

## The Great Grid Upgrade

Sea Link

# Sea Link

## Volume 9: Examination Submissions

Document 9.137: Applicant's Response to Legal Submissions from Objector Groups – SEAS [AS-038, REP2-113, REP5-146], Kent Wildlife Trust [AS-077, REP1-152, REP2-054, REP3A-023], CPRE Kent [REP1-148], and Save Minster Marshes [REP1-246, REP3A-171, REP5-167]

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# 1. About this document

## 1.1 Purpose of this document

- 1.1.1 This document addresses a number of representations concerning the legal adequacy of the Applicant's assessments including in relation to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**the EIA Regulations**"), the Conservation of Habitats and Species Regulations 2017 ("**the Habitats Regulations**") and the Water Environment Regulations 2017 (Water Framework Directive) (England and Wales) ("**the WFD Regulations**").
- 1.1.2 This document supplements the Applicant's existing responses to these representations to confirm why the legal criticisms are not well-founded.

## 2. Legal Framework

2.1.1 The Applicant here summarises relevant parts of the legal framework.

### 2.2 The EIA Regulations

2.2.1 Regulation 4 prohibits the granting of development consent for EIA development “unless an EIA has been carried out in respect of that application”.

2.2.2 Regulation 5 (“Environmental Impact Assessment Process”) provides, in part, that:

“(1) The environmental impact assessment (“the EIA”) is a process consisting of—

- (a) the preparation of an environmental statement or updated environmental statement, as appropriate, by the applicant;
- (b) the carrying out of any consultation, publication and notification as required under these Regulations or, as necessary, any other enactment in respect of EIA development; and
- (c) the steps that are required to be undertaken by the Secretary of State under regulation 21 or by the relevant authority under regulation 25, as appropriate.

(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under any law that implemented Directive 92/43/EEC2 and Directive 2009/147/EC3;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).

(3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.

...”

2.2.3 The essential purpose of the EIA process is to provide the decision-maker with the environmental information required to discharge their duty under Regulation 21. That provides, in part:

“(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must—

(a) examine the environmental information;

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;

(c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.

(2) The reasoned conclusion referred to in paragraph (1)(b) must be up to date at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application.

...”

2.2.4 EIA is therefore a “process” of gathering information, from the Environmental Statement (“ES”), from responses to consultations and notifications, and from the assessment of the ExA, such that the direct and indirect significant effects of the proposed development is described and assessed “in an appropriate manner” (reg. 5). Accordingly, the ES is a constituent part of the EIA process but is not synonymous with it. EIA is “a process that starts, but does not end with, the environmental statement” (see *Boswell v Secretary of State for Transport* [2024] EWCA Civ 145 at [34]). That position was confirmed by the Supreme Court in *R (FoE) v Heathrow Airport Limited* [2020] UKSC 52 at §142 and 143:

“143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal Wednesbury principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation “gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies”. The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an “unduly legalistic approach” in relation to assessment of the adequacy of an environmental statement and said:

‘... In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain the ‘full

information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ..., but they are likely to be few and far between.”

2.2.5 Regulation 3 provides that “environmental information” means “the environmental statement ... including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development”.

2.2.6 The lawful requirements of an ES are prescribed at Regulation 14, which provides:

“(2) An environmental statement is a statement which includes at least—

(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;

(b) a description of the likely significant effects of the proposed development on the environment;

(c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

(d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;

(e) a non-technical summary of the information referred to in subparagraphs (a) to (d); and

(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

(3) The environmental statement referred to in paragraph (1) must—

(a) where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion);

(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the

environment, taking into account current knowledge and methods of assessment; and

(c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment.

(4) In order to ensure the completeness and quality of the environmental statement—

(a) the applicant must ensure that the environmental statement is prepared by competent experts; and

(b) the environmental statement must be accompanied by a statement from the applicant outlining the relevant expertise or qualifications of such experts.”

2.2.7 A lawful ES therefore requires a “description” of the project, of likely significant effects, mitigation, and studied alternatives, and so on (reg. 14). The ES need only include the information “reasonably required” for reaching a reasoned conclusion on the “significant effects” of the development on the environment, taking into account “current knowledge and methods” of assessment (reg. 14). This directly links to the duty on the decision-maker to reach a reasoned conclusion on the significant effects of the development under Regulation 21(1). The adequacy of environmental information is a matter of judgment for the decision-maker with which the courts will not interfere save in cases of *Wednesbury* unreasonableness (*R (Blewett) v Derbyshire County Council* [2004] Env LR 29 at [36]-[41]).

2.2.8 An ES should also include the information in Schedule 4 to the EIA Regulations. These include “a description of the likely significant effects of the development on the environment resulting from, inter alia ... the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources” (para. 5(e)).

2.2.9 The courts have repeatedly identified that the EIA process is intended to be an aid to good environmental decision-making, not a “legal obstacle course” or “obstacle race” for developers: see *R (Blewett) v Derbyshire County Council* [2004] Env LR 29 per Sullivan J at [41]; *R (Hart DC) v Secretary of State* [2008] 2 P&CR 16 per Sullivan J at [72]; and *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] Env. L.R. 5 per Lord Carnwath at [64]. The adequacy of the assessment in an ES is a matter of judgement for the decision-maker subject only to *Wednesbury* unreasonableness: *R (Friends of the Earth Limited) v Heathrow Airport Ltd* [2021] PTSR 190 per Lord Hodge and Lord Sales at [142]-[145].

## 2.3 The Habitats Regulations

2.3.1 Regulation 63(1) of the Habitats Regulations states as follows:

“(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 or a European offshore marine site (either alone or in combination with other plans or projects), and  
(b) is not directly connected with or necessary to the management of that 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.”

