

Connah's Quay Low Carbon Power

Applicant's Legal Submissions on Mitigation vs Compensation

Planning Inspectorate Reference: EN010166
Document Reference: EN010166/9.23
Planning Act 2008 (as amended)
Infrastructure Planning (Applications: Prescribed Forms and Procedure)
Regulations 2009 - Regulation 5(2)(q)
Revision 00

March 2026

CONNAH'S QUAY LOW CARBON POWER PROJECT

APPLICANT'S LEGAL SUBMISSIONS
ON MITIGATION vs COMPENSATION

Introduction

1. The Applicant's application under the Planning Act 2008 for a development consent order for Connah's Quay Low Carbon Power ("the Proposed Development") is subject to examination.
2. During the course of that examination, the Examining Authority ("the ExA") has sought a legal submission on whether the Applicant's proposal to deal with the potential impact on "functionally-linked land" for curlew (*Numenius Arquata*) that use the Dee Estuary / Aber Dyrdwy Special Protection Area ("the SPA") and the Dee Estuary / Aber Dyrdwy Ramsar ("the Ramsar") represent mitigation or compensation for the purposes of the Conservation of Habitats and Species Regulations 2017 ("the Habitat Regulations") as amended by (amongst other things) the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019.
3. The Proposed Development would affect approximately 26 hectares ("ha") of rough grassland, improved grassland and pasture which currently offers foraging opportunities for curlew. Curlew is a qualifying species of the SPA and Ramsar.
4. The area of land affected lies outside the SPA and Ramsar. It is therefore not designated habitat for the SPA or Ramsar. However, the area is considered to act as "functionally-linked land" for curlew using those sites. Of the 26ha affected, 11ha would only be lost temporarily for a period of approximately 9 years during construction and 15ha is to be lost for the longer term during the operation of the Proposed Development.

5. In light of this, and following discussions and engagement with both Natural England (“NE”) and Natural Resources Wales (“NRW”), the Applicant is proposing curlew habitat creation on 26ha of land at a location known as Gronant Fields in line with the provision of a Curlew Mitigation Strategy. Under these proposals, Gronant Fields would be rendered suitable for foraging by creating suitable habitat, as well as improving the value of that area for wintering waders. Further details of the mitigation strategy are set out in the Applicant’s Curlew Mitigation Strategy (EN010166/APP/6.13). This would therefore serve as replacement functionally-linked land. Given that only 15ha of the existing functionally-linked land would be permanently lost, the addition of Gronant Fields will result in an overall area of some 37ha of functionally-linked land for curlew in the long-term.
6. In its Relevant Representation (RR-026) in respect of the Applicant’s Proposed Development, NE has suggested that this proposal “*must be regarded as compensatory measures under the HRA Framework*”. By contrast, in its Relevant Representation (RR-027), NRW acknowledged that the proposal could potentially be considered as mitigation for HRA purposes, but considers that this would be subject to its effectiveness being certain and that the mitigation measures are put in place before the commencement of the associated impacts on the affected site.
7. At a recent Issue Specific Hearing (“ISH3”), the ExA explored this issue further and the Applicant’s competent expert referred to a number of precedents that already exist for treating replacement of functionally-linked land as a form of mitigation rather than compensation. At that same ISH3, NE helpfully confirmed its view that it was because the replacement functionally-linked land at Gronant Fields is itself land within the SPA, they considered that the proposal involved compensation rather than mitigation. Following further oral submissions, the ExA indicated it would be helpful to receive any legal submissions on this issue. This document is intended to summarise the Applicant’s legal submissions accordingly.

Legal Framework

8. The starting point for consideration of this issue is naturally the Habitats Regulations themselves. These were brought into force in order to give effect to what was then the

underlying EU Habitats Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (as amended), along with the relevant Wild Birds Directive.

9. Regulation 63 of the Habitats Regulations provides (so far as material):

“(1) *A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –*

(a) is likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site’s conservation objectives.

...

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site ...

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.”

10. As the Secretary of State for Energy Security and Net Zero (“the Secretary of State”) will be the person deciding whether or not to give consent for the Proposed Development to proceed, the Secretary of State will be the relevant competent authority for the purposes of Regulation 63.

