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Natasha Kopala
Department for Transport
Great Minster House
33 Horseferry Road
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Dear Madam

Planning Act 2008 (as amended) and the Infrastructure Planning (Examination Procedure) Rules 2010

We refer to the extensive new "evidence" of Mr Watts (HE document 9.154 dated February 2021), on which the submissions of Michael Humphries QC (HE document 9.157 dated February 2021) are founded, to highlight multiple basic flaws in it which go to the heart of the issue. These flaws would invalidate any decision of the Secretary of State to approve the DCO Scheme if adopted.

First, the "buffer" woodland is coniferous and is within the SPA. Mr Watts does not dispute that. However, he does dispute that it is thus covered by the APIS tables. Mr Watts constructs an elaborate ecological evaluation (para 2.5.21ff) which seeks to demonstrate that the Conservation Objectives, the Supplementary Advice and the APIS tables are referring only to rotationally managed coniferous plantations and do not mean what they say (namely "Coniferous woodland"). His approach is wrong in law – as made clear in *RSPB vs BAe* [2015] EWCA Civ 227 [21] – "*It was common ground that they mean what they say, and do not mean what the Secretary of State, or for that matter, Natural England or the RSPB, might wish they had said. They must be read in a common sense way and in context. They are conservation objectives for an area that has been classified of being of European significance under the Wild Birds Directive."* His attempt to rewrite the documents by reference to ecological considerations is misconceived in law and impacts the rest of his analysis.

Second, there is thus and contrary to his whole analysis a relevant Air Quality target for the woodland for the Nightjar and Woodlark which is not being met, the achievement of which will be delayed by the Scheme and which, because of the misdirection of law, has been left out of account in the assessment of integrity.

Third, he seeks to justify his claim that the Nightjar do not forage in the woodland and to rebut RHS's evidence to the contrary:

(1) he refers to the HE surveys which were carried out – but he inexplicably fails to note that the surveys in the woodland (one year only) were *visual* surveys just before dawn / just after dusk and therefore wholly unsuited to identifying nighttime foraging activity of

a species which is mainly active at night. These surveys cannot be understood as casting any light on where the nightjars forage. Fundamentally there have been no surveys of nighttime foraging activity. Whilst it is correct that the species do not nest in the woodland, Mr Watts has no evidential base for his contention that the species "do not utilize the established woodland buffer" (2.5.22 – 2.5.23); and

(2) he relies on K Sharps's work on nightjar activity in the Thetford Forest but has misunderstood its conclusions. It shows that nightjar use and prefer structurally diverse landscapes with open canopy plantation forest alongside open areas – the very features exhibited by this part of the SPA and the "buffer" woodland in particular. These features are readily apparent on a site visit.

Fourth, he assumes without any evidence (and contrary to the available evidence) that the nightjar secure all the food they require from the heathlands and/or that the food resource from the heathlands is adequate and that that from the woodland is "a small element" of the relevant species resource [2.5.25]. His conclusion that it is "more than likely" that the open heathland provides all the invertebrate resource that nightjars required is mere conjecture, backed up by no surveys and inconsistent with the scientific paper on which he relies (Sharpe). Further it is contrary to HE's own earlier acceptance that invertebrate from the woodlands contribute to the food resource of the qualifying species (eg REP4-018, 4.7.15). There is no evidence as opposed to unscientific assertion that the food resource in the heathland alone is adequate to sustain a healthy population. In both Sharps' and Alexander and Cresswell's analysis the nightjar had to leave the heathland to forage in the woodland. There is no reason to suppose a different picture here. Further it is common ground that the woodland provides a food supply to the birds – see the summary of all the points where this is acknowledged by HE and NE in REP12-056 paras 83 – 84 and see also HE's REP7-008 para 2.2.5 - 21.

Fifth, based on those misdirections and flawed and unevidenced assumptions he confidently asserts that the woodland is not part of the habitat of the qualifying features; that the woodland does not provide a supporting process to the habitats on which the qualifying species rely; and that impacts on the woodland have "no bearing on" the supporting processes conservation objective. The latter two points are directly contradicted by HE's own SIAA (REP4-018 para 7.4.5-7.4.6 and Table 12) where HE acknowledges that one of the targets under the supporting process conservation objective (food availability) *is* triggered by impacts in the woodland.

Sixth, he asserts that the woodlands were only included as a buffer function. He provides no contemporaneous evidence to support this assertion. More importantly, the assertion is legally misplaced for reasons already addressed. The Court of Appeal is currently considering a case in which an issue is whether the conservation objectives of an SPA apply to each part of the SPA or whether it is sufficient that the SPA as whole meets the conservation objectives even if some activity of the relevant species is displaced from parts – *R (RSPB) v Natural England* (judgement pending). The RHS considers that the basic premise of inclusion of land in an SPA is that it constitutes the "most suitable" habitat for the species (and see *BAe* [21]) and the attempt by Mr Watts to downplay the significance of the buffer as part of the SPA is wrong in principle but necessary to justify this Scheme.

These flaws go to the heart of the logic of HE for failing to conclude that the impacts on AQ from the Scheme risk an adverse effect on the integrity of the SPA by virtue of the targets for, and impact on their achievement, in the woodland buffer. *Compton* is no answer first because there was in that case no assessment of the basic point that woodland invertebrates contribute to the SPA feeding resource and second because there is as yet in the present case no evidential base by which to assess the significance of the impact on

the Conservation Objectives. These basic gaps in the evidence have been our case all along and there is no excuse for not having filled them. Once these flaws are corrected the necessity of seeking alternatives (such as that put forward by RHS) to reduce air quality impacts is clear.

Further HE's approach fails to recognise the significance of: (1) the Management Plan aspiration that areas of the woodland buffer will be cleared / thinned - as part of the proposals to make the habitat even more important for the qualifying species by making the woodlands themselves suitable for nesting in addition to foraging. The Management Plan proposals are tied into the Conservation Objectives by the Supplementary Advice. The Scheme will therefore ensure a continued failure to achieve the Air Quality targets in an area which is to be further improved for use by the qualifying species as part of the plan to restore the SPA to full function; and (2) the fact that some of the areas of woodland buffer are to be SPA enhancement areas under the compensatory habitat proposals which are intended to provide nesting habitat for the qualifying species. The Scheme thus has within itself a basic contradiction – land which is identified as necessary compensation will be subjected to delays in meeting the SPA Air Quality targets for such land.

Yours faithfully

RICHARD MAX & CO