, how?

Until the above points are addressed by the Applicant, we advise that appropriate mitigation measures are not yet in place to ensure that there will be no/minimal impacts from bentonite.

1.5. **Secretary of State request: Paragraph 8.7 – ‘*Natural England*, having now been consulted on the Environment Agency’s draft Habitats Regulations Assessment for the Water Discharge Activity Environmental Permit, is invited to provide advice on**

whether an adverse effect on site integrity due to marine water quality impacts can be excluded for the following sites:

- *Alde-Ore Estuary Special Protection Area (SPA) and Ramsar site;*
- *Benacre to Easton Bavents SPA;*
- *Humber Estuary Special Area of Conservation (SAC);*
- *Minsmere to Walberswick Heath and Marshes SAC;*
- *Minsmere-Walberswick SPA and Ramsar site; and*
- *Outer Thames Estuary SPA.'*

1.6. Natural England response – Natural England have been consulted on the Habitats Regulations Assessment (HRA) undertaken by the Environment Agency in their role as competent authority, to inform conclusions on the operational Water Discharge Activity (WDA) permit. However, we understand that the HRA remains draft at this time, pending editorial checks. It is then due to undergo a planned public consultation, associated with their proposed decision for this WDA permit. Until the Environment Agency has finalised this HRA, we cannot give unqualified advice as to our views on impacts to the integrity of the sites listed.

1.7. Secretary of State request: Paragraph 8.8 – *'Natural England is invited to provide advice on whether an adverse effect on integrity due to indirect impacts of entrapment of prey species on the qualifying bird features of the following sites can be excluded:*

- *Alde-Ore Estuary SPA and Ramsar site;*
- *Benacre to Easton Bavents SPA;*
- *Minsmere-Walberswick SPA and Ramsar site; and*
- *Outer Thames Estuary SPA.'*

1.8. Natural England response – The Applicant has highlighted to Natural England how they have addressed our concerns regarding indirect impact of entrapment of prey species. We advise that in light of the work undertaken to model localised depletion of fish populations, we now agree with the Applicant's conclusion of no adverse effect on integrity to the bird features of the sites listed above.

1.9. Secretary of State request: Paragraph 8.9 - *'Natural England is invited to provide advice on whether an adverse effect on integrity due to physical interaction between species and project infrastructure on the sea lamprey and river lamprey qualifying features of the Humber Estuary SAC can be excluded.'*

1.10. Natural England response –

Sea Lamprey: Natural England agrees with the conclusion of no adverse effect on integrity for the sea lamprey qualifying feature of the Humber Estuary SAC, based on low impingement/interaction observed at Sizewell B, and predicted for Sizewell C. We note that uncertainty analysis could not be completed for this species and advise that predictions should be ground-truthed with monitoring.

River Lamprey: Natural England agrees with the conclusion of no adverse effect on integrity for the river lamprey qualifying feature of the Humber Estuary SAC.

However, it must be noted that we disagree with some of the information presented in the shadow HRA. For example, we would prefer the population estimate of 335,000 – 525,000 as presented in Hull International Fisheries Institute's (HIFI) 2020 comprehensive report to the Marine Management Organisation (MMO) on river lamprey management¹, compared to the 783,043 presented in the shadow HRA from a 2018 HIFI report. We also disagree that 'Southern North Sea population of river lamprey are probably one stock', as cited in paragraph 10.3.13 of the shadow HRA.

Natural England agrees with the HRA Stage 1 conclusion of likely significant effect (LSE) for river lamprey for the following reasons:

- Impingement of river lamprey at Sizewell B is infrequent but not rare, indicating that river lamprey are present in low number in the coastal waters, and there is an interaction.
- River lamprey are thought to restrict themselves to shallow coastal waters. This suggests that the zone of influence from the intake overlaps the relatively limited (relative to sea lamprey) spatial extent of river lamprey off the coast.

Natural England also agrees with the HRA Stage 2 conclusion of no adverse effect on integrity in this regard for the following reasons:

- The predicted annual impingement rates for river lamprey are a minute proportion of the estimated run size in the Humber Estuary SAC, even with the smallest run estimate of 335,000.
- Sizewell C is a great distance from the Humber Estuary SAC. Recent stable isotope analysis and mark-recapture studies suggest that Humber Estuary river lamprey largely remain in and around the estuary. We also know that lamprey do not 'home' to a particular river for spawning, and instead seek optimal conditions in any river. So, any adult river lamprey are unlikely to be from the Humber, and any Humber river lamprey which happen to be entrapped at Sizewell are unlikely to migrate back.

1.11. **Section 8.10 – ‘Natural England and the Environment Agency are invited to provide their views as to whether they are satisfied with the Applicant's Deadline 10 Submission – 9.89/10.7 Draft Fish Impingement and Entrainment Monitoring Plan [REP10-138].’**

1.12. **Natural England response** – Natural England provide our comments below on the Applicant's Deadline 10 Draft Fish Impingement and Entrainment Monitoring Plan [REP10-138]. We advise that our comments have largely not been addressed, and we are therefore not satisfied with this revision of the monitoring plan.