11. In accordance with well-established authority (see for example the Supreme Court’s analysis in *R(Champion) v North Norfolk District Council* [2015] UKSC 52; [2016] WLR 3710 considering *Sweetman v An Bord Pleanala* Case C-258/11 [2015] PTSR 1092) and the equivalent Article 6(3) of the Habitats Directive), Regulation 63 reflects a staged process, but the first stage is not a screening process. There are two components to the requirement:

- a. if a project is not likely to have any significant effect on a relevant site, no further assessment is required; and

- b. it is only if it is concluded that a project is likely to have a significant effect that an appropriate assessment must be carried out of the implications of the project on that site to establish that it will not adversely affect its integrity in light of its conservation objectives.

12. Regulation 64, likewise reflecting Article 6(4) of the Directive, deals with the situation if an adverse effect on the integrity is found to arise. It identifies (so far as material):

“(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site ...

(2) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either-

(a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or

(b) any other reasons which the competent authority, having due regard to the opinion of the appropriate authority, considers to be imperative reasons of overriding public interest.”

13. As to decisions under the Habitats Regulations, the Court of Appeal recently summarised applicable principles in *R(Wyatt) v Fareham Borough Council* [2003] Env LR, drawing on both domestic and European jurisprudence from the Court of Justice of the European Union (“CJEU”) The Senior President of the Tribunals identified that the following points emerge as identified at [9] in his judgement:

- “(1) *The duty imposed by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site under regulation 63(5) is always a matter of judgment for the competent authority itself (see the judgment of the CJEU in *Holohan v An Bord Pleanála* (Case C-461/17) [\[2019\] PTSR 1054](#), at paragraph 44). That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council* [\[2015\] UKSC 52](#); [\[2015\] 1 W.L.R. 3170](#), at paragraph 41, and the judgment of Lord Justice Sales, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [\[2015\] EWCA Civ 174](#); [\[2015\] PTSR 1417](#), at paragraph 83). In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only. This has been emphasised often in the domestic cases (see, for example, the recent first instance judgment in *Compton Parish Council v Guildford Borough Council* [\[2020\] JPL 661](#), at paragraph 207).*
- (2) *In *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [\[2019\] Env LR 27](#) ("Dutch Nitrogen"), the CJEU said that it is "for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the "appropriate assessment"..." (paragraph 101 of the judgment), which "makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain" (paragraph 104). The force of these statements is that the court, for its part, must be wholly satisfied in the exercise of its supervisory jurisdiction that the competent authority's performance of its obligations under article 6(3) was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment. But there is nothing in the CJEU's judgment to suggest that it intended to transform the respective roles of the competent*

authorities and the domestic courts by giving the court the job of undertaking an alternative appropriate assessment of its own.

- (3) *When reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty (see the judgment of Sales L.J. in *Smyth*, at paragraph 80, and the judgment of this court in *Plan B Earth v Secretary of State for Transport* [\[2020\] PTSR 1446](#), at paragraphs 68 and 75 to 79, which were not doubted by the Supreme Court in the same proceedings ([\[2021\] PTSR 190](#))). When exercising its supervisory function, the court will apply the normal *Wednesbury* standard, not a heightened standard such as "anxious scrutiny" (cf. *R. v Ministry of Defence, ex parte Smith* [\[1996\] QB 517](#), and *R. (on the application of Mahmood) v Secretary of State for the Home Department* [\[2001\] 1 WLR 840](#)). It is well-established that such a heightened standard will apply only where fundamental rights or constitutional principles are at stake (see the judgment of Lord Carnwath in *Kennedy v Charity Commission* [\[2014\] UKSC 20](#), at paragraph 245, and the first instance judgment in *R. (on the application of McMorn) v Natural England* [\[2015\] EWHC 3297 \(Admin\)](#), at paragraphs 204 and 205). Given the demanding requirement inherent in regulation 63(5) – for the competent authority to ascertain that the project "will not adversely affect the integrity of the European site" – the court's examination of the authority's performance of its duty will be suitably exacting within the bounds of its jurisdiction. But it should be remembered that the autonomous approach of the domestic courts in judging the lawfulness of such action has been explicitly approved by the CJEU (see the judgment of this court in *Plan B Earth*, at paragraphs 74, 75 and 137, discussing the CJEU's decision in *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [\[2020\] Env LR 4](#)).*
- (4) *A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere*

