

FAO: Carly Stoddart  
Development, Economy and Transport  
Regeneration, Community and Culture  
Medway Council  
Gun Wharf  
Dock Road  
Chatham  
ME4 4TR

By email: [carly.stoddart@medway.gov.uk](mailto:carly.stoddart@medway.gov.uk)

15 April 2014

Dear Ms Stoddart

**Planning application reference: MC/11/2513**

**Outline Planning Application for mixed used development at Lodge Hill Chattenden, Rochester, Kent. Chattenden Woods and Lodge Hill Site of Special Scientific Interest (SSSI)**

Thank you for consulting the RSPB on the above application. The RSPB **objects** to this Outline Planning Application (**OPA**) and requests that Medway Council **refuse** outline planning permission, for a development proposal that would constitute one of the largest single losses of SSSI since the Wildlife and Countryside Act 1981 came in to force. It is hard to see how such a development could be described as 'exemplary for the way it minimises its impact on the environment'. Indeed, we were both surprised and dismayed that the OPA has continued to progress when the principle of the development has already been considered by an inspector and found to be non-compliant with national planning policy at the examination into the draft Medway Core Strategy, making the Core Strategy unsound.

The principal reasons for our objection are set out in summary below with detailed comments provided in the attached Annex.

The RSPB objects for the following reasons:

- **The proposal does not comply with the tests and policies set out in the National Planning Policy Framework (NPPF) in relation to development on SSSIs (Paragraphs 14, 17 and 118):**
  - The evidence provided does not support the claim that Lodge Hill is a 'transformative' development for Medway or the Thames Gateway and that there are no reasonable or realistic alternatives for meeting the objectively assessed housing and employment needs. There is an urgent need for a new strategy for meeting Medway's housing and employment needs;

**South East England  
Regional Office**  
1st Floor, Pavilion View  
19 New Road  
Brighton  
BN1 1UF

**Tel** 01273 775333  
**Fax** 01767 685535

[rspb.org.uk](http://rspb.org.uk)



The RSPB is part of BirdLife International,  
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working to give nature a home around the world.

- Inadequate evidence is provided to support the claim that the presumption against development of a SSSI does not apply in this case. It has not been demonstrated that the benefits this proposal will deliver outweigh either the harm to the special interest features of the Chattenden Woods and Lodge Hill SSSI or the broader national network of SSSIs.
- In any event, the tests of the NPPF require that benefits of the proposed development must be weighed against the harm to the SSSI and the broader network, and not the residual harm of the proposal taking into account any proposed compensation. Compensation is a last resort (as set out in paragraph 118) and should only be considered when it has been proven that no alternatives to the proposal exist, and that the benefits outweigh the harm to the SSSI in its notified state without the development.
- **Lack of legal certainty and security regarding how the proposed mitigation and compensation measures will be achieved and delivered. The majority of the proposed mitigation and compensation measures that are relied upon by the Applicants are outside of the red line boundary for the OPA and therefore do not form part of the OPA.** There are no firm proposals for when, how, where, the timing and phasing of the delivery and the long term management of the off-site mitigation and compensation schemes on which this proposal relies and which can be relied upon by a decision-taker. The OPA does acknowledge that separate planning consents are likely to be needed for delivery of the compensatory measures. These will be necessarily subject to separate regulatory process, the outcome of which cannot be pre-empted. Notwithstanding that fundamental issue, in the absence of a Section 106 Agreement or any other legally binding agreement to accompany the OPA there is no certainty regarding the delivery of the proposed mitigation and compensation measures.
- **The OPA incorrectly relies on the classification of a significant proportion of the application site being considered to be 'Previously Developed Land' (PDL).** An independent planning inspector has stated the proportion of the site that could be described as PDL is towards the lower end of the range presented by the parties in evidence at the Core Strategy Examination (between 15-53%). The presumption in favour of development in relation to PDL is therefore not relevant, and in any case, does not apply to PDL that is 'of high environmental value' (paragraph 17, NPPF) such as SSSI.
- **The harm to the SSSI is far greater than predicted by the Applicant because among other things:**
  - The overall assessment of the impact of the proposed development and potential compensation on nightingale numbers is flawed and underestimates the impacts of the proposal on this feature of the SSSI and its implications for the broader SSSI network.
  - The mitigation proposals in relation to the retained areas of SSSI are inadequate and fail to mitigate the recreational and other effects of the proposal.
  - The development would result in the permanent loss of the nationally scarce neutral grassland feature of the SSSI as the 'mitigation' proposals are unfeasible and untested.
- **The assessment of visitor impacts on other nationally and internationally important designated sites that have the potential to be affected by increased recreational pressure from the proposal is flawed.** A full appropriate assessment of these impacts under the Conservation of Species and Habitats Regulations 2010 (as amended) will be required.

As set out above, the RSPB believes that this proposal fails to comply with national planning policy and should therefore be refused on that basis alone, and that the consideration of compensation is therefore irrelevant. However, notwithstanding this, we have provided detailed comments in the Annex on the compensation principles as proposed in the interest of completeness. Our expert view is that Chattenden Woods and Lodge Hill SSSI is a nationally important site, with a grassland-scrub mosaic and associated flora and fauna that cannot be compensated for.

- **The proposals for compensating for the loss of nightingale habitat are experimental and inadequate.**
  - **Risks and uncertainty.** The risks and uncertainty associated with compensating for the loss of the nightingale at Lodge Hill are consistently underestimated and underplayed in the Environmental Statement (**ES**) and supporting documents. The RSPB believes that attempting what would be an experimental compensation scheme on a nationally important single species population is an unacceptable risk.
  - **Size.** Determining the area of habitat needed requires known risks to be addressed, of which there are many associated with the provision of nightingale habitat, many highlighted by the British Trust for Ornithology. The Applicant exhibits persistent undue optimism in describing its ability to create and maintain optimum habitat conditions. There is insufficient information to demonstrate the Applicant has addressed the list of uncertainties. The Applicant's approach glosses over fundamental ecological risks and assumes that any such problem can be overcome by a small increase in habitat area. Creating more of the same will do nothing to address any inherent weakness in what is a highly experimental scheme.
  - **Time lag.** The ES underestimates the time lag between the destruction of nightingale habitat and the creation of suitable habitat on the Nightingale Compensation Land (**NCL**). The RSPB's view is that the time lag would be much longer than the minimum of four years suggested in the ES and that the Applicant's timescales should not be relied upon.
  - **Habitat creation and management.** The RSPB has considerable doubts that the proposed techniques for habitat establishment and long-term management would be successful, and that the habitat would attract sufficient birds in the timescales described. The rationale behind the site selection process used to identify suitable compensation land at Shoeburyness/Foulness is not clear, and a suitable block of land within the potential NCL area has not been identified. The area is at risk to tidal surges, and its long-term viability as suitable compensation land cannot be considered secure: ecologically, legally or financially.
  - **The surrounding area is heavily designated, and impacts on the Foulness SPA/Ramsar site, Crouch and Roach Estuaries SPA/Ramsar site and Essex Estuaries SAC will need to be considered.** A full appropriate assessment is needed to be carried out unless it can be demonstrated that the NCL would not have a likely significant effect on the interest features of those sites. The Applicant's wintering bird survey data is incomplete. It is highly likely that some of the land that might form the NCL is used for roosting and feeding birds from the Foulness SPA/Ramsar site e.g. wintering Brent geese, and therefore may be, at the least, functionally linked to the SPA.

In determining this OPA, Medway Council must demonstrate that it has discharged its legal duties in relation to SSSIs, international sites, wild birds and biodiversity. These are set out in the Annex.

Notwithstanding our objection and our call for the OPA to be rejected by Medway Council, we note that this application is being treated as a departure application. Should Medway Council be minded either to pass the OPA to the Secretary of State for determination, or to grant permission itself, we strongly support the opportunity for this application to be called-in and determined through the rigour of a public inquiry, given the scale of proposed damage to a nationally important nature conservation site and the implications of this proposal for national planning policy in relation to SSSIs.

This response focuses on areas where the RSPB do not accept the evidence or analysis presented by the Applicant in the replacement OPA and supporting documents. It only covers the key issues. Where the RSPB do not comment on a matter, this does not mean that we accept the Applicant's approach. We reserve the right to make further comments on such matters. If you have any queries or would like to discuss the RSPB's position further, please do not hesitate to get in touch.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'L. Baker', is positioned above the typed name.

Lucy Baker  
Site Conservation Team Manager

## Annex

### The RSPB's detailed comments on the Outline Planning Application for mixed used development at Lodge Hill Chattenden, Rochester, Kent. Planning Application reference: MC/11/2513

#### 1. Nature conservation law

- 1.1. Medway Council (**the Council**) must comply with a number of legal duties under nature conservation law in relation to its determination of the Lodge Hill Outline Planning Application (**OPA**). These are set out below.
- 1.2. Other aspects of the relevant legislation, in particular the requirements of the Conservation of Species and Habitats Regulations 2010 (as amended) (**the Habitats Regulations**) in relation to international sites that also apply to the OPA are discussed in the appropriate sections of our response.

