

Date: 31 October 2012



Thames Basin Heaths SPA  
Local Planning Authorities

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**By email only, no hard copy to follow**

Dear all,

This letter summarises Natural England's position regarding the Community Infrastructure Levy and the Thames Basin Heath SPA. This follows on from the recent TBH Officers meeting which was held in Camberley on the 8<sup>th</sup> October 2012.

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development. We aim to provide advice to Local Planning Authorities, with a solutions focus to enable delivery in line with national and international legislation.

**1. Natural England's Position**

Under the Conservation of Habitats and Species Regulations 2012 (as amended) ("Habitats Regulations"), LPA's have clear legal duties. These include the duty under regulation 9(3) that a '*...competent authority, in exercising any of their functions, must have regard to the requirements of the [Habitats and Wild Birds] Directives so far as they may be affected by the exercise of those functions*'.

Furthermore, under regulation 61(5) of the Habitats Regulations, a competent authority may only agree to a plan or project after having "ascertained" that it will not adversely affect the integrity of a European site. This means having the sufficient level of confidence and certainty of delivery in the avoidance and mitigation package.

The consideration of mitigation measures is covered in regulation 61(6) of the Habitats Regulations. This states that:

*'In considering whether a plan or project will adversely affect the integrity of the site, the 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 they propose that the consent, permission or other authorisation should be given.'*

Therefore when considering adverse affects on the integrity of a European site a competent authority can consider 'conditions' and 'restrictions' which can be imposed on a plan or project. The words 'conditions' and 'restrictions' imply, in Natural England's view, legally enforceable obligations.

Natural England continues to have concerns about the use of the Community Infrastructure Levy (CIL) to effectively deliver Suitable Alternative Natural Greenspace (SANGs) as a mitigation measure for adverse impacts on European Sites. Natural England's key concern is that the use of

CIL to secure SANG provision may not provide the certainty of funding needed to ensure that SANGs will be secured and maintained in perpetuity. Natural England is continuing discussions with DCLG and Defra on this issue.

To ensure compliance with the Habitats Regulations, we consider that each LPA will need to demonstrate, in advance of adopting a CIL charging schedule, that there is sufficient certainty of the required financial commitment to deliver SANGs to the required quality and in perpetuity. If such security can be demonstrated, we consider there is no need for a local authority to undertake an HRA assessment of its Charging Schedule. We would be happy to support such an approach at plan examinations.

Whilst it is for a local authority to determine which is the best approach to adopt to secure compliance with the Habitats Regulations, Natural England would be happy to advise on any option being considered.

At its meeting with the Thames Basin Heaths local authorities on 8 October 2012, Natural England discussed the use of a specific policy in a Development Plan Document (DPD). Natural England was also asked to consider whether a Supplementary Planning Document (SPD) approach would be suitable, and to consider the use of an approach under the Localism Act proposed by Bracknell Forest Council. Our response to each of these proposed approaches is detailed below.

## **2. Development Plan Document (DPD) Approach (the 'Poole Approach')**

The use of a specific policy in a DPD (in this case an Infrastructure DPD) to prioritise Habitats Regulations mitigation spending was considered at the Examination of Poole Council's CIL Charging Schedule, in June 2012. In the Inspector's report (PINS/Q1255/429/10), she noted that the authority had included in its DPD *'a clear policy that placed mitigation at the top of the infrastructure hierarchy.'*

Whilst recognising that concerns about the compliance of CIL with the Habitats Regulations fell outside the remit of the examination, the Inspector nevertheless concluded that the authority had *'done everything within its power to ensure that the CIL receipts will be prioritised to fund Habitats Regulation mitigation.'* In Natural England's view, the Inspector's comments are helpful and can help inform decision making in other areas.

With an adopted DPD in place which clearly states that sufficient contributions will be taken from the CIL pot for Habitats Regulations mitigation measures, before funding is used for other types of infrastructure, Natural England would be confident that funding for mitigation will be secured and that SANGs can be a viable form of mitigation.

However, Natural England's confidence that the SANGs mitigation is viable would rest on the fact that CIL spending on SANGs is prioritised in both the Charging Schedule and the DPD. This confidence would be sustained only for as long as those documents remain in force with those provisions intact. Any changes to the DPD during its lifespan would need to be consulted on afresh. Furthermore Natural England considers that suitable wording would need to be included in the DPD to explain that the mitigation prioritisation would need to be carried forward into any reviews of the DPD to ensure the provisions remain in perpetuity.

## **3. Supplementary Planning Document (SPD) Approach**

A SPD is a non-statutory document that gives guidance on how policies or proposals in DPDs will be implemented. They do not have development plan status.

Natural England would not therefore accept non-statutory SPDs as a secure mechanism for assuring Habitats Regulations compliance with regards to CIL.

## **4. Localism Act Approach (as proposed by Bracknell Forest Council)**

Sections 1 to 8 of the Localism Act 2011 provide for local authorities a 'General power of competence'. We have considered the approach put forward by Bracknell Forest Council.

Bracknell Council consider that the problems identified with CIL could be overcome by a combination of:

*Firstly, a planning condition which provides that the development shall not be occupied until the LPA has confirmed that adequate SANGs arrangements have been put in place;*

*And secondly, an agreement between the LPA and the applicant under the general power of competence in the Localism Act whereby the LPA would agree to expend money on SANGs provision within a specified period.*

In Natural England's view, this approach appears to be acceptable because it would require the local authority to enter into an agreement to spend CIL money in a certain way. Failure to comply with that agreement would lead to a breach which would be enforceable by the various parties to it, in accordance with the terms of the agreement. Therefore this appears to be another mechanism which could help provide the certainty that the mitigation will be provided for the duration that it is needed.

## **5. No Secure Approach**

It is Natural England's view that failure to provide a secure mechanism by which avoidance and mitigation measures will be delivered once the CIL charging schedule has been implemented, would be a failure to comply properly with the purpose of the Habitats and Wild Birds Directives. This would be a breach of both national and European law. Such a breach could lead not only to a successful judicial review challenge being brought against the relevant local authority, but also to a breach of European law obligations which could ultimately lead to the European Commission taking infraction proceedings against the UK Government.

This would be on the grounds of the Government's failure to ensure that European law was properly implemented in the UK. Should infraction proceedings commence and a fine be imposed on the UK Government as a result of these infraction proceedings, then under section 48 of the Localism Act 2011, the Government has the power to require public authorities to make payments, determined by the Government, in respect of that EU financial sanction.

In addition, there would be a number of options open to Natural England or any other objector if it was felt that sufficient certainty to secure compliance with the Habitats Regulations was not provided;

- 1) Appearance at the examination of the CIL Charging Schedule.
- 2) Representations made against the soundness of the next Local Plan Document, which leads to a net increase of dwellings, with appearance at examination. For example, Natural England has made representations on this matter to the Bracknell Forest Council Site Allocations DPD. Without a secure approach to CIL, then Natural England is of the opinion that there would be a likely significant effect in combination with a local authority's housing allocations.
- 3) Objection to any planning application which came forward during the period without a secure mechanism for securing CIL and seeking call in of the application by the Secretary of State where necessary.

As stated at the beginning of this letter, Natural England is committed to working with the Thames Basin Heaths Local Planning Authorities to secure positive outcomes for the SPA. We want to help resolve this issue for each of the authorities, so that the steps outlined above in section 5 are not necessary.

I hope that this information is helpful to you. If you wish to discuss this further, please do not hesitate to contact me.

Yours sincerely

Marc Turner

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*Natural England is here to conserve and enhance the natural environment, for its intrinsic value, the wellbeing and enjoyment of people and the economic prosperity that it brings*