of nature conservation, such as Natural England (see the judgment of Sales L.J. in *Smyth*, at paragraph 84, and the first instance judgment in *R. (on the application of Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin), at paragraph 69). The authority may lawfully disagree with, and depart from, such advice. But if it does, it must have cogent reasons for doing so (see the judgment of Baroness Hale in *R. (on the application of Morge) v Hampshire County Council* [2011] 1 WLR 268, at paragraph 45, the judgment of Sales L.J. in *Smyth*, at paragraph 85, and the first instance judgment in *R. (on the application of Prideaux) v Buckinghamshire County Council* [2013] Env LR 32, at paragraph 116). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Lord Justice Beatson in *R. (on the application of Mott) v Environment Agency* [2016] 1 WLR 4338, at paragraphs 69 to 77).

- (5) When provided with expert evidence in a claim for judicial review, the court will not substitute its own opinion for that of the expert. As this court emphasised in *R. (on the application of BACI Bedfordshire) v Environment Agency* [2020] Env LR 16, at paragraph 87, "[unless] there is clear evidence revealing a failure of ... expertise – for example, some conspicuous factual or scientific error – the court is entitled to conclude there was no such failure". Experts may be expected to provide enough explanation to enable the court to decide whether the views they have stated are based on a conspicuous error (see the judgment of Sales L.J. in *Smyth*, at paragraph 83). But the court will bear in mind that decisions which entail "scientific, technical and predictive assessments by those with appropriate expertise" and which are "highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament)" should be accorded a substantial margin of appreciation (see the judgment of this court in *Plan B Earth*, at paragraph 68, and, at first instance in the same case, *Spurrier v Secretary of State for Transport* [2020] PTSR 240, at paragraphs 176 to 180).
- (6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the

"precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered" (see the judgment of the CJEU in Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA interveniëng) (Case C-127/02)) [2005] 2 CMLR 31 ("Waddenzee"), at paragraph 58). The "precautionary principle" requires a high standard of investigation (see the judgment in Waddenzee, at paragraphs 44, 58, 59 and 61).

- (7) *The duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty". Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" (paragraphs 44, 58, 59, and 61 of the CJEU's judgment and paragraphs 107 and 108 of the Advocate General's opinion in Waddenzee, and the judgment in Holohan, at paragraphs 33 to 37). In Waddenzee (at paragraph 59), the CJEU emphasised the responsibility of the competent authority, having taken account of the conclusions of the appropriate assessment, to authorise the proposed development "only if [it] has made certain that it will not adversely affect the integrity of that site". That, it said, "is the case where no reasonable scientific doubt remains as to the absence of such effects". But as Advocate General Kokott explained in Waddenzee (in paragraphs 102 to 106 of her opinion), a requirement of "absolute certainty" would be "disproportionate". As she said (at paragraph 107), "the necessary certainty cannot be construed as meaning absolute certainty ...", the conclusion of an appropriate assessment is, "of necessity, subjective in nature", and "competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty". Similar observations appear in the judgment itself (in paragraphs 44, 58, 59 and 61). As the Supreme Court acknowledged in Champion, adopting the approach in Waddenzee, "while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority" (see the judgment of Lord Carnwath, at paragraph 41). This*

approach is, in essence, what the "precautionary principle" requires in the context of article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations.

- (8) *The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the European Commission guidance document entitled "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis". That guidance, however, is not law (see *Heard v Broadland District Council* [2012] Env. L.R. 23, at paragraph 69, and *Prideaux*, at paragraph 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.*
- (9) *An appropriate assessment must be based on the "best scientific knowledge in the field" (see *Holohan*, at paragraph 33). Such knowledge must be both up-to-date and not merely an expert's bare assertion (see the judgment of *Sales L.J. in Smyth*, at paragraph 83). And the concept of "best scientific knowledge" is not a wholly free-standing requirement, separate from the precautionary principle itself. It is inherent in the precautionary principle, and in the concept of "no reasonable doubt".*
- (10) *What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as*

to the effects of the works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [\[2014\] PTSR 1092](#), at paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [\[2018\] PTSR 1668](#), at paragraph 38)."