2.3.2 Regulation 63 goes on to provide that a person applying for consent must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required (reg. 63(2)), and that the competent authority must for the purposes of the assessment consult the appropriate nature conservation authority (reg. 63(3)) and, if appropriate, take the opinion of the general public (reg. 63(4)).

2.3.3 This then leads to regulation 63(5), which provides as follows:

“(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 or the European offshore marine site (as the case may be).”

2.3.4 The words “subject to regulation 64” contain an exception to this prohibition on the grant of development consent. Regulation 64(1) sets this out in the following terms:

“(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 or the European offshore marine site (as the case may be).”

## 2.4 The WFD Regulations

2.4.1 The WFD Regulations transpose the Water Framework Directive 2000/60/EC (the “**WFD**”) into domestic law, as well as aspects of two supporting directives on the protection of groundwater (Directive 2006/118/EEC) and environmental quality standards in the field of water policy (Directive 2008/105/EC).

2.4.2 Under Article 4(1) of the WFD, Member States are, amongst other things, required to implement the necessary measures to prevent deterioration of the status of all bodies of surface water and groundwater.

2.4.3 The WFD Regulations establish a framework in England and Wales for the protection of inland waters, transitional waters, coastal waters, and groundwater, with the purpose of preventing further deterioration in, and enhancing, water quality, and to promote sustainable water use.

2.4.4 The relevant appropriate agency in England is the Environment Agency. Under Part 6 of the WFD Regulations, the Environment Agency is required to prepare River Basin Management Plans (“**RBMPs**”) for each river basin district for the approval of the Secretary of State. Further, the Environment Agency is a statutory consultation body under the Planning Act 2008. It must, in providing its views on an application for a Development Consent Order, comply with the requirements of the WFD.

2.4.5 Under regulation 33 of the WFD Regulations, the Secretary of State must, in exercising its functions, have regard to the relevant RBMP and any supplementary plans. The Government’s guidance “Nationally Significant Infrastructure Projects: Advice on the Water Framework Directive” provides:

“When deciding NSIP applications, the Secretary of State will need to consider the potential effects of any proposed development on:

- the environmental objectives and measures within River Basin Management Plan and any supplementary plans and
- the ability of the UK to comply with the WFD, including (if applicable) the derogation provisions of Article 4.7”

2.4.6 Under regulation 5(2)(l) the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, an application for a Development Consent Order must be accompanied by a plan with accompanying information identifying water bodies in RBMP, together with an assessment of any effects on such water bodies likely to be caused by the development.

## 2.5 Schedule 9 to the Electricity Act 1989

2.5.1 The legal duties in the Electricity Act 1989 have been raised by certain Interested Parties. Relevant duties include those in section 9(2) and Schedule 9 para. 1(1).

2.5.2 Section 9(2) provides:

“(2) It shall be the duty of the holder of a licence authorising him to participate in the transmission of electricity—

(a) to develop and maintain an efficient, co-ordinated and economical system of electricity transmission; and

(b) to facilitate competition in the supply and generation of electricity.”

2.5.3 Schedule 9, para. 1(1) of the 1989 Act provides:

“1(1) In formulating any relevant proposals, a licence holder or a person authorised by exemption to generate, distribute, supply or participate in the transmission of electricity—

(a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archeological interest; and

(b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.”

## 2.6 Consultation and publicity

2.6.1 The procedural duties as to consultation on an applicant for development consent are primarily set out in sections 42, 47, 48, and 49 of the of the 2008 Act.

2.6.2 Section 42 provides that:

(1) The applicant must consult the following about the proposed application—

- (a) such persons as may be prescribed,
    - (aa) the Marine Management Organisation, in any case where the proposed development would affect, or would be likely to affect, any of the areas specified in subsection (2),
  - (b) each local authority that is within section 43,
  - (c) the Greater London Authority if the land is in Greater London, and
  - (d) each person who is within one or more of the categories set out in section 44.
- ...”

2.6.3 Section 47 provides that the applicant must prepare a statement setting out how it proposes to consult (the Statement of Community Consultation (“SOCC”)), and to consult with local authorities as to the contents of that statement, and then to consult in line with the statement.

2.6.4 Section 48 requires the applicant to publicise the proposed application in the prescribed manner.

2.6.5 Section 49 provides that:

“(1) Subsection (2) applies where the applicant—

- (a) has complied with sections 42, 47 and 48, and
- (b) proposes to go ahead with making an application for an order granting development consent (whether or not in the same terms as the proposed application).

(2) The applicant must, when deciding whether the application that the applicant is actually to make should be in the same terms as the proposed application, have regard to any relevant responses.

(3) In subsection (2) “relevant response” means—

- (a) a response from a person consulted under section 42 that is received by the applicant before the deadline imposed by section 45 in that person's case,
- (b) a response to consultation under section 47(7) that is received by the applicant before any applicable deadline imposed in accordance with the statement prepared under section 47, or
- (c) a response to publicity under section 48 that is received by the applicant before the deadline imposed in accordance with section 48(2) in relation to that publicity.”

2.6.6 In relation to environmental information, regulation 12 of the EIA Regulations requires that the SOCC contains a statement as to whether the development for which the applicant proposes to make an application is EIA development; and if that development is EIA development, how the applicant intends to publicise and consult on the preliminary environmental information.