#### **Sites of Special Scientific Interest and the Wildlife and Countryside Act 1981 (as amended)**

- 1.3. Sites of Special Scientific Interest (**SSSIs**) are the most important sites for national wildlife and natural features in England. In England, SSSIs are notified by Natural England who has a duty under Section 28 of the Wildlife and Countryside Act 1981 (as amended) (**the WCA**) to notify SSSIs where it is of the opinion that an area of land is of special interest by reason of any of its flora, fauna, or geological or physiographical features and to secure their day-to-day protection and conservation.
- 1.4. The purpose of SSSIs is defined in the Defra Code of Guidance<sup>1</sup> (paragraph 1) as being:

*“...to safeguard, for present and future generations, the diversity and geographic range of habitats, species, and geological and physiographical features, including the full range of natural and semi-natural phenomena throughout England...”*
- 1.5. SSSIs make a fundamental contribution to the ecological processes upon which we all depend and to human quality of life. Individual SSSIs may also provide, or safeguard for the future, valuable research, educational and amenity resources.
- 1.6. Under Section 28G(2) of the WCA, public bodies must:

*“...take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest”*
- 1.7. It is the RSPB's opinion that granting permission does not comply with this duty as the OPA, in its current form, will permanently damage the Chattenden Woods and Lodge Hill SSSI and its notified features (see paragraphs 1.10-1.12 below).

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<sup>1</sup> Defra (2003): Sites of Special Scientific Interest: Encouraging Positive Partnerships.

- 1.8. The Defra Code of Guidance (paragraph 73) states that the Secretary of State expects that all public bodies will take full account of their responsibilities under this duty whenever their actions may affect SSSIs.
- 1.9. Government Circular 06/2005<sup>2</sup>, paragraph 61 requires all section 28G authorities, including local planning authorities, to apply strict tests when carrying out any functions within or affecting a SSSI, to ensure that they avoid or at least minimise adverse affects. It also requires public bodies, which includes the MoD, adopt the highest standards of management in relation to SSSIs in their ownership and to take positive steps wherever possible to conserve and enhance the special interest features of a SSSI where their activities may be affecting it or as opportunities arise in the exercise of their functions.

***The Chattenden Woods and Lodge Hill Site of Special Scientific Interest***

- 1.10. The Chattenden Woods and Lodge Hill SSSI (**the SSSI**) was notified on 13 March 2013 under section 28C of the WCA, and confirmed by Natural England as such at the end of 2013. The site is notified for its mosaic of habitats, including long-established semi-natural woodland (areas of which are recorded as ancient semi-natural woodland), dense scrub and neutral grassland. The site is notified for its nationally important breeding aggregation of nightingales as it supports more than 1% of the GB population.
- 1.11. This recent notification extended the area of the original Chattenden Woods SSSI, originally notified in 1968 for its coppice-with-standards woodland on London Clay, as well as scattered scrub and breeding birds including woodpeckers, turtle dove, nightingale and hawfinch. The SSSI was renotified in 1984 for, among other things, its woodland breeding bird assemblage.
- 1.12. The last condition assessment was carried out in March 2014 and showed that 94% of the site was assessed as being in favourable condition, with the remaining area unfavourable with no change.

**The Natural Environment and Rural Communities Act 2006**

- 1.13. Section 40 of the Natural Environment and Rural Communities Act 2006 sets out a public authority duty to conserve biodiversity. It states that:

*“Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.”*

- 1.14. The RSPB considers that by granting this application the Council would not be acting consistently with this duty.

**The Conservation of Species and Habitats Regulations 2010 (as amended)**

- 1.15. The RSPB wishes to highlight that compliance with Regulation 9 of the Habitats Regulations is required. Regulation 9A(1) of the Regulations provides:

*“(1) Without prejudice to regulation 9(1), the appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must take such steps in*

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<sup>2</sup> Government Circular 06/2005: Biodiversity and geological conservation – statutory obligations and their impact within the planning system, 16 August 2005.  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7692/147570.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7692/147570.pdf).

*the exercise of their functions as they consider appropriate to secure the objective in paragraph (3), so far as lies within their powers.*

*(2) Except in relation to the marine area, the Environment Agency, the Forestry Commissioners, local authorities, the Broads Authority and National Park authorities must take such steps in the exercise of their functions as they consider appropriate to contribute to the achievement of the objective in paragraph (3).*

*(3) The objective is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive...*

*...(7) In considering which measures may be appropriate for the purpose of securing or contributing to the objective in paragraph (3), appropriate account must be taken of economic and recreational requirements."*

1.16. And in addition Regulation 9A(8) provides that:

*"So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the area to which the new Wild Birds Directive applies)".*

## **2. National Planning Policy Framework**

2.1. The National Planning Policy Framework (**NPPF**) is the Government's flagship planning policy. It is designed to encourage the provision of housing where it is needed, while at the same time protecting the environment from damaging development.

### **The need for strategic planning to meet objectively assessed needs**

2.2. The NPPF sets out in a number of policies the importance of local plan making in delivering sustainable development and meeting objectively assessed needs:

2.3. Paragraph 12 of the NPPF states:

*"This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place."*

2.4. Paragraph 14 of the NPPF states:

*"At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.*

*For plan-making this means that:*

- *local planning authorities should positively seek opportunities to meet the development needs of their area;*

- *Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:*
  - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
  - *specific policies in this Framework indicate development should be restricted.*<sup>9</sup>

*For decision-taking this means:*<sup>10</sup>

- *approving development proposals that accord with the development plan without delay; and;*
- *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*
  - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
  - *specific policies in this Framework indicate development should be restricted.*<sup>9</sup>

<sup>9</sup> *For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.*

<sup>10</sup> *Unless material considerations indicate otherwise.”*

- 2.5. Paragraph 17 of the NPPF sets out 12 core principles that should underpin both plan-making and decision taking.
- 2.6. Both the Applicant’s Replacement Planning Strategy February 2014 (Document 01) (**RPS**) and the Development Needs and Alternatives Report February 2014 (Document 03) (**DNAR**) selectively reference the principles set out in NPPF paragraph 17. These documents refer to the principles that planning should:
- [bullet point 3] *“proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities;”*
- 2.7. However, there is no acknowledgement in either of these documents of the principle relating to the natural environment to:
- [bullet point 7] *“contribute to conserving and enhancing the natural environment and reducing pollution. Allocations of land for development should prefer land of lesser environmental value, where consistent with other policies in this Framework;”*
- 2.8. Paragraph 17 also states that planning should:
- [bullet point 1] *“be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework*



*within which decisions on planning applications can be made with a high degree of predictability and efficiency;”*

#### **Lack of strategic planning in Medway**

- 2.9. The withdrawal of the Council’s Draft Core Strategy (**CS**) for a second time (and specifically due to its reliance on the proposed allocation at Lodge Hill that was considered by the Inspector to be unsound) creates a serious lacuna in the strategic planning for Medway, in which the granting of permission for Lodge Hill and its concomitant implications for the SSSI would be inappropriate.
- 2.10. The evidence provided in the DNAR and Applicant’s Replacement Economic Strategy February 2014 (Document 04) (**RES**), which articulates the imperative of the social and economic development needs that it is claimed Lodge Hill will deliver, fails to support the claim that Lodge Hill will be the transformative development that objectively assessed needs show Medway and indeed the Thames Gateway requires. Whilst the RSPB does not dispute the objectively met needs regarding housing and employment, the information presented in the RES does not support the assertion that Lodge Hill is the solution for meeting those needs.
- 2.11. The Applicant’s DNAR has been developed specifically as an attempt to justify the requirement in paragraph 118 of the NPPF (see paragraphs 2.28-2.29 below) to demonstrate that an exception to the presumption against development of a SSSI applies to the OPA (on the basis that the claimed benefits of the development at Lodge Hill outweigh the harm to both the SSSI and the broader network, and that those same benefits could not be met on alternative sites) (RPS, paragraph 6.23).
- 2.12. However, the DNAR demonstrates an increased demand for both housing and employment in Medway that serves to emphasise (i) the serious lack of adequate and strategic local planning in Medway and the wider area and (ii) the need for a thorough strategic review. It does not provide a credible justification for continuing with the Lodge Hill proposal. It provides only very narrow and limited grounds to support Lodge Hill as the solution to meeting those needs (see paragraphs 2.16-2.21 below). Instead it makes a compelling argument for a fresh approach to the strategic planning for how objectively assessed needs can be met in Medway and one that does not include reliance on a single proposal at Lodge Hill.
- 2.13. It is clear that either new large scale sites need to be found and/or it has to be accepted that Medway cannot meet its needs alone. Even if all of the identified options that have been considered so far were to come forward together, they still would not meet the identified needs set out in the DNAR (as recognised in paragraph 5.8 of the DNAR). The overall point remains that there is an urgent need for a new strategy for meeting Medway’s housing (and employment) need.
- 2.14. The Council needs to accelerate the major review of its call for sites planned for 2015, making clear that sites need to be large scale developments that may not have been considered before. A properly considered strategy is urgently needed that:
  - (i) does not promote environmentally damaging development that fails to comply with national planning policy in the interest of plugging a short term gap;
  - (ii) reflects the evidence provided in the Council’s October 2013 SA Addendum that Lodge Hill is not indispensable, and
  - (iii) meets the needs set out in the DNAR.

- 2.15. If a thorough, up-to-date strategic review shows that those needs cannot be met in Medway, then a strategy must be developed to deal with that eventuality. In the absence of an effective strategic planning approach, the scale of the needs that must be met and the solutions required to meet these will only continue to grow.

### ***Annual delivery of housing***

- 2.16. Paragraph 3.48 of the DNAR sets out that Medway's housing needs are considered to be significantly above the level previously proposed by the Council in its now withdrawn CS, which proposed a delivery target of 815 houses per annum for 2006-2028. Instead, the DNAR projects that annual housing delivery of between 1,020 to 1,353 homes is needed, which suggests the need for an additional supply of between 3,000 – 8,000 dwellings over a 15 year plan period, subject to development capacity and on top of the previously identified allocation which included up to 5,000 homes at Lodge Hill (paragraph 3.60, DNAR). Lodge Hill is only proposing to deliver 300 houses per annum, which will make only a relatively small contribution to the CS target of 815, let alone the revised figures set out in the DNAR.
- 2.17. Both the DNAR (paragraph 3.49) and the RPS (paragraph 6.30) reject the possibility of neighbouring authorities being able to help meet objectively assessed needs on the basis that four of the five authorities have current or proposed housing targets lower than projected household growth and the fifth (Dartford) is '*seeking to maximise its capacity through regeneration of strategic sites*'. However, if neighbouring authorities have the sites available they have a duty to co-operate (paragraph 178 of the NPPF) and make provision to help meet objectively assessed needs particularly in relation to strategic priorities including homes and employment, regardless of the indication of their intention to under provide.