14. None of those principles directly address the question that the ExA has asked in respect of the current proposal and the correct approach in law to the difference between mitigation and compensation for the purposes of the Habitats Regulations is ultimately a legal issue, rather than a matter of evaluative judgment, or advice from a body such as NRW or NE. However, there is other legal authority which is relevant to these issues.
15. First, for the purposes of ascertaining whether there are likely significant effects to a European site under the first of the stages in Regulation 63, it is recognised those things which are embedded mitigation that form part of the project may be taken into account, in contrast to specific mitigation measures which are intended to avoid such likely significant effects which should not be taken into account at that stage but may be taken into account when carrying out the appropriate assessment: see *People over Wind* (as cited above).
16. Second, in light of the CJEU's decision in *Briels and Others* (C-521/12, [EU:C:2014:330](#)) dated 15 May 2014, *Orleans and Others* (C-387/15 and C-388/15, [EU:C:2016:583](#)) dated 21 July 2016 there is a distinction to be drawn between protective measures forming part of the plan or project at issue and intended to avoid or reduce any direct adverse effects caused by it, in order to ensure that that plan or project does not adversely affect the integrity of the sites concerned, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the plan or project on that site and which cannot be taken into account in the assessment of the implications of that plan or project on that site: see eg *People over Wind* (above), *Sweetman* (cited above) at [47] and the *Dutch Nitrogen* case (cited above) at [125].

17. In that context, it is relevant to note that the case of *Briels* concerned approval of an order to widen a motorway which would have directly and permanently harmed purple moor grass that was a selection, or qualifying, feature of the Natura 2000 site. The proposed development in that case resulted in direct loss of that protected habitat and the proposal was to create another area of equal or greater size in another part of the site.
18. The CJEU concluded in [28] of *Briels* that a mitigation or protective measure is one which lessens the negative effects of a plan or project with the aim of ensuring that the integrity of the site is not adversely affected, whereas a compensatory measure (by contrast) is one which does not achieve that goal within the narrower framework of the plan or project, but seeks to counterbalance the failure to do so through different, positive effects, in order to avoid a negative effect. As illustrated below, that focus therefore requires one to identify the relevant adverse effect on integrity that is in issue.
19. Third, in cases where a proposal does involve direct harm to the integrity of a European site, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive (see judgment of 26 April 2017, *Commission v Germany*, C142/16, [EU:C:2017:301](#), paragraph 38, and of 25 July 2018, *Grace and Sweetman*, C164/17, [EU:C:2018:593](#), paragraph 51). As identified in the *Dutch Nitrogen* case at [130] the appropriate assessment concerned in such cases it not taking into account the future benefit of measures, if those measure are uncertain and the procedures needed to accomplish them have not yet been carried out, or the level of scientific knowledge does not allow them to be identified or quantified with certainty.
20. Fourth, in relation to the application of these principles, where there is now a considerable body of precedent, supported by jurisprudential analysis, that: (1) an impact on “functionally-linked land” is not direct harm to the relevant protected site itself, of the type that was in issue in *Briels* or *Orleans*; (2) replacement of functionally-linked land as part of a proposal is regularly treated as mitigation (rather than

compensation); and (3) such treatment of an impact on functionally-linked land as mitigation, rather than compensation, is consistent with the fact that the impact is not that of direct harm to a European site, the focus of the appropriate assessment exercise is on an adverse effect on the integrity of a site in terms of its conservation objectives (or qualifying features); and (4) the delivery of replacement of functionally-linked land is a tried and tested technique known to scientific knowledge which can provide the requisite degree of certainty for mitigation, and which can take place before the existing functionally-linked land is lost in any event.

21. In terms of jurisprudential support for the approach to functionally-linked land replacement as a form of mitigation, it may be helpful to refer to two cases in particular.