- 2.6.7 The obligation in section 49(2) to ‘have regard’ to local authority responses does not mean that an applicant is under an obligation to give effect to any suggestions made, or to address all issues raised.
- 2.6.8 Fair consultation generally has four requirements: first, that consultation must be at a time when proposals are still at a formative stage; second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; third that adequate time must be given for consideration and response; and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals (*R (Moseley) v LB Haringey* [2014] UKSC 56 at para 25).
- 2.6.9 It is well-established that there can be consultation on a ‘preferred option’. The fact that a provisional view has been taken, or a preferred option identified, does not prevent a consultation exercise being conducted in good faith at a stage when the position is still formative in the sense that no final decision has yet been made. There is no conflict between a person keeping an open mind and consulting on the preferred route; it is permissible to consult on proposals rather than options which are not being proposed: see *R (Bailey) v Brent LBC* [2011] EWHC 2572 (Admin) at para 90.
- 2.6.10 Provided the fundamental requirements of consultation are observed, a decision-making authority has a relatively wide margin in determining its consultation procedure, subject to irrationality (*R (Wainwright) v Richmond upon Thames LBC* [2001] EWCA Civ 2062 at para 11). The threshold to be applied was considered by Sullivan J in *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), where he said at paragraph 62:
- ‘A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out.’
- 2.6.11 As to publicity, regulation 4(3) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 provides that the Applicant must publicise information including the following:
- “The matters which the notice must include are—
- (a) the name and address of the applicant;
- (b) a statement that the applicant intends to make an application for development consent to the Commission;
- (c) a statement as to whether the application is EIA development;
- (d) a summary of the main proposals, specifying the location or route of the proposed development;
- ...”

## 3. Suffolk Energy Action Solutions (SEAS)

3.1.1 Matters raised by SEAS have been comprehensively addressed in the Applicant's Comments on Relevant Representations identified by the ExA [REP2-014] and in Appendices A and B to that document, along with the Applicant's other responses to SEAS' submissions during the examination. This document focusses on certain discrete legal points raised by SEAS rather than repeating the content of those responses.

### 3.2 Additional Submissions - 12-13 Cumulative Effect - Accepted at the discretion of the Examining Authority [AS-038]

3.2.1 SEAS' contentions here are primarily concerned with an alleged failure to assess or adequately assess inter-project cumulative impacts, with regards to various environmental impacts. In fact these cumulative impacts have all been expressly and properly considered, as was fully explained by the Applicant in [REP2-014]. SEAS' representation is principally assertion unsupported by evidence and in no way undermines the robustness of the cumulative impact assessment undertaken.

3.2.2 The Applicant's cumulative impact assessment clearly discharges the obligation to provide a "description" of the likely significant impacts arising from the cumulative effects with other developments. That SEAS disagrees with those assessments (often for unparticularised or unevidenced reasons) does not displace that analysis.

3.2.3 As to cumulative ecology and biodiversity impacts, most of SEAS' criticisms are that mitigation proposals are "vague" and primarily rely on representations made by the RSPB. The points raised, including as to the representations of RSPB, were comprehensively addressed by the Applicant at p.322 of [REP2-014]. The Applicant's mitigation proposals are robust and sufficient and this is simply a disagreement with the Applicant's informed assessment. The HRA does not fail to assess "cumulative SPA risk"; the HRA clearly takes cumulative impacts into account (see Report to Inform Habitats Regulations Assessment [REP5-036]) and the Applicant has carefully considered these (see **Application Document 6.2.2.13 Part 2 Suffolk Chapter 13 Suffolk Onshore Scheme Inter Project Cumulative Effects [APP-060]**).

3.2.4 As to cumulative impacts on the water environment, this is directly addressed at p.331 of [REP2-014] (and see the references therein). There has been no unlawful failure to assess cumulative impacts; to the contrary, the Applicant has carefully considered them, and has complied with the legal duties cited by SEAS. The criticisms of HDD are addressed at p.338 of [REP2-014], and the Applicant there sets out the assessments informing its opinion that it will not give rise to significant effects.

3.2.5 As to cumulative impacts on coastal geology, the points raised are addressed in pp.336-337 of [REP2-014]. Cumulative impacts on geology have been expressly considered.

3.2.6 As to cumulative agricultural and soils impacts, **APP-060** expressly assesses those effects. An outline Soil Management Plan for Suffolk [APP-354] has also been produced to set out the relevant commitments and mitigation. SEAS' criticism here is again a vague and unparticularised complaint that the Applicant's work is inadequate. The Applicant disagrees.

- 3.2.7 As to cumulative air quality impacts, this has been expressly considered, contrary to SEAS' assertion, as has been explained (see p.360 of [REP2-014]).
- 3.2.8 As to cumulative noise and vibration impacts, an assessment of cumulative noise effects is presented in **Application Document 6.2.2.13 Part 2 Suffolk Chapter 13 Suffolk Onshore Scheme Inter-Project Cumulative Effects [APP-060]** (see Table 13.32 and the conclusions on p.187 in particular).
- 3.2.9 As to cumulative socio-economics, recreation and tourism, the Applicant has carefully considered this and indeed it has responded on this point not just to SEAS but to a number of other interested parties (see in particular [REP2-014] at p.401-402 and [APP-060]).
- 3.2.10 As to cumulative health and wellbeing impacts, the Applicant has again considered these and has not failed to have regard to the possibility of mental health impacts being occasioned by the development (arising, for example, from landscape or recreational changes, among other things). This point is addressed in detail at p.381 of [REP2-014].
- 3.2.11 To the extent that SEAS raise the duty in Schedule 9 para 1(1) of the Electricity Act 1989, the Applicant has also complied with that duty by having regard to the matters mentioned in para 1(1)(a) and committing to reasonable mitigation in accordance with para 1(1)(b), as explained for example in REP2-014 and also in the Planning Statement [AS-057].

