

APPENDIX 14.1: LEGISLATION AND POLICY

The following paragraphs summarise nature conservation planning policy and legislation of relevance to this assessment.

1.1 NATIONAL PLANNING POLICY FRAMEWORK

The Government published the National Planning Policy Framework (NPPF) on 24 July 2018. Text excerpts from the NPPF are shown where they may be relevant to planning applications and biodiversity including protected sites, habitats and species.

The Government sets out the three objectives for sustainable development (economy, social and environmental) at paragraphs 8-10 to be delivered through the plan preparation and implementation level and 'are not criteria against which every decision can or should be judged.' At paragraph 8c) the planning system's environmental objective refers to 'protecting and enhancing our natural, built and historic environment' and to 'helping to improve biodiversity'

In conserving and enhancing the natural environment, the NPPF (Paragraph 170) states that 'planning policies and decisions should contribute to and enhance the natural and local environment' by:

- Protecting and enhancing...sites of biodiversity value... '(in a manner commensurate with their statutory status or identified quality in the development plan)'
- Recognising the wider benefits from natural capital and ecosystem services including trees and woodland.
- Minimising impacts on and providing net gains in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures.
- Preventing both new and existing development from contributing to or being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability.

In respect of protected sites, at paragraph 171, the NPPF requires local planning authorities to distinguish, at the plan level, '...between the hierarchy of international, national and locally designated sites; allocate land with the least environmental or amenity value...take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure; and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries.'

Paragraph 174 refers to how plans should aim to protect and enhance biodiversity. Plans should: 'identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks, including the hierarchy of international, national and locally designated sites of importance for biodiversity [a footnote refers to ODPM Circular 06/2005 for further guidance in respect of statutory obligations for biodiversity in the planning system], wildlife corridors and stepping stones that connect them and areas identified by national and local partnerships for habitat management, enhancement, restoration or creation;' and to 'promote the conservation, restoration and re-creation of priority habitats, ecological networks and the protection and recovery of priority species; and identify and pursue opportunities for securing measurable net gains for biodiversity.'

Paragraph 175 advises that, when determining planning applications, ‘...local planning authorities should apply the following principles:

- a. if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;
- b. development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination with other developments) should not normally be permitted. The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest;
- c. development resulting in the loss or deterioration of irreplaceable habitats, (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists; and
- d. development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity.’

In paragraph 176, the following should be given the same protection as habitats sites¹:

- i. potential Special Protection Areas and possible Special Areas of Conservation
- ii. listed or proposed Ramsar sites; and
- iii. sites identified, or required, as compensatory measures for adverse effects on habitats sites, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites.’

In paragraph 177 the NPPF refers back to sustainable development in relation to appropriate assessment and states: ‘the presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined.’

In paragraph 178, the NPPF refers to planning policies and decisions taking account of ground conditions and risks arising from land instability and contamination at sites. In relation to risks associated with land remediation account is to be taken of ‘potential impacts on the natural environment’ that arise from land remediation.

In paragraph 180 the NPPF states that planning policies and decisions should ensure that development is appropriate to the location and take into account likely effects (including cumulative) on the natural environment and , in doing so, they ‘should limit the impact of light pollution from artificial light on local amenity, intrinsically dark landscapes and nature conservation.’

¹ Habitats sites are defined in the glossary as ‘Any site which would be included within the definition at regulation 8 of the Conservation of Habitats and Species Regulations 2017 (as amended) for the purpose of those regulations, including candidate Special Areas of Conservation, Sites of Community Importance, Special Areas of Conservation, Special Protection Areas and any relevant Marine Sites.’

1.2 GOVERNMENT CIRCULAR ODPM 06/2005 BIODIVERSITY AND GEOLOGICAL CONSERVATION

Paragraph 98 of Government Circular 06/2005 advises that “the presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat. Local authorities should consult Natural England before granting planning permission. They should consider attaching appropriate planning conditions or entering into planning obligations under which the developer would take steps to secure the long-term protection of the species. They should also advise developers that they must comply with any statutory species’ protection provisions affecting the site concerned...”