22. First, in *Murphy Re Judicial Review* [2017] NICA 51 the Court of Appeal of Northern Ireland rejected a challenge where the claimant had sought to rely upon *Briels* to object to the appropriate assessment exercise in respect of a road dualling scheme in Northern Ireland where the land on which the dualling was to occur was outside the boundary of the SPA, but provided foraging and roosting for some of the SPA protected species (see paragraph [9] of the judgment), namely Whooper Swan. The mitigation proposed in that case comprised field amalgamation measures with land management agreements. It was accepted that there was a need to consider the significance of the non-statutory “functionally-lined land”. The final issue that the Court of Appeal had to deal with was identified at [36] as to whether those field amalgamation measures were “mitigation or compensatory measures” where the importance of that matter was that if they were compensatory measures, rather than mitigation, they could only be justified by way of derogation under Article 6(4) of the Directive. In concluding that they were mitigation, the Court of Appeal of Northern Ireland concluded:

“38. *In paragraph [28] of Briels the court concluded that a mitigation or protective measure is one which lessens the negative effects of a plan or project with the aim of ensuring that the integrity of the site is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project but seeks to counterbalance the failure to do so through different, positive effects in order to avoid a net negative effect.*

39. *That analysis requires one, therefore, to identify the selection feature at risk. In Briels the selection feature was purple moor grass. That feature was to be a*

direct casualty of the project. The suggestion that a net overall benefit could be achieved by the creation of a new habitat could not be guaranteed and that offended the precautionary principle.

40. *In this case the protected feature is the Whooper Swan. There is no direct impact on the protected feature. The foraging lands are not themselves a protected feature. The appropriate assessment and the Statement indicate that with the field amalgamation measures there will be no adverse impact on the protected feature. The measures in this case are aimed at avoiding or reducing any significant adverse effects on the protected feature. They are plainly mitigating measures.”*

23. The same general approach is evident in the High Court’s decision in *R(Lee Valley Regional Park Authority) v Epping Forest District Council* [2015] EWHC 1471 (Admin), as upheld by the Court of Appeal [2016] EWCA Civ 404. This concerned substantial glass house development and provision and use of storage ponds including the remodelling of an existing lake outside the relevant Lea Valley SPA and Ramsar site, but where the lake provided habitat for 3 SPA citation species and had supported 2 of them (Gadwall and Shovellor). One of the issues raised for the High Court by the subsequent challenge was whether the ecological works to address this change to the lake were mitigation or compensation and this was addressed by Dove J (as he then was) at paragraph 79 of his judgment and onwards:

“79. *The second question is whether the ecological works were in reality mitigation or, by contrast, compensation. Were the replacement elements of water body and habitat enlargements and enhancements aimed at avoiding or reducing the significant effects? That question must, in my view, be answered by starting with the protected nature conservation interest concerned and an understanding of the source of the effect.*

80. *In this case, the SPA interest concerned was the Gadwall and Shoveler ducks. It was not a particular protected habitat type but, rather, the species which were the basis of the designation. The works (and the conditions related to timing) were designed to reduce and avoid harm to the interests of those birds. This was to be achieved by undertaking works when, as a result of the birds' migration, they were far less abundant, and implementing a scheme "providing an adequate extent and continuity of supporting habitat" to eliminate, avoid or reduce the likely significant*

81. *Once one starts with an understanding of the protected nature conservation interest and the source of the anticipated potential effect, the distinction between the present case and that of, of instance, the case of is clear. In Briels the protected interest was a type of habitat which would be adversely affected, and the proposal was to create new areas of that habitat type. In that case, the new areas of habitat were not mitigation but were compensation for the impact*

on the habitat type, which was the nature conservation interest concerned. It was not, like the present case, a measure designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place.”

24. The Court of Appeal upheld the categorisation of this as mitigation by the High Court (albeit in that case justifying the conclusion of no likely significant effects as the mitigation measures were being taken into account at that stage) stating at [66]:

“... The proposed mitigation measures were not novel or complicated: the re-shaping and enlargement of Langridge Scrape, with no loss of surface water area, and the creation of additional habitat for Gadwall and Shovellor. As the judge said the “ecological works” proposed were “clearly mitigation, not compensation” having been “designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place” (paragraphs 79-81 of the judgment”...