### **3.3 SEAS Rebuttal of NGET Alternatives Responses [REP2-113]**

- 3.3.1 In this representation, SEAS sets out a number of criticisms relating to site selection by the Applicant. It is described as a rebuttal to the Applicant's alternative sites document, which, it is understood, is primarily Appendix B to [REP2-014]. That document describes itself in the following terms: "This document sets out the Applicant's response to the converter station local site alternative put forward within SEAS's Relevant Representation on alternatives" (see §B1.1). The document first responds on the inclusion of Site 3 (the proposed Saxmundham Converter Station) and its reliance on the National Grid Ventures (NGV) projects. Secondly, it responds to the case put forward by SEAS that Site 4 (the former RAF Leiston site) represents a better alternative. SEAS more broadly appears to contend that the needs case for the Proposed Project is inadequately explained and/or has not been amended in light of consultation feedback or changing circumstances.
- 3.3.2 The Applicant's response in Appendix B of [REP2-014] is comprehensive and shows that the consideration of alternatives has been lawful and appropriate. Given the comprehensiveness of the document, this section focusses on the certain specific issues raised by SEAS, which are largely asserted disagreements with the judgments and explanations in Appendix B.
- 3.3.3 The EIA Regulations provide that an ES needs to provide a "description" of the alternatives considered and needs to give an "indication of the main reasons" for selecting the chosen options. These requirements have all clearly been met and nothing in SEAS' representation demonstrates otherwise. Consultation feedback has been conscientiously considered but it is of course not binding, and the Applicant is entitled to consult on preferred options.
- 3.3.4 The Applicant clearly explained in Appendix B that Site 3 was selected as the preferred option both in light of the potential for co-location and independently, in the sense that regardless of co-location, it remained the preferred option. SEAS' argument, which is

that the needs case for the Proposed Project has fundamentally weakened absent the Nautilus connection (which is not accepted – see in particular the overview of the need case and response to points on need raised by certain Interested Parties in Applicants Response to 2GEN1 and 2GEN2 in respect of Need **[REP5-142]**), and therefore the Applicant must be misrepresenting their position here, seems to misunderstand that conscientious engagement with parties and consultees does not mean agreeing with everything that is said or being bound by the preferences of those parties. The Applicant’s assessments are transparent, and the conclusions set out are expressions of a careful and thorough site options appraisal process.

- 3.3.5 SEAS’ criticisms of the Applicant’s approach to assessing the character of RAF Leiston are unfounded. The Applicant’s assessment was that, as the NPPF definition of previously developed land (PDL) suggests, one should take into account the fact that the physical development on land which has previously been developed has been removed. That is obviously relevant, because the justification for developing on brownfield land is that one is not developing on land which can host inter alia vegetation and agriculture. If the PDL has partly returned to agricultural use, as it has at RAF Leiston, then that needs to be taken into account (see §B.5.1).
- 3.3.6 SEAS’ criticisms of the Applicant’s approach to assessing transport factors in choosing between sites 3 and 4 are misguided and misread Appendix B. The Applicant expressly recognised that the need for a Fromus crossing weighed against site 3. The Applicant expressly recognised that the Sizewell Link Road would make Site 4 more accessible, but also noted that road would only be built many months after the Proposed Project’s construction would begin. That SEAS thinks the road will be built earlier has been noted but was not agreed with. The Applicant also did not need to be sure which of the three options for the Fromus crossing it would realise to rely on the Fromus crossing being in place; each option would enable the required crossing and three potential ways of achieving that reassured the Applicant a crossing could be delivered.
- 3.3.7 SEAS points on heritage as a factor in site selection are addressed in Appendix A to **[REP2-014]**. The document primarily responds to SEAS’ contention that that a greater number of heritage assets would be affected by the Proposed Project than has been identified in the submitted DCO application documents. Appendix B focuses on heritage impacts relating to Site 4 because it is a response to SEAS’ contention that Site 4 was preferable to Site 3 on the basis that it would reduce heritage impact. The passages in Appendix B (§§B.5.8-11) explain how significant a heritage impact Site 4 would have.
- 3.3.8 SEAS’ comments as to community impacts are mere repetitions of their view that traffic impacts on the community, among other things, are unacceptable to them. They contend that the Applicant has overestimated the proximity of Site 4 to a nearby settlement by about 500 metres. But even if SEAS’ measurements were accepted, the measurements given in §B.5.12 are expressly said to be “approximate”, so there has been no misstatement or misunderstanding.
- 3.3.9 As to tourism, again the Applicant was pointing out that SEAS had failed to have regard to the tourism impacts of Site 4, because they had ignored the proximity of a nearby caravan park. And given the Proposed Project’s impacts on tourism are not significant, effects on tourism were unlikely to be a determining factor in site selection.
- 3.3.10 SEAS’ does not adequately grapple with the crucial point that 1.9km less HVDC and HVAC cable will be required for Site 3 as compared with Site 4. It is not clear why SEAS criticises costs considerations being an element of this decision. Costs and viability are obviously legitimate factors in the balance for site selection.

- 3.3.11 The Applicant made no error in not subjecting Site 4 to a full EIA, given it was not the selected site. It was entitled to draw reasonable conclusions about the potential environmental impacts that development on Site 4 would give rise to.
- 3.3.12 SEAS then turns to criticisms of responses from the Applicant in the Tables of **[REP2-014]**. The Applicant reiterates that there is an urgent needs case for the Proposed Project regardless of changes relating to Nautilus, which have been considered. There was no “failure to consider the potential to connect into the existing B substation or proposed Sizewell C substation”, but rather an assessment that there would be a range of significant technical risks and challenges involved in so doing, which is an assessment SEAS baselessly disagrees with.
- 3.3.13 The Applicant’s approach to Bradwell on Sea was lawful. The Applicant took the view, as SEAS explains at §54, that there were a variety of technical and geographical reasons for not selecting Bradwell. The Applicant considered Bradwell and had regard to consultation responses that urged the use of Bradwell (see §5.2.11 of the Option Selection and Design Evolution Report **[APP-369]**).