Paragraph 99 of Government Circular 06/2005² advises that “it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted”.

1.3 STANDING ADVICE (GOV.UK)

The GOV.UK website provides information regarding protected species and sites in relation to development proposals: ‘Local planning authorities should take advice from Natural England or the Environment Agency about planning applications for developments that may affect protected species.’ GOV.UK advises that ‘some species have standing advice which you can use to help with planning decisions. For others you should contact Natural England or the Environment Agency for an individual response.’

The standing advice (originally from Natural England and now held and updated on GOV.UK³) provides advice to planners on deciding if there is a ‘reasonable likelihood’ of protected species being present. It also provides advice on survey and mitigation requirements.

When determining an application for development that is covered by standing advice, in accordance with guidance in Government Circular 06/2005, Local planning authorities are required to take the standing advice into account. In paragraph 82 of the aforementioned Circular, it is stated that: ‘The standing advice will be a material consideration in the determination of the planning application in the same way as any advice received from a statutory consultee...it is up to the planning authority to decide the weight to be attached to the standing advice, in the same way as it would decide the weight to be attached to a response from a statutory consultee.’

1.4 LOCAL PLANNING POLICY CONTEXT

The Development Plan relevant to the Application Site comprises the saved policies of the Welwyn Hatfield District Plan (Welwyn Hatfield, 2005). Of these, the following three are relevant to ecology and nature conservation at the Site:

² ODPM Circular 06/2005. *Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impacts within the Planning System* (2005). HMSO Norwich.

³ <https://www.gov.uk/protected-species-and-sites-how-to-review-planning-proposals#standing-advice-for-protected-species>

1.4.1 Policy R6: River Corridors

Relevant extract: *“Development will not be permitted which would involve the culverting or diverting of any watercourse, and/or the siting of buildings in close proximity to the river channel, unless the Council is satisfied that there would be no detriment to the river corridor.”*

1.4.2 Policy R11: Biodiversity and Development

Relevant extract:

Policy R11- Biodiversity and Development

All new development will be required to demonstrate how it would contribute positively to the biodiversity of the site by;

- (i) The retention and enhancement of the natural features of the site;**
- (ii) The promotion of natural areas and wildlife corridors where appropriate as part of the design;**
- (iii) The translocation of habitats where necessary, where it can be demonstrated that the habitat or species concerned cannot be successfully accommodated within the development;**
- (iv) The use of locally native species in planting in accordance with Policy D8 Landscaping;**
- (v) Helping meet priorities/targets set out in the Local Biodiversity Action Plan.**

1.4.3 Policy R13: Sites of Special Scientific Interest

Relevant extract:

Policy R13 - Sites of Special Scientific Interest

Proposals for development in or likely to affect Sites of Special Scientific Interest will be subject to special scrutiny. Where such development including that on land adjoining or adjacent to the sites may have an adverse effect, directly or indirectly, on the SSSI it will not be permitted unless the reasons for the development clearly outweigh the nature conservation value of the site itself and the national policy to safeguard the national network of such sites.

Where development is permitted the Council will consider the use of conditions and/or planning obligations to ensure the protection and enhancement of the site's nature conservation interest.

1.4.4 Policy R14: Local Nature Reserves

1.4.5 Relevant extract:

Policy R14 - Local Nature Reserves

Planning permission will not be granted for any development likely to have an adverse effect on local nature reserves unless it can be clearly demonstrated that there are reasons for the proposal which outweigh the need to safeguard the substantive nature conservation value of the site.

Where development is permitted which would damage the nature conservation value of the site such damage should be kept to a minimum. Where appropriate the Council will consider the use of conditions and/or planning obligations to provide appropriate compensatory measures.