### ***Employment provision***

- 2.18. The DNAR identifies Medway as having underperformed compared to its neighbours and similar authorities in south-east England (paragraph 3.55), with a local economy characterised by a low number of jobs and low productivity, and therefore, unlike other authorities of its size, is not an employment hub for the wider area but instead sees major out-commuting. It describes this (paragraph 3.55) as an '*inherently unsustainable employment pattern which would be exacerbated if Medway were not to significantly increase employment opportunities within the Borough.*'
- 2.19. The economic vision for Lodge Hill, as set out in the RES, states that the aim at Lodge Hill will be to '*provide employment opportunities which maximise employment rates and reduce the need to travel for Lodge Hill residents, and provide jobs for the residents of the Hoo Peninsula and Medway;*' (paragraph 4.1).
- 2.20. However, neither the evidence provided in the RES or the DNAR provides any compelling justification that Lodge Hill will be an essential component capable of delivering objectively assessed employment needs, nor that it will be the type of transformative and '*game changing*' development that Medway and the Thames Gateway needs and which it claims to deliver (DNAR paragraphs 4.5 and 4.46, RPS paragraph 6.38).
- 2.21. A considerable amount of new employment floorspace is needed in Medway - the DNAR states (paragraph 3.31) that, based on up to date population projections there is a 127,781m<sup>2</sup> deficit of commercial floorspace in the M2 Access Sub Area, even with the inclusion of Lodge Hill. However, the OPA at Lodge Hill adopts a highly cautious approach to meeting these needs with only 44,100m<sup>2</sup> of commercial floorspace based on a **medium** [emphasis added] density

configuration proposed (paragraph 5.5, RES) rather than a high density solution that would have the capacity to provide up to 70,000m<sup>2</sup>. Furthermore, it is only intended to release and develop this commercial floorspace incrementally (paragraph 5.3, RES), broadly in line with the residential development over a 17 year build out period (paragraph 6.5, RES). The effect of this will be that employment opportunities will be delivered only in response to demand generated by the new housing, making it difficult to justify Lodge Hill as the transformative, game changing development the Applicant claims it to be.

#### **Reliance on historical planning policy**

- 2.22. Both the DNAR (Section 2), the RPS (Sections 2 and 6), the RES (section 2) and the Applicant's Replacement Sustainability Report February 2014 (Document 11) (**RSR**) rely heavily on historical strategic planning policy regarding the assertion that Lodge Hill is unique in terms of what it will deliver for Medway and the wider Thames Gateway.
- 2.23. Paragraphs 6.48 and 6.49 of the RPS state that Lodge Hill has consistently been considered the most appropriate location for the delivery of a new settlement against the reasonable alternatives and that in the case of historic and current policy documents, this has included scrutiny by an independent Inspector(s)/Panel(s). It fails however to recognise that the most recent draft Medway CS was withdrawn precisely due to the proposed strategic allocation for a new freestanding settlement at Lodge Hill on the basis that it was unsound (see the Medway CS Examination Inspector's letter (**Inspector's letter**), dated 21 June 2013 to Medway Council).
- 2.24. The DNAR (paragraph 2.7) refers to the inclusion of Lodge Hill in the South East Local Enterprise Partnership's (**LEP**) draft Strategic Economic Plan 2013 as one of the specific locations where the LEP believe significant growth can be achieved and which has the potential for a transformational impact across the Thames Gateway. This plan assumed that Lodge Hill would be delivered through the Council's CS (as did the draft Kent and Medway Growth Plan 2013) but the DNAR fails to recognise that the CS failed under scrutiny by an Inspector as a direct result of the Lodge Hill allocation.
- 2.25. The RSR (see section 5.4) relies heavily on Lodge Hill having development potential in historic planning documents but states that it has not been allocated. A sustainability appraisal should assess a proposal on its merits, not taking account of any previous identification of development potential in the past.
- 2.26. The Inspector's letter concludes (paragraph 7.2) that the revocation of the South East Plan and the notification of Lodge Hill as a SSSI are material changes in circumstance and that the allocation of development at Lodge Hill is therefore inconsistent with national planning policy and declared the relevant CS policy (CS33) unsound as a result.

#### **NPPF policies on Sites of Special Scientific Interest**

- 2.27. The policies set out in the NPPF do not prohibit development which damages or destroys SSSIs, but they do steer development away wherever possible from such important places for nature. NPPF Paragraph 14 and footnote 9 (see above) specifically identify SSSIs as an example of where policies within the NPPF indicate development should be restricted.
- 2.28. NPPF paragraph 118 sets out policies in relation to the conservation and enhancement of biodiversity, with specific policies relating to SSSIs:

*“When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:*

- if significant harm 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;*
- proposed development on land within or outside a Site of Special Scientific Interest likely to have an adverse effect on a Site of Special Scientific Interest (either individually or in combination with other developments) should not normally be permitted. Where an adverse effect on the site’s notified special interest features is likely, an exception should only be made where the benefits of the development, at this site, clearly outweigh both the impacts that it is likely to have 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;*
- development proposals where the primary objective is to conserve or enhance biodiversity should be permitted;*
- opportunities to incorporate biodiversity in and around developments should be encouraged;*
- planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss; and...”*

2.29. In exceptional circumstances development on a SSSI can be possible (even if it may not be desirable), but the tests set out in the first two bullet points of paragraph 118 are intended to ensure that these special places are only damaged (i) where there really is no alternative location for the development and (ii) where the benefits of development at that site clearly outweigh both the impacts on the features of the SSSI itself and any broader impacts on the national network of SSSIs. There is no evidence provided in the OPA and its supporting documents to support the claim that the benefits of the development that would be delivered at Lodge Hill clearly outweigh any likely adverse impacts on the relevant SSSI features (nor any broader impact on the national network of SSSIs) (see paragraphs 2.16-2.21). Therefore there is no evidence that Lodge Hill should be considered an exception to the presumption against development of a SSSI as the Applicant suggests.

#### ***The avoid-mitigate-compensate hierarchy***

2.30. The Inspector’s letter confirms that paragraph 118 of the NPPF requires an avoid-mitigate-compensate approach. This is also acknowledged in the Nightingale Compensation Report February 2014 (Environmental Statement (ES), Document 12, Appendix 5U), which states *“options for avoiding and mitigating the effects of the proposed development should be exhausted before opting for compensation”* (paragraph 2.2.3). Paragraph 118 of the NPPF clearly states that compensation is a last resort only to be considered when it has been proven that no alternatives to the proposal exist, and that the benefits outweigh the harm to the SSSI in its notified state without the development and any broader impacts on the national SSSI network. Paragraph 6.324 of the RPS also states that paragraph 118 of the NPPF provides for compensatory habitat to be provided where it is not possible to either avoid or mitigate significant harm resulting from the OPA.

2.31. However, paragraph 6.78 of the RPS states the requirements of the NPPF must be balanced with other relevant material considerations, that case law makes clear that the application of the 'mitigation hierarchy' does not dislodge all other material considerations and that,

provided due account is taken of the potential harm and the measures considered or proposed to address that harm, it is not necessary for an applicant to exhaust every stage in the hierarchy before turning to the next. It goes on to state that in particular, whether harm is addressed by avoidance, mitigation, compensation, or a combination of all or any of them is not determinative and that the decision-maker is entitled to consider the environmental information as a whole (including a consideration of avoidance, mitigation and/or compensation measures) and to thereby assess the nature, extent and acceptability of the effects that a development will have on the environment. On this basis, the Applicant claims that it is right that the planning authority takes into account any avoidance, mitigation and compensation measures when reaching a conclusion as to the likely effects of the development and the weight that should be afforded.

- 2.32. Firstly, the RSPB, until informed of the relevant judgments and having considered them and reviewed the reliance placed on them, would question the statement made in paragraph 6.78.
- 2.33. Secondly, the RSPB would also question the Applicant's statement that the NPPF must be balanced with other relevant material considerations. This may be true for a proposal that is in line with an up-to-date local plan, but for an application such as this (which the RPS, paragraph 3.4 acknowledges is to be considered a departure application) and one which has not provided sufficient evidence to show that its mitigation measures are ecologically robust and legally and financially secured (see the RSPB's separate comments on these points), the RSPB argues that the Applicant cannot rely on its interpretation of the NPPF, paragraph 118 as set out in paragraph 6.78 of the RPS, particularly in the absence of an adequate review of alternative sites with less harmful impacts (see paragraphs 2.54-2.58 of this Annex).
- 2.34. Paragraph 6.86 of the RPS claims that through various design principles the harm to the SSSI can predominantly be mitigated, but this completely ignores the fact that the majority of the nightingale population at the site will be displaced through destruction of its habitat, referring to the effects on nightingale as 'residual impacts' (paragraph 6.87) that will be dealt with through compensation. On this basis, paragraph 6.87 seeks to dis-apply the 'presumption against' development as set out in the second bullet point of paragraph 118 of the NPPF on the flawed basis that any residual effects will be addressed through compensation.