### **3.4 Outstanding Issues on Ecology [REP5-146]**

- 3.4.1 This representation is said to critique the adequacy of responses from the Applicant at Deadline 4 to issues raised at Issue Specific Hearing 2 primarily.
- 3.4.2 As to SEAS’ comments relating to the Applicant’s assessment of acid grassland impacts and mitigations, the Applicant has carefully assessed the suitability of the land. The proposals for acid grassland restoration are in Application Document 7.5.7.1 Outline Landscape and Ecological Management Plan – Suffolk **[REP4-065]** and are specific. This will be followed by a detailed LEMP post-consent. SEAS says the previous use of the land ought to be considered but does not explain why this would change the analysis of the existing qualities of the mitigation land, which has been carefully assessed. The mitigation land is considerably larger than the impacted land, and will be of higher quality, reflecting an improvement (see §5.3 of the oLEMP).
- 3.4.3 As to mooted impacts on the marsh harrier, surveys have been conducted and they only identified the presence of that species on the wetlands of the RSPB reserve. This will be crossed by trenchless methods. The reasons given by the Applicant for screening out impacts on the marsh harrier are cogent and clear (see for example p.322 of **[REP2-014]**).
- 3.4.4 It is not correct that the assessment of the hoverport was only by aerial photograph – a walkover was also conducted (see p.20 of **[REP5-132]**). The hoverport is only intended to be used for a vehicle access track, which is on an existing track and largely on hardstanding. SEAS’ view that there may be “fissures” hosting reptiles in that hardstanding is unevidenced and such fissures have not been identified by the Applicant in its assessments. The Applicant has explained that, in any case, there is currently no reason to think such fissures, if they exist, would collapse when vehicles drive over it, though this will be considered in a structural survey (see p.5 of **[REP4-085]** which SEAS cites).
- 3.4.5 As to bat tracking surveys, see p.9 of **[REP4-085]**. The Applicant has taken a conservative approach and assumed all affected hedgerows are capable of hosting bats (see p.314 of **[REP2-014]**). It has prepared its mitigation on this conservative assumption. Given the only plausible impact of the Proposed Project on roosting bats is by way of hedgerow displacement, this is a robust and sufficient protection.

## 4. CPRE Kent

### 4.1 Written representations (WR) and summaries for any that exceed 1500 words [REP1-148]

- 4.1.1 The Applicant has responded to these submissions in full at section 2.3 of **Application Document 9.79: Applicant’s Comments on Written Representations [REP2-034]**. Those comments are not repeated here. Instead, a summary is provided of the Applicant’s position in respect of the legal issues raised.

#### Section 104 of the Planning Act 2008

- 4.1.2 The Secretary of State must have regard to the matters set out at sections 104(2)(a) to (d) in deciding this application for an order granting development consent. Section 104(3) requires the Secretary of State to decide this application “*in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies*”. Section 104(7) applies where the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
- 4.1.3 For the reasons set out in **Application Document 7.1 (C): Planning Statement [AS-057]**, the Proposed Project is in accordance with the relevant national policy statements, namely NPS EN-1, EN-3, and EN-5. The benefits also outweigh the adverse impacts such that section 104(7) does not apply.

#### Regulation 14(2)(d) of the EIA Regulations

- 4.1.4 The requirements under Regulation 14 are discussed at sections 2.2.6 and 2.2.7 above. These requirements do not include CPRE Kent’s request for “*a comparative cost-benefit or environmental appraisal*”.
- 4.1.5 There has been full compliance with the requirement under Regulation 14(2)(d) to provide both “*a description of the reasonable alternatives studied by the applicant*” and “*an indication of the main reasons for the option chosen*”. This is contained in the following documents:
- **Application Document 6.2.1.3: ES Part 1 Introduction Chapter 3 Main Alternatives Considered [APP-044]**
  - **Application Document 7.2: Strategic Options Report Backcheck Report [APP-320];**
  - **Application Document 7.3 Design Development Report [APP-321];**
  - **Application Document 8.1: Corridor Preliminary Routeing and Siting Study (October 2022) [APP-368]; and**
  - **Application Document 8.2: Options Selection and Design Evolution Report (October 2023) [APP-369].**
- 4.1.6 CPRE Kent’s suggestion that there has been a contravention of Regulation 14(2)(d) is therefore unfounded.

- 4.1.7 For substantially the same reasons, the related complaints in respect of NPS EN-1 and EN-5 are also without merit.

### **The Applicant's duties under the Electricity Act 1989**

- 4.1.8 The Applicant has met its duties under the Electricity Act 1989, including its duty under section 9 to "*develop and maintain an efficient coordinated, and economical system of electricity transmission*" (which includes reducing costs on behalf of consumers), and also the duty to have regard to the desirability of conserving the environment and doing what can reasonably be done to mitigate effects (para 1(1) of Schedule 9 to the Electricity Act 1989). These duties are addressed in full in **Application Document 7.1 (C): Planning Statement [AS-057]**.

### **Regulation 63 of the Habitats Regulations**

- 4.1.9 For the detailed reasons set out in the Applicant's full response in **[REP2-034]** (as well as section 6.17 of **Application Document 9.34.5 (B): Applicant's Response to Selected Relevant Responses [REP2-022]** responding to CPRE Kent's Relevant Representation), the evidence submitted in respect of ecology and biodiversity is sufficient and adequate. The Applicant has therefore fully complied with the obligation to "*provide such information as the competent authority may reasonably require*" for the purposes of the appropriate assessment under Regulation 63(2).