¹ Effective Management of River Lamprey Stocks, Report to MMO, Project ENG3089 (2020) delivered jointly by HIFI (University of Hull) and Durham University

- General Comment – Clarity has been provided on the monitoring methodology. It now appears that intensive monitoring will be undertaken for only three years. Natural England continue to advise that this is not sufficient and does not reflect the longevity of the development and ensuing environmental impacts.
- General Comment – Additional clarity of process has been provided throughout, and particularly in section 5. However, criteria for extending monitoring are problematic, and key sections remain vague. The Marine Technical Forum (MTF) is integral to decision making, yet no clear guidance on the composition or qualifications of this group are provided. Clear decision criteria have been provided for the basic best-case scenario, but vague processes remain for instances where uncertainty remains, or findings are statistically different from the Environmental Statement (ES) estimates.

Natural England maintains a scientific disagreement with the Applicant over some of the population comparators used for marine fish in the ES. Therefore, we advise that we object to using the same population comparators in future decision-making processes. These concerns were addressed in the ES either by low observed entrapment rates for that species, or by additional context provided by the localised assessment model.

- General Comment – Natural England highlight that the applicant has not addressed our Deadline 8 comment [REP8-298e] advising all data produced by the monitoring plan should be made publicly available and secured in the terms of reference for the MTF.
- Paragraph 2.2.2 – We maintain that the efficacy of the Fish Return & Recovery system (FRR) must be compared against predicted (both lethal and sublethal) impacts. The Applicant has provided no commitment to comparing findings against predictive impacts in the ES, only ‘providing further evidence on short-term survival’.
- Paragraph 2.2.2 – Sampling is confirmed to be just for three years. As previously stated, Natural England advise this is insufficient and does not reflect the lifetime of the Development or the uncertainty present in the ES regarding impacts on marine receptors.
- Paragraph 2.1 – Natural England reiterate our comment provided at Deadline 8 [REP8-298e] which remains unaddressed: *‘Natural England advise that monitoring should be a minimum of every three years for comprehensive entrapment monitoring, with samples ideally being taken on the same day for entrained and impinged fish, over the lifetime of the proposed development. Monitoring should increase to annually if the data indicates significant differences between predicted and actual entrapment figures.’*
- Paragraph 2.2 - Natural England reiterate our comment provided at Deadline 8 [REP8-298e] which remains unaddressed: *‘We advise that all data produced should be made publicly available and secured in the terms of reference for the*

MTF.'

- Paragraph 2.3.9 – The additional clarification regarding presentation of data to the MTF is appreciated.
- Paragraph 3.1 - Natural England reiterate our comment provided at Deadline 8 [REP8-298e] which remains unaddressed: '*Natural England advise that the Terms of Reference for the MTF be included in the Fish Monitoring Plan. This is to define the organisations involved in the MTF, their roles, and how decisions are to be made.*'
- Paragraph 3.1.2 – Natural England advise that many key decisions are being deferred to the MTF, and therefore do not reflect Natural England's comments to date.
- Paragraph 3.1.3 – The Applicant has addressed our previous comment and plans for a 24-hour survivability experiment are found in paragraph 4.2.3.
- Paragraph 3.1.5 - Natural England reiterate our comment provided at Deadline 8 [REP8-298e] which remains unaddressed: '*As we have advised under comment 2.2 above, all data should be made publicly available and secured in the terms of reference for the MTF, in addition to being reported to the MTF.*'
- Paragraph 5.2 – The Applicant has addressed our previous comment, and there is a commitment to smelt monitoring and mitigation plan.

1.13. **Secretary of State request: Paragraph 8.12** – '*In relation to changes to coastal processes/sediment transfer impacts on the Minsmere to Walberswick Heaths and Marshes SAC and the Minsmere-Walberswick SPA and Ramsar site, **Natural England**, the **MMO**, the **EA**, the **RSPB** and the **Suffolk Wildlife Trust** and **ESC** are invited to comment on the Applicant's updated submissions in relation to changes to coastal process and sediment transport made at the final examination deadline:*

- *Deadline 10 Submission – 9.12 Preliminary Design and Maintenance Requirements for the Sizewell C Coastal Defence Feature [REP10-124]; and*
- *Deadline 10 Submission – 6.14/10.5: Environmental Statement Addendum, Volume 3, Chapter 2, Appendix 2.15.A: Coastal Processes Monitoring and Mitigation Plan [REP10-041].'*

1.14. **Natural England response** – We welcome the firm commitment from the Applicant to using native material which we were seeking at Deadline 10, however this remains only part of our concerns in terms of work required before we can agree with the Applicant's conclusion of no adverse effect on integrity. This included further work on the soft Coastal Defence Feature (sCDF) design, threshold volumes for recharge, particle size modelling (to refine/optimize) and groundwater work, as well as clarification on inconsistencies/errors such as the proposed frequency of beach nourishments.