### ***Residual impact***

- 2.35. As stated above, paragraph 118 of the NPPF makes it clear that compensation is a last resort. The benefits of the OPA must be weighed against the harm to the SSSI and the broader network and not against the residual harm of the proposal taking into account any proposed compensation.
- 2.36. Paragraph 152 of the NPPF requires local planning authorities to avoid significant adverse impacts on any of the three dimensions of sustainable development (economic, social and environmental) and that wherever possible alternative options which reduce or eliminate such impacts should be pursued. The Inspector's letter (paragraph 4.3) confirms that the scale of impact in relation to the SSSI and its features 'constitutes a significant adverse impact'. However, the RPS (paragraph 6.23) states that an exemption to the presumption against development on land designated as a SSSI applies in this case because the benefits of the development should be weighed against any *residual* adverse impact on the relevant SSSI features taking into account the proposed compensation and makes a reference to case law but without stating which cases are being relied upon.

- 2.37. Firstly, the RSPB wishes to be informed as to which judgments the Applicant is relying on for these statements. The RSPB, until informed of the relevant judgments and having considered them and reviewed the reliance placed on them, would question the statement made in this paragraph. For example it not clear how the decision maker can be asked to assess the benefits of the development “against any residual adverse impact on the relevant SSSI features, taking into account the avoidance, mitigation and compensation measures incorporated within the development proposals...” (as stated in paragraph 6.23 of the RPS) without sufficient clarity on the details of those mitigation and compensation measures and without them being secured at this stage (see the RSPB’s comments paragraphs 2.64-2.67). The RSPB also disputes that those measures are incorporated into the OPA.
- 2.38. Secondly, should this approach be taken, then logically the same principle of only having to balance the benefit of a development against residual impacts after compensation has been identified could be applied to any SSSI across the network where the special interest is considered capable of being compensated for. **This fundamentally undermines the purpose of SSSI designation and protection which is to safeguard these sites for present and future generations** (see paragraphs 1.4-1.5 above).
- 2.39. In the case of Lodge Hill, there is no guarantee that (i) the compensation will be successful (and therefore the degree of residual harm is at this stage unknown) (see the RSPB’s separate comments on the proposed compensation) and (ii) even if it were successful, that the Nightingale Compensation Land (**NCL**) would be designated as SSSI and therefore able to contribute to the value of the broader SSSI network. Therefore, development of the Lodge Hill site could result in the loss of the only SSSI in the UK designated for nightingale and would consequently have considerable implications for the broader network of SSSIs, as well as resulting in the loss of what is almost certainly one of the single most important sites for nightingale in the UK. The RPS (paragraph 6.92) attempts to justify the loss of the only SSSI notified for nightingale by saying that this species occurs at other SSSIs across its natural range and therefore any damage to the features at Lodge Hill is unlikely to affect the coherence of the network as a whole. This is irrelevant, as nightingale are not afforded any specific protection on those sites other than de facto by the protection afforded to the site in general through its designation as a SSSI. Neither will nightingale benefit at such sites through management specifically intended to meet their needs.
- 2.40. The RPS (paragraph 6.92) also claims that the impacts on semi-natural ancient woodland and MG5 grassland at Rough Shaw will be ‘fully addressed through avoidance and mitigation measures’ (and therefore capable of maintaining their SSSI status), that impacts on other areas of SSSI grassland will be mitigated through translocation and re-creation measures and that replacement habitat for nightingale will be created on a sufficient scale for it to be capable of being of special interest in its own right. As already stated, the RSPB strongly disagrees with the adequacy and legal certainty regarding all of these measures and argues therefore that the OPA will result in significant harm to the SSSI.

#### **The presumption in favour of sustainable development**

- 2.41. The NPPF paragraph 14 (see excerpt above at paragraph 2.4) places the presumption in favour of sustainable development at the heart of plan making and decision making, but does provide exceptions where development should be restricted in accordance with other policies within the NPPF.
- 2.42. As the RSPB demonstrates in paragraphs 4.16-4.85 of our response, the OPA and its associated mitigation and compensation measures will result in a **net loss** rather than a net gain in

biodiversity. However, paragraph 6.60 of the RPS states that the NPPF presumption in favour of sustainable development should apply with full weight to Lodge Hill on a number of grounds.

- 2.43. Firstly, it incorrectly states that paragraph 119 of the NPPF does not apply. Paragraph 119 states that:

*“The presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined.”*

- 2.44. The Applicant incorrectly seeks to dis-apply this ‘presumption against’ sustainable development in relation to the need for appropriate assessment<sup>3</sup> (**AA**) in accordance with the Habitats Regulations. Paragraph 6.60(ii) of the RPS states that Land Securities and Thomson Ecology (DIO’s experts on biodiversity) have reviewed the likely significant effects<sup>4</sup> of the proposal on the international sites of the Medway Estuary and Marshes Special Protection Area (**SPA**)/Ramsar site, the Thames Estuary and Marshes SPA/Ramsar site (**North Kent international sites**) and also in relation to the international sites in proximity to the proposed Nightingale Compensation Land at Shoeburyness/Foulness in Essex and concluded that no AA is required. Paragraph 6.60 of the RPS states that the Replacement Information for Appropriate Assessment report (ES February 2014, Document 12, Appendix 5Y) (**RIAA**) has been prepared on a precautionary basis only so that the Council, as the competent authority, could undertake an AA if considered necessary and was not prepared on the basis that it is required by the Habitats Regulations.
- 2.45. Paragraphs 4.27-4.28 of the RSPB response sets out why the Applicant’s assessment of the likely significant effects of the proposal is flawed and that an AA is needed and hence that paragraph 119 of the NPPF does apply to the Lodge Hill proposal.
- 2.46. Regulation 68 of the Habitats regulations states that:

*Regulation 68 (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.*

- 2.47. In the absence of (i) an adequate assessment of the recreational impacts arising from the OPA on the North Kent international sites and (ii) adequate mitigation to address any such impacts that are identified, it is not possible for the Council, as the competent authority, to satisfy the requirement of Regulation 68 of the Habitats Regulations.
- 2.48. Also, in relation to recreational impacts from the development on the nearby SSSI woodlands at Northward Hill and Tower Hill to Cockham Woods (the RPS, paragraph 6.60 (ii)), the RSPB disagrees with the statement that there is unlikely to be a significant negative impact on these sites (see paragraph 4.27 of the RSPB’s comments).

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<sup>3</sup> Regulation 61 of the Conservation of Species and Habitats Regulations 2010 (as amended).

<sup>4</sup> Regulation 61(a) of the Conservation of Species and Habitats Regulations 2010 (as amended).

2.49. Secondly, the RPS (paragraph 6.60) states that the NPPF does not give paragraph 118 or SSSIs special status and that SSSIs are referred to as an example of areas where meeting objectively assessed needs should potentially be restricted, subject to the proper application of all the of the relevant NPPF policies. It is plain that the NPPF does not intend to accord the presumption in favour of sustainable development to a proposal that would adversely affect a SSSI. The Inspector's letter concludes (paragraph 7.1) that *'development at Lodge Hill would have a significant adverse impact on the SSSI and the Framework's [the NPPF's] objective of halting the overall decline in biodiversity'* and that in considering the balance to be struck between all the dimensions of sustainable development, the Inspector is not persuaded that the *'social and economic benefits that would flow from development on this site would outweigh the harm to a site of national importance for biodiversity.'*

2.50. Thirdly, paragraph 6.60 of the RPS claims that the needs that would be met through and the benefits that would arise from the OPA would significantly and demonstrably outweigh any residual adverse impacts that it may have, with reference to paragraph 14 of the NPPF. The RSPB demonstrates in paragraphs 2.16-2.21 of this response that neither the benefits of the development nor its ability to meet the objectively assessed needs identified are supported by the material prepared in support of the OPA.

2.51. Paragraph 109 of the NPPF states that:

*"The planning system should contribute to and enhance the natural and local environment by:*

...

- *minimising impacts on biodiversity and providing **net gains** in biodiversity where possible, contributing to the Government's commitment to halt the overall decline in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;"* [Emphasis added]

2.52. The RPS (paragraph 6.91) states that an ecological package is proposed which, through a combination of avoidance, mitigation and compensation, would secure a long-term net gain for biodiversity, consistent with paragraph 109 of the NPPF. However, as the RSPB demonstrates in paragraphs 4.16-4.85 of our response, the proposed mitigation and compensation measures will result in a **net loss** rather than a net gain in biodiversity.

2.53. The RPS (paragraph 2.31) refers to a joint vision for the site developed in conjunction with the Council that includes the statement that Lodge Hill *'...will be an exemplar for the Thames Gateway in the way that it minimises its impact on the environment...'*. It is hard to see how a proposal that will result in what is almost certainly the single largest loss of SSSI to development in England could be described as exemplary for the way it minimises its impact on the environment.