### **Wildlife and Countryside Act 1981**

- 4.1.10 CPRE Kent alleges a breach of the Wildlife and Countryside Act 1981 in relation to the Applicant's ecological assessments but does not particularise it. In such circumstances, it is not possible for the Applicant to provide a particularised response. The Applicant's position, however, is that there is full compliance with the Wildlife and Countryside Act 1981, including in respect of protection of habitats and species, as set out in the Ecology and Biodiversity chapters of the Environmental Statement.

## 5. Kent Wildlife Trust

### 5.1 Written representations (WR) and summaries for any that exceed 1500 words [REP1-152]

- 5.1.1 The points raised in this written representation have been carefully and comprehensively addressed in the Applicant's response to KWT in Applicant's Comments on Written Representations [REP2-034] (see section 2.6), and also in Applicant's Comments on Relevant Representations Identified by the ExA [REP2-014] (see section 2.8).
- 5.1.2 KWT's contention that the HRA consultation was legally inadequate, because the Applicant did not consult KWT, is without merit, as explained in p.40 of [REP2-034]. KWT's assertion that the lack of consultation meant "key assumptions were carried forward into the screening stage despite relying on incomplete or missing baseline data" is unparticularised and vague. Thematic meetings were in any case held with KWT during pre-application stage where HRA matters were discussed.
- 5.1.3 The HRA screening process was lawful and applied the precautionary principle (see pp.40-41 of [REP2-034]). The Applicant has only screened out effects where the risk of significant effects can "be ruled out alone on the basis of objective scientific evidence" (see §Ex1.2.2 of the HRA [REP5-036]). KWT makes an unparticularised and vague criticism that these professional conclusions are "without evidential justification". The Applicant does not agree.
- 5.1.4 KWT's contention that the screening process was "legally inadequate" because the Applicant "pre-determined" whether there were likely significant effects before gathering detailed survey data is mistaken and misunderstands the screening exercise (see p.41 of [REP2-034]). KWT has not explained what significant adverse impacts the Applicant has missed or failed to consider, reflecting the robustness of the Applicant's screening.
- 5.1.5 KWT is also wrong to suggest that the Applicant has unlawfully accounted for mitigation measures at the screening stage (see p.41 of [REP2-034]). The HRA carefully considers the legal principles raised by KWT at section 2.2. Given the Applicant had those principles firmly in mind, it is unsurprising KWT identifies only one "speculative mitigation" measure they consider should not have played a role at the screening stage, being controls over the discharge of drilling fluid. The Applicant addresses drilling fluid discharge in the HRA and generally concludes the risk of discharge is very low (see for example §Ex1.4.20). However, drilling fluid discharges and frac out are carried over into the stage 2 assessment (see §§7.4.11-14) so KWT's criticism that they have been screened out is incorrect.
- 5.1.6 KWT's legal criticism seems to be that the HRA is not sufficient evidence to enable the AA to safely determine there will be no adverse effects, because it is "does not provide the "complete, precise and definitive findings" required to remove all reasonable scientific doubt" as to adverse effects. Ultimately that is a matter of evaluative and technical judgment for the decision-maker, subject to *Wednesbury* reasonableness. The Applicant does not agree that its assessment is insufficient.
- 5.1.7 For the reasons given below, the criticisms of open-cut trenching are irrelevant, because that is not part of the "plan or project" being proposed, with the exception of the

area required for the limited installation of the marine cable(s) from the Mean Low Water Springs (MLWS) to the trenchless crossing exit pits within the intertidal mudflats. No alternative technique is capable of being used without a formal amendment to the DCO, with a new supporting environmental assessment and HRA.

- 5.1.8 KWT is also wrong to say that the HRA breaches regulation 63(1) of the Habitats Regulations because it does not assess impacts on protected sites in light of their conservation objectives. The Applicant cites them, was aware of them, and the Appropriate Assessment reflects an application of them (see p.45 of [REP2-034]).
- 5.1.9 The Applicant does not agree with KWT's contention that the baseline survey data for Pegwell Bay was insufficient. It was compliant with law and best practice (see pp.45-46 of [REP2-034]).
- 5.1.10 It is incorrect to say that an effect needs to be considered cumulatively even where, assessed individually against the relevant significance criteria, an impact pathway cannot be established for the effect individually (see p. 46 of [REP2-034]).
- 5.1.11 The Applicant's proposed mitigation is appropriately secured and is supported by evidence and is therefore consistent with regulation 63(6) of the Habitats Regulations and applicable guidance (see pp.47-48 of [REP2-034]).
- 5.1.12 KWT's contention that the ES breaches regulation 14(2)(d) of the EIA Regulations in relation to its description of the consideration of alternatives is addressed in Application Document 9.34.1 Applicant's Responses to Relevant Representations [REP2-014] and again in [REP2-034] at pp.50-52.
- 5.1.13 The legal authorities cited by KWT have been considered but they either merely restate that alternatives may need to be considered (which has been done) or their relevance is unclear. The cited remarks of Holgate J in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) merely say that alternatives may need to be considered by the decision-maker if there are strong planning reasons for doing so. The Applicant has assessed reasonable alternatives. The cited remarks from *Holohan v An Bord Pleanala* (Case C-461/17) merely restate the regulation 14(2)(d) duty to consider alternatives and expressly permit the rejection of an option "at an early stage". The case of *R (Mead Realisations Ltd) v SSCLG* [2025] EWHC 2317 (Admin) is not authority for the claimed proposition that "alternatives must be examined with sufficient rigour and transparency to allow the decision-maker to understand why one has been selected over another". That case is about the proper relationship between the NPPF and PPG. Even if that proposition were an accurate statement of law, the ES (and the information gleaned from the wider EIA process) enables the decision-maker to do that.
- 5.1.14 The alleged non-compliance with NPS EN-1, EN-5, and the Horlock Rules, in relation to site selection and design, has been addressed at p. 53 of [REP2-034].
- 5.1.15 The Applicant has addressed the criticisms relating to its application of the mitigation hierarchy at pp. 54-55 of [REP2-034]. The mitigation hierarchy has been rigorously applied by the Applicant, as part of the approach to consenting set out in **Application Document 7.3 Design Development Report [APP-321]** and as part of the iterative process of EIA.
- 5.1.16 The assessment of cumulative impacts, and the scope of projects assessed, is robust and legally sufficient (see pp. 57-58 of [REP2-034]).