To provide further advice on this issue, we therefore require that our Deadline 10 comments (see pages 3 -16 – Comments on Deadline 7, Deadline 8 and Deadline 9 Submission [REP10-200]) are addressed and responded to point-by-point. This has not yet been done as the Applicant's updated reports as referenced above (REP10-124 (BEEMS Technical Report TR544) and REP10-040 (dCPMMP)) were submitted at the same time as but not in response to our latest comments on this issue. We note that the Secretary of State has requested this to be done by the Applicant under request 8.11 and we will of course be willing to review this information once it is made available and provide an update on our position.

1.15. **Secretary of State request: Paragraph 8.15** - *'In relation to in-combination impacts on the harbour porpoise feature of the Southern North Sea SAC, the **Applicant**, in consultation with **Natural England**, is invited to provide an updated SIP subsequent to Deadline 10 Submission – 5.10/10.11 Shadow Habitats Regulations Assessment Addendum Appendix 9A: Southern North Sea Site Integrity Plan [REP10-022] to address Natural England's outstanding concerns in Deadline 10 Submission – 9.10.7 Statement of Common Ground [REP10-097].'*

1.16. **Natural England response** – Natural England was provided with an updated version of the Southern North Sea Site Integrity Plan (SIP) by the Applicant on 13th April 2022. Unfortunately, we have not therefore been able to review it in time for this deadline. We will endeavour to review and provide an updated position on its adequacy at a subsequent deadline if requested.

1.17. **Secretary of State request: Paragraph 8.17** – *'Section 28I of the Wildlife and Countryside Act 1981 includes procedural requirements in relation to operations likely to damage features of a SSSI. At the end of the Examination, Natural England were of the view that there would be harm to SSSIs. The Secretary of State asks **Natural England** to confirm whether they agree that the DCO examination has met the requirements to give Natural England notice of the proposed operations and time to respond (section 28(2) to (4)).'*

1.18. **Natural England response** – Paragraph 8.17. Subsections 28I (2) - (6) of the 1981 Act reads as follows:

'(2) Before permitting the carrying out of operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest, a section 28G authority shall give notice of the proposed operations to Natural England.

(3) Subsection (2) applies even if the operations would not take place on land included in a site of special scientific interest.

(4) The authority shall wait until the expiry of the period of 28 days beginning with the date of the notice under subsection (2) before deciding whether to give its permission, unless Natural England have notified the authority that it need not wait until then.

*(5) The authority shall take any advice received from Natural England into account -
(a) in deciding whether or not to permit the proposed operations, and
(b) if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.*

(6) If Natural England advise against permitting the operations, or advise that certain conditions should be attached, but the section 28G authority does not follow that advice, the authority -

(a) shall give notice of the permission, and of its terms, to Natural England, the notice to include a statement of how (if at all) the authority has taken account of the Council's advice, and

(b) shall not grant a permission which would allow the operations to start before the end of the period of 21 days beginning with the date of that notice.'

The purpose behind these provisions is to ensure that where a body such as The Department for Business, Energy and Industrial Strategy (BEIS) is minded to grant a consent in circumstances where that consent might lead to harm to the special features of an SSSI, Natural England is notified in advance and given an opportunity to properly understand the effects of the proposal on the SSSI(s), and then to advise. This first stage notification process may be followed by a second stage notice process (subsection (6)), if the decision-maker proposes not to follow Natural England's advice.

In this situation, Natural England do not believe that it would be lawful to accept that this Development Consent Order (DCO) examination process equates to a notice under s. 28I (2). Our reasoning is as follows:

- The DCO process in this case was complex and protracted and we see legal risk in treating it as a 'notice' given by BEIS to Natural England on a specific date, as the statute requires. In a much simpler case, with fewer or simpler ecological issues at stake, and less flux in the nature of the Applicant's proposals vis a vis ecological issues, a different view might be possible, but you may share our feeling that in this case a loose interpretation of s. 28I (2) leaves scope for requests by others for judicial review.
- To put this in another but related way, there is nothing in the DCO process that in reality amounts to BEIS giving notice of the details of the proposal to Natural England. BEIS is only really engaged at the point when it receives the Examining Authority's (ExA) Report and Recommendations, the terms of which Natural England is not aware of. The s. 28I (2) duty is placed on BEIS, and not the Applicant for consent or the ExA.
- We also note from your letter of 31 March 2022 that important issues affecting SSSIs are unknown at present and cannot be decided upon by BEIS until the various pieces of further information/advice that you have requested from Natural England in section 8 of your letter have been supplied. We will, of course, deal fully with all of the March 31 requests that are directed at us, but until BEIS has considered that information and decided how the proposals are to be affected by it, if at all, Natural England is not in a position to give fully informed advice sufficient to allow BEIS to fulfil its s. 28I (5) duty.

This concludes Natural England's advice at this time, which we hope you will find helpful.

For any queries relating to the content of this letter only, please contact Jack Haynes on [REDACTED].

Yours sincerely,

Jack Haynes
Senior Adviser
Norfolk & Suffolk Area Team