### **Alternatives to the Outline Planning Application at Lodge Hill**

2.54. In the absence of an up-to-date and thorough strategic review of how the needs identified in the DNAR can be met (see paragraphs 2.9-2.15 above), it cannot be demonstrated that there are no satisfactory alternatives to Lodge Hill that could achieve Medway's needs (as claimed in the RPS, paragraphs 6.40 and 6.79). It is therefore not possible to conclude that the harm cannot be avoided through locating on an alternative site with less harmful impacts (RPS, paragraph 6.84)



- 2.55. The DNAR does not support the claim that the benefits Lodge Hill could deliver are incapable of being met on an alternative site(s). In terms of meeting economic needs, many of the claimed benefits of Lodge Hill could apply to other sites (such as those claimed in paragraph 4.13 of the DNAR regarding transport links and its location within North Kent's corridor of innovation centres and networks). The Council's SA Addendum of October 2013 (based on further evidence reported on in September 2013 which revisited some of the five original alternative options and extends them to try and provide areas that are comparable with Lodge Hill in terms of size) identifies two 'realistic and reasonable alternatives to Lodge Hill' - Capstone Valley and East Rainham (paragraphs 3.7). Paragraph 4.2 the SA Addendum clearly states that these two options are considered by Medway Council as reasonable alternatives, but that Lodge Hill is still considered to have the potential for the greatest positive effect on the economy and social objectives (which is not supported by the evidence presented in the DNAR, see paragraphs above), while also 'having the potential for the greatest negative effect on biodiversity'. These findings are not reflected in the Applicant's assessment of alternative options in the DNAR.
- 2.56. Furthermore, the DNAR (Executive Summary) and RPS (paragraphs 2.18, 6.39 and 7.7) describe Lodge Hill as the only 'proposed freestanding new settlement in the Thames Gateway'. However, the Government's recent announcement of its commitment to a new Garden City at Ebbsfleet in Dartford (approximately only 11 miles from Lodge Hill) clearly undermines this claim. The RSPB notes that the planning permission for Ebbsfleet is held by Land Securities, the MoD's agent for Lodge Hill.
- 2.57. Appendix 5 of the DNAR is a preliminary ecological assessment of the five alternative development sites reviewed. It grossly underestimates and in places deliberately ignores the importance of the SSSI designation. It claims that the five alternative sites share similar ecological constraints to each other and to Lodge Hill, completely ignoring the fact that Lodge Hill is designated SSSI (paragraph 5.1.1). It states that all five alternative sites are within 2km of European protected sites, but fails to acknowledge that so is Lodge Hill (paragraph 5.1.2). It completely overlooks the fact that Lodge Hill itself is actually subject to statutory designation in paragraph 5.1.3. It fails to recognise that Lodge Hill is likely to have protected species and species of conservation concern within its boundaries, as are the other five sites (paragraph 5.1.4). Finally, it glosses over the fact that Lodge Hill actually has the lowest proportion of land of low conservation value of all six sites (paragraph 5.1.5).
- 2.58. Lodge Hill should not be permitted on the ad-hoc basis that harm to the SSSI is justified in the apparent absence of alternatives, as the DNAR claims, when it is being assessed (i) only against options that are clearly out of date and inadequate, (ii) on incomplete information (see the analysis) and (iii) in the context that Medway will need to identify more land anyway in addition to Lodge Hill if it is to meet its development needs (paragraph 6.40 of the RPS). Whether there is justification for retaining Lodge Hill in any future consideration of options should only be determined through a strategic planning process that has been subject to a properly conducted Strategic Environmental Assessment and Sustainability Appraisal.

#### **Previously developed land**

- 2.59. The OPA incorrectly relies on the classification of a significant proportion of the application site being considered to be 'Previously Developed Land' (**PDL**) and support for the development of such land provided in the NPPF.

2.60. Paragraph 17 of the NPPF states that planning should:

[bullet point 8] *“encourage the effective use of land by reusing land that has been previously developed (brownfield land), provided that it is not of high environmental value;”*

2.61. The RPS (paragraphs 6.68 – 6.69) asserts that the Lodge Hill proposed development site is located on predominantly previously developed land (60% of the total area of the development site and 80% of the developable area excluding green infrastructure). The Replacement Sustainability Report (RPS) states that the site ‘can therefore be classified as brownfield land for the purpose of the assessment’ (paragraph 5.4.1.3).

2.62. The Inspector’s letter states (paragraph 5.5) that (in the Inspector’s view) the proportion of the site that could be described as PDL is towards the lower end of the range presented by the parties in evidence at the CS Examination. This ranges from 15% (RSPB response to consultation on SA/SEA Addendum consultation)<sup>5</sup> to 53% (verbal evidence of CBRE for Land Securities).

2.63. The presumption in favour of development in relation to the land’s alleged status as PDL is therefore incorrect, and in any case, as the Inspector’s letter points out (paragraph 5.5), does not apply to PDL that is ‘of high environmental value’ (paragraph 17, NPPF, bullet point 8 and paragraph 111) such as SSSI. The Inspector states that *‘whatever the proportion of the site that is previously developed, the fact that it has been designated as a SSSI and is therefore of high environmental value means that its development does not benefit from any particular support from the Framework [the NPPF] in this respect.’*

**Lack of legal certainty and security regarding the how the proposed mitigation and compensation measures will be achieved and delivered**

2.64. The majority of the proposed mitigation and compensation proposals that are relied upon by the Applicants are outside of the red line boundary for the OPA and therefore do not form part of the OPA. Paragraphs 3.15 and 3.16 of the RPS state that mitigation and compensation will be dealt with through reserved matters and/or subject to planning conditions/obligations. There are no firm proposals for when, how, where, the timing and phasing of the delivery and the long term management of the off-site mitigation and compensation schemes on which this proposal relies and which can be relied upon by a decision-taker.

2.65. The RSPB objects on the basis of lack of certainty regarding the delivery of the proposed mitigation and compensation measures in the absence of (i) a draft Section 106 Agreement or any other legally binding agreement to accompany the OPA and (ii) the separate planning and other consents necessary to deliver the proposed mitigation and compensation.

2.66. In the absence of a signed Section 106 Agreement or other similar obligation or agreement that (i) precisely defines the size, area and location of the NCL, (ii) makes full provision for its delivery and (iii) secures its long term management, outline planning permission should not be granted. Similar provision will be needed for the aspects of the off-site mitigation area that are not set out in the OPA.

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<sup>5</sup> Document EX82A, RSPB response to SA/SEA Addendum consultation, 25 February 2013. See Annex 1, page 1.

- 2.67. Based on the limited information provided and the RSPB's experience with habitat creation on the scale proposed, it is clear that the type of measures suggested would require planning permission with associated planning conditions and obligations from a separate planning authority. The OPA does acknowledge that separate planning consents are likely to be needed for delivery of the compensatory (RPS, paragraph 6.333, which states that some of the works necessary to provide the compensatory habitat at the NCL, particularly under site preparation, may constitute 'development'). These consents will be necessarily subject to separate regulatory process, the outcome of which cannot be pre-empted. Notwithstanding that fundamental issue, in the absence of a Section 106 Agreement or any other legally binding agreement to accompany the OPA there is no certainty regarding the delivery of the proposed mitigation and compensation measures.

### **RSPB comments on the Replacement Sustainability Report**

- 2.68. The RSPB has serious concerns regarding the approach taken in the RSR. It lacks both rigour and detail even for an OPA. It is based on extensive assumptions because of a lack of information about what needs to be assessed (see paragraph 7.1.1.5) and fails to acknowledge, appropriately analyse and report upon the serious ecological effects of the development (Chapter 7 in particular, paragraph 7.1.1.5). As a result, the report makes no attempt to score the actual sustainability credentials and instead simply assumes the development will have an 'excellent' rating (see paragraph 1.1.1.6).
- 2.69. Section 5.7 of the RSR (Ecology) demonstrates a failure to understand the most basic principles of ecology and planning, neither reflecting planning policy nor appropriate ecological assessment practice. It at best underplays – and in various places ignores - the potential impact on the SSSI, for example by suggesting that the response to the recent SSSI designation should be to '*consider the wider ecology, biodiversity and landscape impact to protect the species in and around the development*' (paragraph 5.7.1.5).

### **3. Local planning policy**

- 3.1. In the absence of an up to date Local Plan, various retained policies in the adopted Medway Local Plan 2003 are relevant to the OPA.

#### **Medway Local Plan 2003**

- 3.2. Policy S14 of the "saved" from the Medway Local Plan states that "*The site has long term development potential for business, educational and/or residential uses and this will be considered in the next review of the Medway local plan*". There is no assumption implicit in this policy that the site will be allocated for housing, and it is clear that the intention is to allow the local plan process to determine its future, which it has now done by rejecting the Lodge Hill strategic allocation (see paragraph 2.9 above in relation to the most recent consideration of this allocation in the now withdrawn CS).
- 3.3. Policy BNE35 (International and National Conservation Sites) states that development that will materially harm, directly or indirectly the scientific interests of these sites will not be permitted unless the development is connected with or necessary to, the management of the site's wildlife interest. It states that development for which there is an overriding need will exceptionally be permitted if no reasonable alternative site is (or is likely to be) available and that such need will be judged against the national and/or international ecological importance of the affected nature conservation designation. It goes on to state that when an SPA is affected this need must comprise imperative reasons of overriding public interest.

- 3.4. Policy BNE37 (Wildlife Habitats) states that development that would cause a loss, directly or indirectly, of important wildlife habitats or features not protected by policies BNE35 (international and national nature conservation sites) or BNE36 (strategic and local nature conservation sites) will not be permitted unless (i) there is an overriding need for development which outweighs the importance of these wildlife resources; (ii) no reasonable alternative site is (or is likely to be) available if ancient woodland, inter-tidal habitats and calcareous (chalk) grassland would be lost; (iii) the development is designed to minimise the loss involved; and (iv) appropriate compensatory measures are provided.
- 3.5. Paragraph 6.75 of the RPS also dismisses Policy BNE35 in so far as it relates to direct and indirect effects on internationally designated sites based on its earlier conclusion that there are no likely significant effects from the OPA on international sites. The RSPB disagrees with this argument for the reasons set out in paragraphs 4.27-4.28 of the RSPB's response.
- 3.6. Paragraph 6.71 of the RPS refers to the protection afforded to SSSIs by Policy BNE35 and that an exception applies to this where there is an overriding need for development, if no reasonable alternative site is (or is likely to be available). As already stated above, the RSPB's strongly believes (i) that significant harm will be caused by the OPA, (ii) that the developer has failed to provide adequate information to demonstrate that no alternative sites with less harmful impacts are available, (iii) that the proposed mitigation measures have not been designed to minimise the loss involved and (iv) that compensatory measures are neither appropriate nor adequate in so far as they have been proposed.