- 5.1.17 As to the speculative grid connection in Pegwell Bay, the Applicant has already explained that the project postdates the Proposed Project, is speculative and not reasonably foreseeable, and therefore cannot be assessed for cumulative impacts (see §7.34.10 of [REP2-024]).
- 5.1.18 The assessment of intra-project cumulative effects is also robust and legally sufficient and does not amount to or involve unlawful salami-slicing (see pp. 59-60 of [REP2-034]). KWT is unable to identify any impacts that have not been adequately considered.
- 5.1.19 As to impacts to biodiversity, particularly by HDD, this has been addressed at pp.60-61 of [REP2-034] and the documents cited therein.
- 5.1.20 As to habitat loss at Minster Marshes and the Ash Level and South Richborough Pasture Local Wildlife Site, and habitat loss for the Golden Plover, this has been addressed at pp.62-64 of [REP2-034].
- 5.1.21 As to water pollution, primarily as arising from culvert overflow, see pp.65-66 of [REP2-034] and §2.8.6 of [REP2-014].
- 5.1.22 Noise and vibration impacts, and the Applicant's compliance with the cited policy provisions, has been addressed at pp.66-68 of [REP2-034].
- 5.1.23 The Applicant's surveys of protected birds, including the golden plover, is robust and sufficient, as explained in pp.68-70 of [REP2-034] and the documents cited therein.
- 5.1.24 The Applicant's approach to assessing impacts on riparian and marine mammals was sufficient and lawful – see Table 2.8 of Application Document 9.34.1 Applicant's Detailed Responses to Relevant Representations identified by the ExA [REP1- 111], as cited in p.72 of [REP2-034], The Applicant has also comprehensively addressed these criticisms in §§2.8.10-11 of [REP2-014].
- 5.1.25 As to BNG and the scope of the BNG Parameters Line, this has been addressed at p.74 of [REP2-034]. The BNG Parameters Line is based on the design drawings submitted with the DCO application and includes all land within the Order Limits where permanent or temporary impacts to habitats are reasonably expected to occur. Natural England has confirmed that it "is satisfied that this approach will accurately reflect both the current and future biodiversity baselines and has accepted this approach on other NSIPs previously" (see B43 of [REP2-014]). All permanent and temporary impacts are captured within the BNG parameters line, including construction compounds, laydown area, haul roads and access routes (see p.75 of [REP2-034]). The Applicant has explained in detail a robust methodology for ascertaining the degree of improvements to biodiversity required to achieve 10% BNG (see pp.76-78 of [REP2-034]).

## **5.2 Comments on any further information/ submissions received by deadline 1 and deadline 1A [REP2-054]**

- 5.2.1 This document describes itself as a response to Section 2.8 of the Applicant's document 'Detailed Responses to Relevant Representations identified by the ExA (pp. 253 – 268), that being [REP2-014] and the 'Thematic Responses to Relevant Representations', that being [REP2-024]. The points raised are directly responded to in Section 9 of [REP3-064] and are otherwise substantively addressed in the documents cited by KWT, and in the Applicant's Comments on Written Representations [REP2-034].
- 5.2.2 As to site selection, this is addressed at p.20 of [REP3-064]. It is not correct that the terrestrial appraisal of sites was undertaken subsequent to marine appraisals.