1.4.6 Policy R15: Wildlife Sites

Policy R15 - Wildlife Sites

Planning permission will not be granted for any development which would have an adverse effect on Wildlife Sites or Regionally Important Geological/Geomorphological Sites unless:

- (i) It can be demonstrated that the reasons for development outweigh the need to safeguard the biodiversity of the site; and**
- (ii) Measures are taken to mitigate the effect of the development, to compensate for any residual adverse effects and to reinstate the nature conservation value of the site.**

1.4.7 Policy R17: Trees, Woodland and Hedgerows

Policy R17 - Trees, Woodland and Hedgerows

The Council will seek the protection and retention of existing trees, hedgerows and woodland by the use of planning conditions, section 106 agreements, hedgerow retention notices and tree preservation orders where applicable. New development will be required to incorporate wherever appropriate new planting with locally native species and should be in accordance with Policy D8 Landscaping.

1.4.8 Policy R20: Light Pollution

Policy R20 - Light Pollution

In order to minimise light pollution, external lighting scheme proposals, including floodlighting, will only be approved where it can be demonstrated that all of the following criteria can be satisfied:

- (i) The scheme proposed is the minimum needed for security and operational purposes or to enhance the external appearance of the building to be illuminated;**
- (ii) Glare and light spillage are minimised;**
- (iii) The amenity of residential areas is not adversely affected;**
- (iv) The visual character of historic buildings and conservation areas are not adversely affected;**
- (v) There would be no adverse impact on the character or openness of the countryside and green belt;**
- (vi) There would be no adverse effects on ecology and the natural environment including wildlife; and**
- (vii) There would be no dazzling or distraction of drivers using nearby roads.**

1.4.9 Hertfordshire Biodiversity Action Plan

The Hertfordshire Local Biodiversity Action Plan (HBP 2006) includes habitat action plans for seven habitats, of which woodland and neutral grassland are relevant to the Application Site. It includes species action plans for 16 species, of which Natterer's bat, song thrush and great crested newt are relevant to the Application Site.

1.4.10 Hertfordshire Local Wildlife Site Selection Criteria

Criteria for the selection of Local Wildlife Sites in Hertfordshire are provided in *Selection criteria for Local Wildlife Sites in Hertfordshire* (Herts LWS Partnership, 2012). Criteria for grassland include the following:

"H2.1 Where full NVC analysis is available, sites of the NVC communities listed in Appendix" [which includes, for Neutral grassland: MG4, MG5 and MG9].

"H2.2 Neutral, calcareous, acidic and marshy grassland supporting a high diversity of plant species and species indicative of substantially unimproved swards:-"

"H2.2b Neutral: Grassland site with a predominance of species characteristic of old neutral grassland with 8 or more species recorded from those listed in Appendix 5."

1.5 WILDLIFE LEGISLATION

1.5.1 The Conservation of Habitats and Species Regulations 2017

The Conservation of Habitats and Species Regulations 2017 make provision for implementing the EC Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora ('the Habitats Directive') into UK law. The Regulations also detail measures relating to the conservation of SPAs and

Special Areas of Conservation (SACs), often referred to collectively as European Sites or Natura 2000 Sites.

Local planning authorities have a statutory duty under Regulation 63 of the 2017 Regulations, to assess the implications of a plan or project on a European site. Examination of Regulation 63 indicates that this is a two stage process.

Under Regulation 63(1)(a), the first stage is to assess whether or not the plan or project is likely to have a significant effect on a European site, either alone or in combination with other plans or projects. When carrying out this initial 'screening' assessment, it is necessary to determine if the plan or project is directly connected with or necessary to the management (conservation) of the site (Regulation 63(1)(b).