#### **4. General comments on the Environmental Statement**

- 4.1. This response focuses on areas where the RSPB do not accept the evidence or analysis presented by the Applicant in the replacement OPA and supporting documents. It only covers the key issues. Where the RSPB do not comment on a matter, this does not mean that we accept the Applicant's approach. We reserve the right to make further comments on these and other matters relating to the proposal's ecological effects.
- 4.2. Our comments are set out under the following headings:
- Quality and findings of the bird surveys
  - Ecological impacts
  - Mitigation measures
    - Replacement Access Management Strategy
    - Off-site Mitigation Area
  - Compensatory measures
- 4.3. With reason, given the significance of this case, the ES is a large and complex document. However, there are features that exacerbate the difficulty of assimilating it. There are numerous repetitions between and within documents (sometimes with minor changes), inconsistencies, obvious errors and mislabelling.
- 4.4. In addition, the RSPB is concerned about the failure to take a precautionary approach, as should be adopted in a case involving features of national importance. For example, rather than presenting an objective assessment of the effects, attempts are made to understate the potential severity of effects (such as the number of nightingale territories affected), to reduce the recommended area of compensation land (see below), and to give assurances regarding the early availability of 'mitigation' habitat (even though delivery mechanisms and management techniques have yet to be adequately described).

### **Quality and findings of the bird surveys**

- 4.5. The environmental statement contains the results of breeding and wintering bird surveys of the application area and adjoining parts of the Chattenden Woods and Lodge Hill SSSI, undertaken in, respectively, spring 2013 and winter 2008/09. Reference is made and some information included deriving from an earlier breeding bird survey in 2009. The results of these surveys seem broadly in line with what might be expected in the area but we have concerns over some aspects of the survey methods and the findings, such that they will have resulted in underestimation of the breeding bird population of the survey area.

#### ***Wintering birds***

- 4.6. Some species using the area regularly would have been missed by the limited coverage as achieved, involving just three visits. There is no indication that existing data sources were investigated – for example, the online Kent bird atlas records seven species in TQ77L alone (most of this tetrad is within the area) that were not found by the survey (and five were found by the survey that are not recorded for TQ77L).

#### ***Breeding birds***

- 4.7. The breeding bird survey involved five visits between 30 April and 13 June, each of about five hours, using the standard territory mapping method. Paragraph 1.2.2 of document 5H mentions the cool weather of spring 2013 and claims that “sufficient records were still obtained during the survey periods to determine bird species, distribution and numbers”.
- 4.8. Birds vary in their detectability, both between species and seasonally within individual species. This is discussed by Bibby et al. (1992)<sup>6</sup> (referenced in document 5H), who describe possible sources of error in a mapping census of this type include census speed, season, time of day and species differences. The number of visits that were made is less than the standard (see Marchant 1983)<sup>7</sup> and the extent of coverage per visit was much higher than normal. There is also the difficulty of analysing the mapped results; species differ greatly in the ease with which territories can be determined; this issue is not mentioned. **It is unlikely that a survey undertaken as described will have identified all territories, and perhaps not even all species present in the survey area.** There are mentions in paragraphs 2.1.7 and 3.1.1 of document 5H that the results are approximate but the confidence implied in paragraph 1.2.2 and elsewhere is misplaced.
- 4.9. It remains likely that, broadly, the survey results characterise the breeding bird community, the range of species and their relative densities, and the locations of territories. But they are far from accurate. For example, one species that occurs in the survey area but which was not recorded is treecreeper. This can be a difficult species to locate, especially if survey coverage omits the early spring. A range of resident woodland species, including woodpeckers, nuthatch, treecreeper and some of the tits are most evident in March-April, when their song frequency is highest and before leaf emergence. Any or all of these may have been underestimated. Treecreeper was found during the 2009 survey, which began in March.

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<sup>6</sup> Bibby, C.J., N.D.Burgess and D.A.Hill (1992) *Bird Census Techniques*. Academic Press, London.

<sup>7</sup> Marchant, J.H. (1983) *Common Birds Census Instructions*. British Trust for Ornithology.

- 4.10. In Table 2 of document 5H, the report indicates species recorded in 2013 that were not recorded in 2009. Two of these (marsh tit and meadow pipit) are given territory totals and one (common buzzard) is described as a possible breeder. The report does not draw attention to three species for which territories were identified in 2009 but which were not recorded in 2013; these were woodcock, treecreeper and bullfinch. Their apparent absence in 2013 could have been an artefact of the survey limitations.

#### ***Nightingale status and the importance of the Lodge Hill population***

- 4.11. The nightingale population in Britain has undergone severe and ongoing declines in the last 45 years, with a contraction of the population into south-east England<sup>8</sup>. The BTO/RSPB/JNCC Breeding Bird Survey indicated that nationally, the species declined by 46% in the last 15 years<sup>9</sup>, whilst longer term data indicates a decline of more than 90% in the last 40 years<sup>10</sup>. Chattenden Woods and Lodge Hill SSSI is of national importance for nightingale, comprising more than 1% of the British population.

#### **Population at Lodge Hill**

- 4.12. A number of surveys have been carried out to assess the nightingale population at Lodge Hill. The ES makes reference to surveys carried out by Thomson Ecology for the applicant, as well as BTO surveys of nightingales in 2012 and 2013. We regard these BTO surveys as the best information available on nightingales at the site but would like to draw attention to two points. First, BTO indicate that the population estimates are minima, since some birds may have been missed and because territory analysis was conservative. Second, the BTO estimate for 2012 was 85 not 84; the correction of the figure was made after the production of the 2012 report but the higher figure is included in the 2013 report. These points are not mentioned in the ES.

#### **Nightingale status and ecology**

- 4.13. The documents in the ES make many references to nightingale status and ecology that are questionable and seem to reflect either a lack of understanding on the author's part or a wish to devalue the importance of the Lodge Hill population. This does not engender confidence in the proposals that are then made to compensate for the loss of a nationally important population.
- 4.14. For example, in a number of places, the nightingale is described as "relatively common and widespread", and it is questioned whether the decline reported by the BTO and others is genuine (for example in sections 7 & 8 of document 5V). While the first contention may be true in that the species is more numerous and widely distributed than the rarest species in the country, it is equally true that it is far less common and widespread than many. A range contraction of the size that has taken place in England and which is now evident in Kent<sup>11</sup> is inevitably accompanied by population decrease, and it is misleading to interpret the successive national population estimates as indicating no decline while ignoring the changes in methodology and analysis.

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<sup>8</sup> Hewson and Fuller (2012). Factors Potentially Affecting the Viability and Success of Biodiversity Offsetting to Compensate for Nightingale Habitat Loss. BTO.

<sup>9</sup> RSPB et al (2013) The State of the UK Birds 2013. [http://www.rspb.org.uk/Images/sukb2013\\_tcm9-358727.pdf](http://www.rspb.org.uk/Images/sukb2013_tcm9-358727.pdf).

<sup>10</sup> Holt, Hewson & Fuller (2012). The Nightingale in Britain: status, ecology and conservation needs. *British Birds* 105: 172-187.

<sup>11</sup> See [http://www.kentos.org.uk/atlas/2008/N\\_shtml](http://www.kentos.org.uk/atlas/2008/N_shtml).

- 4.15. Furthermore – as stated in the ES - nightingales are well researched and understood but this is relative in contrast to many less well studied bird species. Whilst the broad characteristics of location, physical features and vegetation composition and structure are known, the finer-grained detail of vegetation preferences and factors such as soil and water, and how they relate to nightingale food sources, are not precisely defined. In addition, detailed nightingale research has been undertaken at only a few locations, and lessons learned at those cannot necessarily be applied elsewhere.

#### **Ecological impacts**

- 4.16. The scale of the Lodge Hill development means it has a wide range of ecological impacts of differing magnitudes and severity. The RSPB's comments are primarily concerned with:
- (i) Direct and indirect impacts on the Chattenden Woods and Lodge Hill SSSI.
  - (ii) Impacts on breeding bird populations (excluding nightingales).
  - (iii) Recreational impacts on other protected areas within the vicinity of the proposal.

#### ***Direct and indirect impacts on the Chattenden Woods and Lodge Hill SSSI***

- 4.17. The Lodge Hill development will result in the direct and permanent destruction of significant areas of the SSSI, including:
- (i) Scrub, woodland and associated supporting habitats that hold the majority of the nationally important population of breeding nightingales for which the SSSI is notified; and
  - (ii) The majority of the nationally scarce neutral grassland for which the SSSI is notified.
- 4.18. The RSPB agrees with the Applicant that there will be a permanent loss of the nightingale population dependent on those habitats that will be destroyed by the built development and associated infrastructure.
- 4.19. The OPA is for a substantial residential development. In the absence of mitigation measures of certain efficacy, it can be expected to generate additional visits by people and their pets to:
- (i) Those parts of the Chattenden Woods and Lodge Hill SSSI that are not destroyed by the physical development; and
  - (ii) Nearby protected sites, including SPAs and Ramsar sites (see below).
- 4.20. It can be expected, on the basis of established research, to lead to increased harm by reason of the mechanisms identified in the table below, including trampling, disturbance, predation and eutrophication.
- 4.21. The remaining breeding nightingale population that utilises habitats within the SSSI, but outside those areas of direct loss, can be expected to suffer significant negative impacts from a combination of various urbanisation effects (see table below). These will persist for the lifetime of the Lodge Hill development. As described below, the RSPB considers there are serious flaws with many of the mitigation measures suggested by the Applicant to address these urbanisation effects, such that they cannot be relied upon to reduce the short, medium or long-term effects on the nightingale population dependent on those habitats outside areas of direct loss. Indeed, at paragraphs 5.2.4-5.2.6 of Document 5U, the Applicant accepts that if its proposed avoidance/mitigation measures are completely unsuccessful, then all nightingale territories would, eventually, be lost from the SSSI as a result of the development.

