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RE: Sea Link (EN020026) Nationally Significant Infrastructure Project (NSIP) Application – Consultation Response on the Report on the Implications for European Sites (RIES) – Kent Wildlife Trust (██████████)

Kent Wildlife Trust (“KWT”) welcomes the opportunity to comment on the Examining Authority’s (“ExA”) Report on the Implications for European Sites (“RIES”). KWT wishes to emphasise that all concerns raised in previous deadline submissions throughout the DCO process remain extant and are relied upon in full. The omission of any specific issue from this response should not be interpreted as an indication that the matter has been resolved or that KWT’s position has changed. This response should therefore be read alongside KWT’s previous representations.

Likely Significant Effects

KWT maintains concerns regarding the identification and screening of Likely Significant Effects (“LSE”) within the Applicant’s Habitats Regulations Assessment (“HRA”), with more detailed information provided within our Deadline 1 submission. Tables 2.1 and 2.2 of the RIES demonstrate that a substantial number of European sites are located in close proximity to the proposed development, with multiple impact pathways identified across all project phases. This reinforces KWT’s view that the Mitigation Hierarchy has not been appropriately applied, particularly with respect to the requirement to prioritise avoidance.

KWT strongly disagrees with the statement made in paragraph 2.5.3 which says: “*The applicant confirmed (1ECOL49, [REP3-069]) that no in-combination LSEs had been identified where a LSE had not been identified for that pathway as a result of the proposed development alone.*” This position taken by the Applicant assumes that if Sea Link on its own doesn’t cause a LSE for a particular impact pathway, then combining it with other projects also won’t create LSEs.

This approach is flawed and not consistent with the requirements of the Habitats Regulations. It fails to recognise that effects which are not significant when considered in isolation may become significant when combined with other plans and projects. For example, the Nemo Link project has already resulted in disturbance to the Thanet Coast and Sandwich Bay SPA, Ramsar and Thanet Coast SAC via open-cut trenching of intertidal mudflats and saltmarsh habitats, subsequently disturbing qualifying bird species. The proposed Sea Link project would introduce further, similar pressures in the same location, to the same European designated sites. When considered alongside a reasonably foreseeable future project, such as the Aberdeenshire to Richborough project, there is clear potential for cumulative impacts arising from repeated disturbance, extended construction periods, and additional habitat loss.

In this context, it is not credible to conclude that no LSE would arise in combination. Even where individual projects may give rise to effects that are not significant alone, the combined effect of multiple projects acting on the same receptors, in the same location, and overlapping timescales clearly reach the threshold of LSE.

KWT still stands by our concerns outlined in Table 2.3: Issues raised in the examination to date by the ExA and Interested Parties (“IPs”) in relation to the applicant's screening of LSEs (alone and in-combination), namely ID 2.3.1 Precautionary Approach, where we consider that the Applicant’s screening had failed to apply the precautionary approach by screening out effects where impacts were described as unlikely or not anticipated rather than ruled out. We considered that the screening minimised the significance of likely impacts by using temporal and qualitative descriptors such as “temporary”, “localised”, or “small in scale” without evidential justification. The Applicant (Table 2.6, [REP2-034]) considered this to be a point in semantics rather than a ‘lower test’ being applied and stated that they had quantified terms within their assessments. KWT continues to disagree with this argument.

We welcome and support Requirement 16 of the dDCO and Condition 10(1) of the deemed marine licence (“DML”) (Schedule 16), which secure the use of trenchless techniques for landfall installation. However, as set out in our Deadline 4 response, there are clear precedents where similar commitments have ultimately not been deliverable at the construction stage. In those cases, applicants have successfully sought post-consent changes to allow open-cut trenching, on the basis that works could not otherwise proceed. This raises a significant concern in respect of the Sea Link project. If, at construction stage, HDD and other trenchless methods are demonstrated to be unfeasible and open-cut trenching across the saltmarsh is presented as the only viable alternative, there is a realistic risk that a change request could be submitted by the Applicant and approved. Such an outcome would result in irreversible damage to a highly sensitive habitat, as seen in comparable cases such as Nemo Link.

KWT therefore considers that the current drafting does not provide sufficient certainty or safeguard against this risk. The requirement must be strengthened to make unequivocally clear that, under no circumstances, would open-cut trenching through saltmarsh or other irreplaceable habitats be permitted, including through post-consent change requests. In the event that trenchless techniques are demonstrated to be unfeasible, this should not give rise to alternative construction methods. Rather, it must trigger a requirement for the Applicant to return to the consideration of alternative routes and landfall locations which avoid such impacts. We request that Requirement 16 is amended to include that if no feasible alternative to trenchless installation exists at Pegwell Bay, then the Sea Link project should not proceed at the current landfall location. This approach is necessary to ensure that unacceptable impacts cannot be authorised post-consent, and to provide certainty that the integrity of designated sites and irreplaceable habitats will be fully protected in accordance with the Habitats Regulations.