If it is found to be the case that the plan or project is likely to have a significant effect on a European site, and that it is not directly connected with or necessary for the management of the site, the requirement for completing stage 2 is triggered. Stage 2 is set out at the end of Regulation 63(1). This states that (where the above conditions have been met) the competent authority (in this case the Planning Authority) shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

Although it is the duty of the local planning authority to undertake the first stage screening test, the relevant information needs to be provided to enable them, as the competent authority, to carry out their duties under the 2017 Regulations. This derives from Regulation 63(2) of the 2017 Regulations:

"A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment to enable them to determine whether an appropriate assessment is required."

The Regulations provide for the designation and protection of 'European sites', the protection of 'European protected species', and the adaptation of planning and other controls for the protection of European Sites. Under the Regulations, competent authorities i.e. any Minister, Government department, public body, or person holding public office, have a general duty, in the exercise of any of their functions, to have regard to the EC Habitats Directive.

These requirements are relevant to the proposed development because the Dorset Heaths Special Protection Area (SPA) and Ramsar site, and the Dorset Heaths Special Area of Conservation are all 100 m from the application site at their closest point. Because of this proximity, the potential effects on these designated areas have been considered in a HRA screening report, included in Appendix 4.2 The results of this assessment are summarised and incorporated in the Predicted likely effects Section below.

1.5.1.1 European Protected Species (Animals)

The Conservation of Habitats and Species Regulations 2017 consolidates various amendments that have been made to the 2010 and original (1994) Regulations which transposed the EC Habitats Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Council Directive 92/43/EEC) into national law.

"European protected species" (EPS) of animal are those which are shown on Schedule 2 of the Conservation of Habitats and Species Regulations 2010 (as amended). They are subject to the provisions

of Regulation 43 of those Regulations. All EPS are also protected under the Wildlife and Countryside Act 1981 (as amended). Taken together, these pieces of legislation make it an offence to:

“Intentionally or deliberately capture, injure or kill any wild animal included amongst these species

Possess or control any live or dead specimens or any part of, or anything derived from a these species

deliberately disturb wild animals of any such species

deliberately take or destroy the eggs of such an animal, or

intentionally, deliberately or recklessly damage or destroy a breeding site or resting place of such an animal, or obstruct access to such a place

For the purposes of paragraph (c), disturbance of animals includes in particular any disturbance which is likely—

to impair their ability—

to survive, to breed or reproduce, or to rear or nurture their young, or

in the case of animals of a hibernating or migratory species, to hibernate or migrate; or

to affect significantly the local distribution or abundance of the species to which they belong.”

Although the law provides strict protection to these species, it also allows this protection to be set aside (derogated) through the issuing of licences. The licences in England are currently determined by Natural England (NE) for development works. In accordance with the requirements of the Regulations (2010), a licence can only be issued where the following requirements are satisfied:

The proposal is necessary ‘to preserve public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment’

‘There is no satisfactory alternative’

The proposals ‘will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

1.5.1.2 Definition of breeding sites and resting places

Guidance for all European Protected Species of animal, including bats and great crested newt, regarding the definition of breeding and of breeding and resting places is provided by The European Council (EC) which has prepared specific guidance in respect of the interpretation of various Articles of the EC Habitats Directive.⁴ Section II.3.4.b) provides definitions and examples of both breeding and resting places at paragraphs 57 and 59 respectively. This guidance states that:

⁴ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC. (February 2007), EC.

“The provision in Article 12(1)(d) [of the EC Habitats Directive] should therefore be understood as aiming to safeguard the ecological functionality of breeding sites and resting places.’ Further the guidance states: ‘It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place”.

1.5.1.3 Competent authorities

Under Regulation 7 of the Conservation of Habitats and Species Regulations 2017 (as amended) a “competent authority” includes “any Minister of the Crown..., government department, statutory undertaker, public body of any description or person holding a public office.

In accordance with Regulation 9, “a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the [Habitats and Birds] Directives. This means for instance that when considering development proposals a competent authority should consider whether EPS or European Protected Sites are to be affected by those works and, if so, must show that they have given consideration as to whether derogation requirements can be met.