Table 1: Summary of key negative impacts of urban development on wildlife

<b>Effect</b>	<b>Description</b>
<b>Fragmentation</b>	Loss of supporting habitats Lack of connectivity between sites preventing movement/genetic exchange between sites Smaller site size increases edge effects from generalist species
<b>Predation and increased mortalities</b>	Access by pet cats, some of which hunt away from home Increase in crows and magpies on sites with greater human activity Increased fox population within urban areas
<b>Roads and traffic levels</b>	Road kills from traffic Increased levels of noise and light pollution Roads can be barriers to species mobility
<b>Disturbance to birds</b>	Areas with high visitor pressure are not settled by breeding birds, resulting in lower densities Adults flushed from the nest by people/dogs, disturbance linked to higher levels of predation High visitor pressure reduces productivity
<b>Pollution</b>	Ground and water surface pollution from hard surfaces, spills and dumping Air pollution from fires and vehicles
<b>Trampling</b>	Soil compaction and erosion Damage to breeding and wintering sites Creation of more extensive path networks increases spatial disturbance
<b>Vandalism</b>	Damage to signs fences and gates, reduces visitor information and control Can affect site management practices
<b>Eutrophication</b>	Enrichment of soils from dog excrement Dumping of household and garden rubbish Dust, salt, run-off from roads
<b>Fires</b>	Higher fire incidence close to urban areas causing; Direct mortality of fauna Temporary removal of breeding and foraging habitat Long term vegetation changes from repeated fires
<b>Restrictions on management</b>	Objections to management e. g. tree clearance Increased costs of wardening

Impacts on nationally scarce neutral grassland

4.22. The ES provides an assessment of the impacts on neutral grassland as a direct result of construction. It concludes the Lodge Hill development would result in the destruction of 11.6 ha of the nationally scarce neutral grassland notified by NE (in Fields 1-3, Figure 1, ES Appendix 5C), plus an additional 16 ha which, in the RSPB's view, is potentially of a similar value (Fields 4-9, Figure 1, ES Appendix 5C). We agree with the conclusion in the ES that this loss would result in a significant negative impact up to national level (paragraph 5.7.1.2, chapter 5, ES).



- 4.23. Notwithstanding concerns about the surveys undertaken in the ES (outlined below), this grassland is highly valuable, partly due to the species richness and high quality indicators of ancient grassland; and partly due to the presence of a complex grassland scrub mosaic, as identified by NE in their SSSI notification. In addition, it is highly likely that these fields will support an important invertebrate assemblage.
- 4.24. We have serious concerns about the adequacy of the surveys undertaken by Thomson Ecology, in particular for fields 4-9, which are likely to underestimate the quality of the assemblage. Specifically, the survey carried out in fields 4-9 was carried out too late in the season (October) and without enough quadrats being taken. Taking just five quadrats in each field implies that there is only one NVC community per field. However, the data indicates there are at least two, possibly three grassland communities, an underscrub community and at least one scrub community. In addition, the presence of orchids has been noted, but identification of species has not been carried out. Some species of orchid which could occur at Lodge Hill are priority or protected species.

***Impacts on breeding bird populations (excluding nightingales)***

- 4.25. The RSPB agrees with the assessment at paragraph 5.7.1.14 (chapter 5, ES) that the effect on breeding birds (excluding nightingale) would be a significant impact up to county level, not least because of the presence of several declining and scarce species, including turtle dove, cuckoo and marsh tit.
- 4.26. The breeding bird survey states that it detected 4 turtle dove territories (see Table 5-14, chapter 5, ES). Turtle dove is red-listed in the Birds of Conservation Concern 3<sup>12</sup> due to significant long-term declines. In the most recent State of the UK Birds (2013)<sup>13</sup>, turtle dove is identified as showing one of the greatest declines of any UK breeding bird species. Its long-term trend is a 95% decline between 1970 and 2011. This decline has been accompanied by significant range contraction so that the species is now mostly confined to the south and east of England.<sup>14</sup> Notwithstanding our concerns elsewhere regarding the breeding bird survey methodology used at Lodge Hill, the presence of 4 territories of this species at a single location is now considered notable. Further survey using methodology specifically targeted at this species (e.g. immediately after sunrise) would be useful to establish a more accurate population for this species.

***Recreational impacts on other protected areas within the vicinity of the proposal***

- 4.27. Predictions have been made on potential numbers of people who might visit the nearby Medway Estuary and Marshes SPA/Ramsar and Thames Estuary and Marshes SPA/Ramsar and the SSSI woodlands at Northward Hill and Tower Hill to Cockham Woods from the OPA. These are included in the RIAA and the assessment of recreational impact on SSSIs in Documents 5Y and 5Z respectively. Data from visitor surveys conducted by Footprint Ecology have been used to extrapolate figures for the OPA. However, in the view of the RSPB the methods used and assumptions made are flawed, visitor numbers are considerably underestimated and no reliance can be placed on the conclusions on visitor numbers or impacts on the nearby international and national sites.

<sup>12</sup> Eaton M.A., Brown A.F., Noble D.G., Musgrove A.J., Hearn R., Aebischer N.J., Gibbons D.W., Evans A. & Gregory R.D. 2009. Birds of Conservation Concern 3: the population status of birds in the United Kingdom, Channel Islands and the Isle of Man. *British Birds*. 102, 296–341.

<sup>13</sup> RSPB et al (2013) The State of the UK Birds 2013. [http://www.rspb.org.uk/Images/sukb2013\\_tcm9-358727.pdf](http://www.rspb.org.uk/Images/sukb2013_tcm9-358727.pdf).

<sup>14</sup> Balmer et al (2013) Bird Atlas 2007-11: the breeding and wintering birds of Britain and Ireland.

4.28. Therefore we conclude that a likely significant effect cannot be ruled out in respect of the potential impacts on the two SPA/Ramsar sites, and that an AA is required.

#### **Mitigation measures**

4.29. A wide range of possible mitigation measures are described in the replacement application documents. Our comments below concentrate on the following elements:

- Replacement Access Management Strategy
- The Off Site Mitigation Area
- Habitat creation
- 'Mitigation' measures for loss of nationally scarce neutral grassland

#### ***Replacement Access Management Strategy (5R)***

4.30. The RSPB sets out its comments on the Replacement Access Management Strategy under the following headings:

- Linear routes
- Buffers
- Wardening
- Low density housing
- Monitoring and maintenance

4.31. In summary, the RSPB concludes there are significant flaws in the Replacement Access Management Strategy and that it cannot be relied upon to mitigate the various urbanisation effects on the SSSI and its features.

#### ***Linear routes***

4.32. Paragraph 4.2.5 identifies 'ecologically sensitive areas where access for all user groups will be restricted and controlled' (ancient woodland and ancient woodland buffers and specifically, Rough Shaw, Chattenden Woods and the off-site mitigation area).

4.33. It is stated (paragraph 4.2.28-29) that no new access points or footpaths are proposed within areas of retained SSSI at Chattenden Woods or Lodge Hill Wood (where an existing track is to be closed off), but that new access points and well managed paths will be provided as 'alternative routes' in other areas of ancient woodland SSSI where no officially designated public rights of way currently exist (paragraph 2.3.1) (Round Top Wood, Wybornes Wood and Deangate Wood – all within the OPA boundary). These new paths will be surfaced with stone or boardwalks. It is also proposed to construct an adventure playground in Deangate Wood. This will serve to increase recreational access to these areas of ancient woodland.

#### ***Buffers***

4.34. Among the proposed mitigation measures are buffer zones of varying width around the proposed development, and the planting of dense thorny scrub, fencing, hedges and ditches.

4.35. A buffer of 100m-200m width is proposed between the development and the area of retained SSSI known as Chattenden Woods (paragraph 1.2.2), which is to be managed as no public access with the exception of an existing footpath along Lochat Road (Chattenden Woods Buffer Zone West).

- 4.36. Chattenden Woods Buffer Central and Chattenden Woods Buffer East (also between 100-200m, paragraph 1.2.2) are immediately adjacent to Rough Shaw and Lodge Hill Wood respectively, both of which are part of the retained SSSI. However, both of these buffer areas are to be managed as country park and sports pitches, where public access and recreational uses will be strongly encouraged. The presence of a wet ditch, dense thorny scrub planting and fencing to discourage direct access from the adjacent development next to the central compartment of the Chattenden Woods Buffer is irrelevant if access into this area is to be encouraged anyway by its country park status and public access paths.
- 4.37. A buffer of 20m width of mainly planted dense thorny scrub is proposed between the development and the areas of ancient woodland at Round Top Wood, Wybornes Wood and Deangate Wood (paragraph 4.2.29), all of which are also within the retained SSSI.
- 4.38. The stated purpose of the buffers is to minimise impacts on the retained areas of the SSSI from recreational activities, pets and the dumping of house and garden waste. However these open spaces will actually serve to lead people towards - not away from - the main areas of the SSSI woodland and will actively encourage access and recreational use by people and dogs.
- 4.39. All of the buffers (except the 20m buffers planted with dense scrub) will be open to the public. Even the dense scrub buffers will be pierced by public access paths in places.
- 4.40. The buffer zones will therefore be ineffective in discouraging access to the SSSI (as the public will be encouraged to use them). They will also be too narrow to significantly reduce access by domestic cats to what remains of the SSSI. The RSPB notes that these narrow buffers stand in marked contrast to the application of a 400m buffer around residential developments on Foulness/Shoeburyness as part of the criteria for selecting possible areas for nightingale compensation.
- 4.41. No evidence is provided to demonstrate the effectiveness of other measures that are proposed to impair access by cats, e.g. the presence of Lochat Road between the development and Chattenden Woods or the retention of the magazine wall in the same area (no details of the height or characteristics of the wall are provided to demonstrate its effectiveness as a cat barrier).
- 4.42. No scientific evidence has been provided to justify either the effectiveness of the barriers proposed (scrub, ditches and fences) to prevent access by people or cats, or on the use and efficacy of such mitigation measures elsewhere.
- 4.43. Neither is there any justification for varying the buffer between 20m-200m in relation to the retained areas of SSSI (all of the retained SSSI woodland should be treated the same in terms of the level of mitigation required), or that the buffers applied to the areas of the retained SSSI at the application site should be any less than the proposed 400m buffer between the proposed NCL and residential development (Document 5W, paragraphs 3.2.6 and 3.4.13). The methodology referred to in 4.2.32] for calculating buffer width refers to the 'Doncaster Methodology'<sup>15</sup>. However, this is concerned with the protection of individual trees from impacts such as shading, root damage and other effects of locating buildings in close proximity to trees, and not the recreational impacts and cat predation impacts resulting from urban development in proximity to semi-natural ancient woodland.