- 5.2.3 As to KWT's contention that the Applicant was wrong to say that the proposed converter station and substation site "does not directly interact with national or international protected sites (or indeed locally designated sites)" because it impacts FLL relating to the Thanet Coast and Sandwich Bay SPA, the meaning of that language read in its context is clear and does not mean impacts to FLL have been ignored. To the contrary they have been carefully considered and mitigated, as explained above. In any case, the FLL which would be impacted by the Minster Converter Station and Substation was expressly considered and accounted for (see HRA §Ex1.4.47 **[REP5-036]**).
- 5.2.4 The Applicant's approach to cumulative effects and the scope of projects included for assessment is addressed above (see §5.1.16). KWT's criticisms of the robustness of the cumulative impact assessment "particularly in relation to qualifying features of the Thanet Coast and Sandwich Bay SPA" is unparticularised, and in any event, has been addressed above per §5.1.16, and see also p.60 of **[REP2-034]** and p261 of **[REP2-014]**.
- 5.2.5 KWT's criticisms as to the mitigation hierarchy have been addressed comprehensively (per the above at §5.1.15).
- 5.2.6 As to the Applicant's commitment to trenchless techniques, see p.48 of **[REP2-034]** and p.20 of **[REP3-064]**. The Applicant is confident that a trenchless approach beneath the sensitive saltmarsh is deliverable, and in this regard see the written response provided in response to Action Point 16 (document 9.72.2 Applicant's Response to Issue Specific Hearing 1 (ISH1) Action Points – Deadline 1A) **[REP1A-037]**.
- 5.2.7 KWT contends that the Applicant's 'ecological baseline' is incomplete, in the sense that the Applicant's evidence relating to the Proposed Project's impacts on the golden plover and seals is incomplete. The Applicant's response to these criticisms, set out in §§2.8.9 and 2.8.11 of **[REP2-014]**, in **[REP2-034]**, and as per the above (see §5.123), are comprehensive. A detailed explanation of the assessments of marine mammals is set out at pp.21-22 of **[REP3-064]**. The assessment is complete and robust.
- 5.2.8 As noted above, proposals for mitigation for loss of functionally linked land for golden plover have been agreed with Natural England and are secured in the Register of Environmental Actions and Commitments (REAC) **[REP5-115]**.
- 5.2.9 In response to ExQ 1MM14, the MMO agreed with the Applicant there would be no likely significant effects on seals resulting from prey unavailability (see **[REP4-126]**).
- 5.2.10 As to the hoverport, the Applicant does not intend to clear any vegetation, and the use of the land will be limited to vehicles driving on an existing track and hardstanding, neither of which is a habitat suitable for relevant protected species. The Applicant has made several commitments which will have the effect of avoiding an adverse effect (see pp.20-21 of **[REP5-132]**).
- 5.2.11 The Applicant has explained the position in respect of not pursuing a SoCG with KWT at p.22 of **[REP3-064]**. The absence of a SoCG with KWT does not indicate procedural unfairness. KWT has clearly had a sufficient opportunity to make their case to the ExA. As p.22 explains, KWT has had its say and will continue to do so and the Applicant has engaged with KWT consistently since early development and is willing to continue to do so. KWT's representations have been carefully considered and addressed, repeatedly (including by way of this document). There is no legal obligation to agree SoCGs with every stakeholder. KWT fails to explain how a SoCG would have enabled them to make their case more clearly in any regard.

## 5.3 Written Representations (WRs) relating to Change Request 1 [REP3A-023]

- 5.3.1 The Applicant's direct response to this representation is set out in Table 2.7 of [REP4-089].
- 5.3.2 The Applicant has had careful regard to the biodiversity at the hoverport site and its approach to this point is set out in detail at pp.38-39 of [REP4-089]. It has assessed this by way of aerial photographs and a site visit by professional ecologists. In that passage, the Applicant explains that it will survey the saltmarsh immediately prior to construction to ensure its survey is up to date, as required by REAC B67. The Applicant has also explained that, absent a licence from the landowner, it cannot access the land to conduct ecological surveys, though it has made every reasonable effort to do so. The Applicant addresses this issue by way of REAC B66, which provides for steps including a pre-construction survey to "ensure ecological interest features of the former hoverport are not affected during construction". The Applicant has explained that most of the vehicle track is on solid concrete without significant cracks or crevices and therefore not on vegetation. Where there are cracks, trackway will be used, such that there will be no significant disturbance on protected vegetation or species.
- 5.3.3 Whilst the case law cited by KWT is acknowledged, it is not relevant here, given the Applicant's temporary movements will not result in disturbance or degradation of protected habitats or species. The Applicant has also complied with EN-1 §4.3.3 because it has had careful regard to temporary construction impacts on the hoverport, being the vehicular movements addressed immediately above. The Applicant has had careful regard to providing the ExA with baseline data and has committed to gathering that information, once that becomes possible, pursuant to the aforementioned REAC provisions, and before disturbance could be caused to ecological features that may be identified in the survey. Site specific surveys will be carried out when they are possible.
- 5.3.4 As to protected and priority species on the former hoverport, the Applicant acknowledges the case of *Morge v Hampshire CC* [2011] UKSC 2 but it again does not accept that vehicular movements over concrete and track will disturb protected wildlife or the vegetation they may depend on. Activities will also be subject to the aforementioned REAC commitments to prevent disturbance during construction.
- 5.3.5 The case of *Wooley v Cheshire East BC* [2009] EWHC 1227 (Admin) concerned whether a local planning authority was entitled, under regulation 3(4) of the Conservation (Natural Habitats etc) Regulations 1994, to simply acknowledge potential impacts on protected species by a proposed development without weighing those impacts against the proposal. The "critical issue" in that case was "how a local authority ... should have regard to the Directive" when determining applications (see paragraph 22). In the present case, however, the Applicant has clearly had careful regard to impacts on protected ecological features, and has made binding commitments to prevent disturbing them. It has not simply acknowledged the possibility of disturbance and done nothing, as per the LPA's error in *Wooley*.
- 5.3.6 Nor has the Applicant "deferred" its assessment. It has assessed vehicular movements ahead of those movements occurring and determined they will not cause disturbance. It has also committed to assessing ecological impacts further before construction works beyond that are undertaken on the former hoverport.
- 5.3.7 The Applicant has had careful regard to the mitigation hierarchy in its environmental assessments (see, inter alia, §5.1.15 above). KWT's contention that avoidance cannot

be demonstrated is addressed in p.41 of [REP4-089]. The Applicant has sought to ensure, and has made binding commitments in that vein, that disturbance will be avoided, for the reasons explained above (in particular §§5.3.2-3).

## 6. Save Minster Marshes

### 6.1 Response to Written Representations submitted at Deadline 5 [REP5-167]

- 6.1.1 It is noted that these submissions make various legal arguments in respect of the Habitats Regulations and the WFD Regulations. The Applicant has responded to these submissions in full in **Application Document 9.134: Applicant's Comments on Other Submissions Received at Deadline 4 and Deadline 5.**

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