Regarding ID 2.3.7 Sandwich Bay SAC – Trenchless landfall techniques, KWT disagrees with the Applicant’s HRA screening conclusion, which excludes LSE arising from direct habitat loss on the basis that trenchless landfall techniques do not constitute mitigation. We agree with the ExA that trenchless techniques, such as HDD, are clearly a form of mitigation. Their inclusion is directly driven by the presence of irreplaceable saltmarsh habitat; in the absence of such constraints, the Applicant has

demonstrated elsewhere in the project (e.g. through intertidal mudflats) that open-cut trenching would be the default construction method. The use of HDD is therefore not an inherent or fixed feature of the project design, but a measure introduced specifically to avoid or reduce harm to European designated sites and their qualifying features. As such, it is not appropriate for the Applicant to rely on trenchless techniques at the screening stage to exclude LSE. Established case law makes clear that mitigation measures cannot be considered when determining whether LSE may arise. This principle was confirmed in *People Over Wind v Coillte Teoranta* (Case C-323/17), where the Court of Justice of the European Union held that measures intended to avoid or reduce harmful effects cannot be considered at the screening stage of an HRA. Similarly, in *R (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008], the Court emphasised the need for a precautionary approach, requiring that effects can only be excluded where there is no reasonable scientific doubt. More recently, domestic case law has reinforced that embedded or standard mitigation cannot be relied upon to screen out effects unless it can properly be characterised as part of the project itself rather than a measure to avoid harm. On this basis, LSE from direct habitat loss should not have been screened out. As mentioned above, there are clear precedents where similar commitments to trenchless installation have not been deliverable at the construction stage, and applicants have successfully sought post-consent amendments to allow open-cut trenching based on technical or feasibility constraints. This raises a significant and realistic risk for the Sea Link project. If trenchless methods are later demonstrated to be unfeasible, and open-cut trenching across the saltmarsh is presented as the only viable alternative, there is a credible pathway for a change request to be submitted and approved. Without our recommended amendments to Requirement 16, and without assessment of reasonable worst-case scenarios (including open-cut trenching), the conclusion that no LSE would arise from direct habitat loss is not robust. The HRA screening should therefore be revisited to properly reflect the potential for significant effects on the integrity of European designated sites.

Regarding ID 2.3.11 Thanet Coast SAC and Thanet Coast and Sandwich Bay SPA and Ramsar – Changes to marine water quality from release of contaminants and debris at the Hoverport site, our position on this has been clear. In our view, this approach is not consistent with the Mitigation Hierarchy, as reasonable opportunities to avoid or reduce harm have not been adequately pursued. We have provided further detailed evidence on this matter within our response to the Examining Authority's Third Written Questions ("ExQ3") and Deadline 6 submission. Ultimately, we think this is a clear example of how the applicant has not applied the Mitigation Hierarchy, ruled out impacts to irreplaceable habitats and therefore falls under the category of exemptions to the Critical National Priority ("CNP") policy.

In respect of ID 2.3.15 Stodmarsh SPA and Ramsar site – loss of functionally linked land ("FLL") for hen harrier, KWT shares the concerns raised by the RSPB. In particular, KWT considers that species-specific surveys should have been undertaken to robustly inform the assessment. In the absence of adequate survey data and evidence, it is not possible to conclude, beyond reasonable scientific doubt, that there would be no LSE arising from the loss of FLL for hen harrier. KWT therefore does not agree with the Applicant's conclusion that no LSE would arise in this regard.

Adverse Effects on Integrity

KWT strongly disagrees with the Applicant's conclusion as stated in paragraph 3.1.6 that the proposed project would not adversely affect the integrity of any European site, either alone or in combination with other projects or plans. We maintain concerns regarding the proposed use of the former hoverport for

access. As raised by Natural England and others, there remains insufficient evidence to demonstrate that contaminants associated with historic land uses, such as colliery spoil and fuel storage, would not be mobilised through construction traffic and heavy plant movements. The Applicant's reliance on the absence of ground disturbance does not adequately address the risk of degradation of the hardstanding and subsequent release of contaminants, including potential effects on water quality and designated site features. We also share the ExA's concerns in respect of the Outer Thames Estuary SPA, particularly the potential for disturbance and displacement effects on qualifying features such as the red-throated diver. The current assessment does not provide sufficient certainty to conclude no adverse effect on site integrity. Critically, we are concerned that the Applicant's in-combination assessment is incomplete. The omission of the Aberdeenshire to Richborough project from the cumulative impact assessment represents a significant gap, given the potential for overlapping spatial and temporal effects, particularly in relation to intertidal ornithological receptors. Without proper consideration of this project, the Applicant cannot robustly conclude that there would be no adverse effect on the integrity of European sites in combination with other plans and projects. For these reasons, we do not agree that the conclusions of the HRA are sound or sufficiently evidenced.