25. As already noted, there is also considerable precedent for the approach that affected functionally-linked land that does not fall within a protected site can be replaced by other land which will serve a similar purpose by way of mitigation, rather than it being required to be treated as compensation. In such cases, it is important to note that loss of functionally-linked land is not a direct harm to the protected European site itself, as reflected in the analysis above, and the focus for an appropriate assessment is about considering an adverse effect on the integrity of the European site, by reference to the relevant qualifying feature.

Application of the Legal Principles to the Proposed Development and Gronant Fields

26. In light of the above, the correct application of the legal principles stated above strongly supports the correct legal conclusion that the Proposed Development with the Curlew Mitigation Strategy at Gronant Fields represents mitigation, rather than compensation, and it is therefore legitimate to conclude that with such mitigation, there will be no adverse effect to the integrity of the SPA (nor indeed the Ramsar, albeit that is subject to policy rather than statutory protection).
27. In summary, first, the Proposed Development does not involve any direct harm to the SPA habitat itself and it is therefore not a situation such as that which arose in *Briels* or *Orleans*.

28. Second, whilst a loss of functionally-linked land used by qualifying species of a SPA can clearly lead to the need to consider the Regulation 63 test (as in *Murphy* or *Lea Valley*), as there is no direct loss of habitat from the SPA itself, the focus of any assessment under Regulation 63 must necessarily be on the adverse effect on integrity in terms of the relevant qualifying species. Here it is an adverse effect on the integrity of the SPA in terms of its curlew population (as it was Whooper Swan in *Murphy* or Gadwall and Shovellor in *Lea Valley*). The question is whether or not there will be any adverse effect on the integrity of the SPA in terms of that qualifying species, not whether there will be a loss of functionally-linked land which is then (wrongly) treated as an automatic adverse effect on integrity.
29. Thirdly, there is clear precedent for the dealing with functionally-linked land to address a loss of this kind and for scientific knowledge and certainty to enable one to be satisfied that such a proposal is mitigation, particularly where it can be delivered before the loss of functionally-linked land takes place. In this case, there is no basis for suggesting that there is a lack of certainty in this respect.
30. Fourthly, it is notable that NRW and NE accept (or must necessarily accept) that such an approach to functionally-linked land replacement is capable of being mitigation in these circumstances, and has been in many other cases. It has become clear, however, that the only basis for seeking to suggest otherwise is because the replacement functionally-linked land would be within the SPA. However, that is not a legally correct basis for treating such provision as compensation rather than mitigation, and that is a misapplication of *Briels* and *Orleans*.
31. In *Orleans* the CJEU was recognising in that particular case the proposal in question involved the disappearance of part of the Natura 2000 site - 20ha of tidal mudflats and tidal marshes: see paragraph [37]. Accordingly, this led the CJEU to identify that any positive effects of the future creation of a new habitat (as was being proposed) to compensate for the loss of area and quality of that same habitat type would be highly difficult to forecast with the requisite degree of certainty and would only occur several years into the future (see eg [52]-[53]). But the CJEU was dealing with measures to replace directly lost habitat from the SPA, rather than replacement of functionally-linked land used by protected species. There is nothing in *Orleans*, nor which arises as

a matter of logical principle, to suggest that addressing the loss of functionally-linked land outside an SPA through enhancement of land within an SPA site cannot be treated as mitigation, and has to be treated as compensation. Such a contention is confusing the point that the CJEU was making that where there is already direct harm to the SPA (by the loss of habitat within it), then replacement of habitat within the SPA may fall not to be treated as mitigation. But the CJEU was not suggesting that loss of functionally-linked land by (as in this case) making land not otherwise suitable for the protected species suitable for that species cannot be mitigation.