1.5.2 The Natural Environment and Rural Communities (NERC) Act 2006

This Act places a duty on all public bodies to have regard to the conservation of biodiversity when exercising their duties, and requires the secretary of state to identify a list of habitats and species which are of principal importance for the conservation of biodiversity in England (Section 41 habitats and species). The presence of species or habitats of principal importance is a material consideration in planning decisions, in accordance with the NPPF and PPG.

Descriptions of Biodiversity Action Plan Priority Habitats (Maddock, 2011) assist in the identification of habitats of principal importance. Based on these criteria, and on the Phase 1 habitat survey, two areas within the proposed location for the ICF show some conformity to descriptions of habitats of principal importance (i.e. open mosaic habitat and acid grassland). However, because of their poor condition and small area, these areas are considered to be of relatively low (i.e. local) ecological value.

1.5.3 The Wildlife and Countryside Act 1981 (as amended)

This Act provides national legislation to implement the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and Council Directive 79/409/EEC on the conservation of wild birds (Birds Directive) in Great Britain. The Act provides for the notification and confirmation of Sites of Special Scientific Interest (SSSIs), provides protection to all wild birds and special protection for certain species of birds, animals and plants listed in the Schedules of the Act.

1.5.3.1 Nesting Birds

All nesting birds are protected under Section 1 of the Wildlife and Countryside Act 1981 (as amended) which makes it an offence to intentionally kill, injure or take any wild bird or take, damage or destroy its

nest whilst in use or being built, or take or destroy its eggs. In addition to this, for some rarer species (listed on Schedule 1 of the Act), it is an offence to disturb them whilst they are nest building or at or near a nest with eggs or young, or to disturb the dependent young of such a bird.

1.5.4 The Countryside Rights of Way Act, 2000

This Act primarily provides for public access on foot to areas of open land. However, it also strengthens the legal protection for species under the Wildlife and Countryside Act, 1981 (as amended) and introduces a new offence relating to reckless disturbance and/or killing and injury of these species. The CRoW Act also provides increased powers for the protection and management of SSSIs.

1.5.5 The Protection of Badgers Act, 1992

This Act makes it an offence to willfully kill, injure, take, possess or cruelly ill-treat a badger, or to attempt to do so; or to intentionally or recklessly interfere with a sett. Sett interference includes disturbing badgers whilst they are occupying a sett, as well as damaging or destroying a sett or obstructing access to it. This legislation was introduced for reasons of animal welfare, rather than nature conservation. Badgers are a widespread and common species.

ODPM Circular 06/2005⁵ provides further guidance on statutory obligations towards badger within the planning system. Of particular note is paragraph 124, which states that “The likelihood of disturbing a badger sett, or adversely affecting badgers’ foraging territory, or links between them, or significantly increasing the likelihood of road or rail casualties amongst badger populations, are capable of being material considerations in planning decisions.”

Natural England provides Standing Advice⁶, which is capable of being a material consideration in planning decisions. Natural England recommends mitigation to avoid impacts on badger setts, which includes maintaining or creating new foraging areas and maintaining or creating access (commuting routes) between setts and foraging/watering areas.

No signs of badgers were found at the Site, but there is some potential for badgers to excavate setts there in the future.

1.5.6 The Wild Mammals (Protection) Act, 1996 (as amended)

Under the Wild Mammals (Protection) Act 1996 it is an offence to cause unnecessary suffering to wild mammals, including crushing and asphyxiating. This Act is primarily concerned with animal welfare and aims to prevent cruelty. As a result, offences include those actions with the intent to inflict unnecessary suffering. A wild mammal includes any mammal which is not domestic or captive. Fox, wild deer and other mammals such as rabbits are therefore covered by the Act.

⁵ ODPM Circular 06/2005. *Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impacts within the Planning System* (2005). HMSO Norwich.

⁶ <http://www.naturalengland.org.uk/ourwork/planningdevelopment/spatialplanning/standingadvice/specieslinks.aspx>