In regard to ID 3.3.19 we want to emphasise Natural England's concerns that HDD is likely to fail at Pegwell Bay. This echoes our concerns from the very start of the pre-DCO application process. KWT are not convinced that the Applicant has shown through reasonable scientific doubt that there will be no adverse effects on integrity if HDD fails and open-cut trenching is approved post-consent as it has been with numerous other NSIP projects. As stated above, we are pleased with Requirement 16, however we do not trust that the Applicant won't seek post-consent change requests to open-cut trenching if trenchless methods fail, and as such request amendments to state that Sea Link should not proceed at the current landfall location of Pegwell Bay if HDD and other trenchless technologies fail.

In respect of ID 3.3.22, KWT notes that commitments B67 and B70 of the REAC require consultation with Natural England and KWT regarding the identification and agreement of access routes across the hoverport and intertidal mudflats. These commitments are clearly intended to ensure that access arrangements are developed collaboratively, informed by ecological constraints, and subject to appropriate scrutiny prior to being finalised. However, KWT notes that at Issue Specific Hearing 3 ("ISH3") the Applicant presented plans which included illustrated access routes across these areas. This gives rise to significant concern that access routes may have already been identified and, in effect, predetermined in advance of the consultation required under the REAC commitments. Such an approach risks undermining the purpose and effectiveness of those commitments, reducing consultation to a retrospective exercise rather than a meaningful and iterative process. KWT emphasises that the identification of access routes in this location is a matter of considerable environmental sensitivity, with the potential to affect designated habitats and qualifying features. It is therefore essential that no routes are fixed or assumed prior to full and proper consultation with relevant stakeholders, including KWT and Natural England.

In light of this, KWT considers that greater clarity and assurance is required that the REAC commitments will be adhered to in practice, and that access routes will remain genuinely subject to consultation and agreement, rather than being presented as effectively predetermined.

In respect of ID 3.3.23, KWT does not agree with Natural England's position that sufficient information has been provided to conclude that the proposed golden plover mitigation site would adequately offset

the predicted impacts of the development. KWT maintains that the evidence presented to date does not demonstrate that the proposed site is suitable to function as effective mitigation for this qualifying species. KWT remains concerned that the site is subject to a range of constraints which undermine its suitability, including noise disturbance, artificial lighting, and visual disturbance. Golden plover are highly sensitive to disturbance, and the presence of these factors are liable to significantly reduce the likelihood of the site being used as intended. In KWT's view, these issues have not been adequately addressed or resolved within the Applicant's submissions. Furthermore, KWT considers that there remains insufficient evidence to demonstrate that the proposed mitigation would be functionally equivalent to the habitat being affected, or that it would deliver the required outcomes with a sufficient degree of certainty. This is particularly important in the context of the Habitats Regulations, which require a high level of confidence in the effectiveness of mitigation measures where they are relied upon to avoid adverse effects on site integrity.

KWT therefore maintains its position, as set out in previous deadline responses, that the proposed golden plover mitigation site is not suitable, and highly unlikely to be used by the species. We stress that success should not be judged simply by whether any golden plover use the mitigation site, but by whether it supports an equivalent level of use to that recorded on the converter site, i.e. a peak count of 370 birds. If monitoring surveys demonstrate that this level of use is not achieved at the mitigation site, adaptive management measures should be triggered to implement additional suitable land areas of mitigation. All concerns previously raised by KWT in respect of this matter remain extant and have not been resolved.

Annex 1: ExA's Understanding of Positions at Point of RIES Publication

The ExA's statement in paragraph A1.3: "*The ExA understands that KWT does not agree AEoI [Adverse Effect on Integrity] can be excluded for Thanet Coast & Sandwich Bay SPA and Ramsar site or Thanet Coast SAC*" is correct.

KWT emphasises that our concerns raised throughout the Examination remain extant, including those relating to ecological survey effort, the application of the Mitigation Hierarchy, trenchless techniques, mitigation measures and the consideration of alternatives to avoid impacts on European sites. KWT also continues to support the concerns raised by other environmental organisations, including the RSPB and CPRE Kent.

We hope that our response to the RIES and expertise will be of assistance to the Examining Authority. If you require any further information or would like to discuss our response in more detail, please do not hesitate to contact me.

Kind regards,

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