32. As indicated, it is helpful that NE has explained that this is the way they have arrived at the contention that the proposal may be compensation rather than mitigation, but it reveals the error of law that has been made in equating the issues in *Briels* and *Orleans* (which concerned loss of habitat within the SPA itself) with the situation that arises here.
33. For these reasons, the Applicant submits that the proposal to address the loss of functionally-linked land is clearly mitigation rather than compensation, applying the principles set out above and the approach articulated in *Murphy* and *Lea Valley* which themselves correctly apply, and distinguish, the principles in *Briels*.
34. For completeness, it is noted that the Applicant has also proposed mitigation in respect of the very minor loss of Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*) which is a qualifying feature of the SAC. As explained in more detail in the Applicant's Report to Inform Habitats Regulation Assessment (EN010166/APP/6.12), the effect on such saltmarsh habitat is very limited. The proposed construction of a new permanent outfall structure and headwall for a surface water drainage discharge from the Main Development Area would take place adjacent to an existing surface water outfall in that location. Both are located in an area confirmed to be relevant saltmarsh. However, the effect as a result of construction would be temporary, limited to an area of approximately 650m² and the only longer term (i.e. for the life of the Proposed Development) loss would be far smaller and approximately only thirty years. This longer term loss is therefore potentially *de minimis*.

35. It has not been considered necessary to address the application of the same principles identified above as to why the proposed removal of flood defences to create a far larger area of saltmarsh within the SAC is clearly mitigation, rather than compensation, as the ExA's questions were directed in particular towards the question of the functionally-linked land for curlew. However, for the sake of completeness, on the application of the same principles set out above the Applicant submits it is clear that what is being proposed is mitigation. Amongst other things:

- (1) By way of clear distinction with either *Briels* or *Orleans*, the effect on the habitat is very different in nature and only involves a temporary construction effect and then a far smaller longer term, but not permanent, effect arising from the outfall and headwall – there is no permanent long term loss of habitat of the type that was in issue in *Briels* or *Orleans*.
- (2) Unlike the situation in *Briels* and *Orleans*, and consequent on (1) above, there is no proposal to create an entirely new area of habitat in the SAC where none currently exists. Instead, the proposal is in fact to restore natural coastal processes within the SAC by retreating the existing artificial coastal defences from an existing area of what would otherwise be saltmarsh so as to allow the existing areas of saltmarsh to continue to persist without erosion in the face of sea level rise, and so ensuring no net loss of saltmarsh in the long term. The Dee Estuary here is a dynamic system with saltmarsh being lost and gained through natural deposition and erosion and, in the longer term, through sea rise. There would likely be localised loss of saltmarsh within the SAC due to such rising sea levels in any event, without the Proposed Development. The proposed retreat area will reduce such losses, thus providing mitigation for any non-permanent losses from the Proposed Development, but also achieving a key conservation objective for the SAC in terms of maintaining the extent of saltmarsh types with a balance of saltmarsh communities.
- (3) The proposed habitat creation in *Briels* related to loss of habitat of a terrestrial system (*Molinia* meadow) which was not naturally dynamic, and its extent does not move geographically or fluctuate but is static and based on the localised presence of suitable conditions, and so the replacement habitat involved seeking to create entirely new *Molinia* meadow (something that is rarely done) and requires

one to start from scratch, carry out extensive manipulation to create the necessary hydrological conditions, is an artificial process and therefore has very clear risks of not being successful, and hence failed the necessary test of certainty of avoiding an adverse effect on the integrity of the protected site. Whereas, the proposal here is fundamentally different. The saltmarsh in question, as in most coastal systems, is already dynamic and accretes and erodes naturally and is sometimes lost entirely, or gained in other locations. Its extent and distribution changes naturally over time around the estuary and that is a feature of its nature, particularly at a small scale. The proposal here is not artificial, nor is it uncertain in nature. It involves removal of artificial coastal defences to allow those same natural processes to be restored to this small area to mitigate the very small effect on the natural processes in another even smaller area. And so to the extent that the Proposed Development involves any impact (where the reality is the longer term effect is very small indeed), the mitigation that is proposed is clearly a proposal which satisfies the relevant tests expressed in *Briels* and *Orleans* by virtue of (amongst other things) its certainty of success in restoring the natural processes in the area.

31 MARCH 2026

██