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<sup>15</sup> [http://www.sussexwildlifetrust.org.uk/uploads/bufferstrips\\_without.pdf](http://www.sussexwildlifetrust.org.uk/uploads/bufferstrips_without.pdf).

- 4.44. The RSPB does not believe that these barriers as described will prevent significant impacts of a large urban development on the birds of the SSSI.

#### Wardening

- 4.45. The proposals for wardening in section 4.3 are vague and speculative. There is no guarantee that volunteer wardens will be forthcoming or effective, and paid wardens are proposed only at weekends and other key times which are unspecified but presumably refer to bank holidays in certain places (unspecified) during the summer. In the view of the RSPB these proposals are inadequate and not likely to be effective as described. Therefore they cannot be relied upon as mitigation.

#### Low density housing

- 4.46. Low density housing is suggested as additional mitigation to reduce impacts in certain areas. The RSPB is not aware of any evidence that urbanisation effects are greater or less as a result of low density housing. Therefore this should not be relied upon as mitigation.

#### Monitoring and Maintenance

- 4.47. The RSPB welcomes the monitoring and maintenance obligations proposed in section 4.4 but notes that elements of this work are proposed from the first year of residential occupation in Phase 1 until five years after the completion of Phase 3. Furthermore, no details are given as to who would be responsible for implementing them, whether other measures will be secured in perpetuity and how and by whom decisions will be made to change the access management measures if they are found wanting, and how this will be monitored and secured.
- 4.48. The provision of information boards and leaflets to inform residents and visitors of the importance of the retained areas is also welcomed but these would need to be updated from time to time, and maintained in perpetuity, including the delivery of leaflets to new residents as properties are bought and sold. The holding of open days for schools, public meetings, local community groups and guided walks is also welcomed. However, no indication is given on who will organise these and how they will be funded.
- 4.49. Given the importance of all the measures for access and management to protect the remaining features of the SSSI, the RSPB believes that much fuller details need to be provided at the OPA stage for their effectiveness to be assessed.

#### ***The Off Site Mitigation Area***

- 4.50. The Off Site Mitigation Area is outside the red line boundary for the OPA and therefore does not form part of the OPA. There are no firm proposals for when, how, where, the timing and phasing of the delivery and the long term management of the off-site mitigation scheme on which this proposal relies and which can be relied upon by a decision-taker. In the absence of a Section 106 Agreement or any other legally binding agreement to accompany the OPA there is no certainty regarding the delivery of the proposed mitigation measures.
- 4.51. A proposal has been made to provide a range of 'mitigation' measures on an adjoining area of 86 ha, currently mostly arable and improved pasture land owned by MoD and subject to their continuing use and operational requirements. The off-site mitigation area is clearly integral to the OPA (ES, Chapter 2, 2.4.4.44) and its impacts should have been subject to a full environmental assessment.

- 4.52. The MoD's ongoing operational requirements may at some future point require that the area be cleared of woodland or scrub or used far more intensely such that it no longer offers the mitigation suggested unless MoD can confirm that any agreement will be adhered to no matter what circumstances arise. There is no indication that the area will be set aside in perpetuity or where resources will come from to manage it for nature conservation, or how it will be integrated with the MoD's ongoing operational requirements.

#### Habitat creation

- 4.53. A number of proposals for ponds, wildlife hotels, hibernacula and log piles are included that will be useful features for wildlife. However, these will all have a limited life and will require maintenance or replacement. Moreover, it appears that no information is available on the hydrology of the area (for example will the ponds hold water in dry conditions?), the soil types and agricultural grade of the land or the estimated times to provide replacement habitat.

#### 'Mitigation' measures for loss of nationally scarce neutral grassland

- 4.54. The Applicant suggests that the loss of grassland can be 'mitigated' by creation/translocation (Table 5-7, chapter 5, ES). We consider any such scheme to be compensation rather than mitigation given that the existing grassland would be completely destroyed by construction. We consider the proposals outlined are entirely unfeasible, untested and at odds with the avoid-mitigate-compensate hierarchy in the NPPF.
- 4.55. It is the RSPB's view that the grassland-scrub mosaic is irreplaceable in any meaningful timescale. We are not aware of any successful approaches to translocating *Genista tinctoria* (Dyers greenweed) or *Silva silaus* (pepper saxifrage), for example. The development would therefore result in the permanent loss of this nationally scarce habitat, which forms part of the SSSI feature.

#### **Compensatory measures**

- 4.56. The RSPB supported the notification of Chattenden Woods and Lodge Hill SSSI in 2013 because, among other reasons, it holds over 1% of the British population of nightingales, and objects to the OPA on the grounds that the loss of this population is unacceptable. We agree with the assessment made in the ES (Chapter 5, Ecology) that the effect of the development on nightingales would be a negative impact of national significance. We also agree that the effect on other breeding birds would be a significant negative impact of up to county level.
- 4.57. However, the RSPB does not accept that the compensation scheme described in very basic terms offers sufficient assurance that the negative effects can be compensated for. There are doubts concerning the selection of areas to accommodate such a scheme, its consequential environmental effects, the establishment of suitable habitat and its long-term management. These issues are discussed below. However it is important to state, as discussed elsewhere, that we do not accept that the avoid-mitigate-compensate hierarchy has been objectively applied or that there is no alternative to the selection of Lodge Hill for a development of this size. While we offer comments on the NCL, this does not mean that we accept that it is an appropriate solution.
- 4.58. In cases where habitat compensation is to be provided, and in particular in relation to the loss of the majority of a SSSI, it should adhere to well-established principles:

- (i) **Targeted** at completely compensating for the damage caused by the development (so-called “like for like” or “within type”);
- (ii) **Effective** in both ecological and legal terms so that it supports the ecological functions of the species affected over the long-term, is legally secured, adequately protected, financially secure and subject to regular monitoring and review;
- (iii) **Well-located through** compensation measures realised as close as practicable to the location where the damage will be caused (but not vulnerable to the same pressures – see Effective);
- (iv) **Well-timed** so **that** the compensation measures are fully functional before the damage is caused;
- (v) **Sufficient** in extent to meet the ecological needs of the affected species and habitats. This should address risks associated with effectiveness, location and timing.

4.59. We set out our detailed comments below on the limited information available in respect of the compensation measures proposed by the Applicant. These clearly demonstrate that the proposed measures have significant flaws and that no confidence can be placed in them. There is no firm, clear and robust compensation package proposed by the Applicant, only vague commitments. The Applicant has failed to specify the land on which the compensation measures would be implemented or provided evidence that the appropriate legal, financial and ecological guarantees have been or can be secured.

4.60. In summary we consider the compensation scheme fails adequately to meet any of the principles set out above. As it stands, there is no tangible compensation proposal upon which the Council or other decision-maker can rely. Therefore, we consider the Applicant has failed to meet this key requirement of paragraph 118 of the NPPF.

4.61. Based on the limited information provided and the RSPB’s experience with habitat creation on the scale proposed, it is clear that the type of measures suggested would require planning permission with associated planning conditions and obligations from a separate planning authority. This is recognised in the RPS, paragraph 6.333, which states that some of the works necessary to provide the compensatory habitat at the NCL, particularly under site preparation, may constitute ‘development’. Given the nature and scale of the damage to a SSSI, as a bare minimum the RSPB would have expected a submitted planning application, complete with full environmental information setting out the detailed location and design for the compensation measures, identifying all potential impacts and risks (environmental, legal (including tenure), financial) associated with those measures and setting out how these will be overcome to secure ecologically effective compensation.

#### ***The Nightingale Compensation Land***

4.62. The creation from scratch of habitat for a nightingale population of this size has never been attempted before. The RSPB considers it is wholly inappropriate to seek to carry out such an experiment when dealing with the conservation of a SSSI. The RSPB is not aware of any evidence that can guarantee the effectiveness of intentional establishment of fully functioning habitat capable of supporting breeding nightingales and certainly not at this scale.

#### ***Size***

4.63. Habitat compensation ratios are designed to address known risks and are only appropriate where there is reasonable confidence that a larger area of habitat will succeed in overcoming those risks and ensure the compensation objectives are met. In the case of species-led compensation measures, this requires confidence that the provision of a larger area of lower

quality habitat will support a population at the required level and sustain it in perpetuity. This is not the case with nightingales, where the list of uncertainties is considerable<sup>16</sup>. This contrasts with persistent undue optimism exhibited by the Applicant in describing its ability to create and maintain optimum habitat conditions.

- 4.64. Reports by BTO in October 2012<sup>17</sup> and Environment Bank Limited (**EBL**) in December 2012<sup>18</sup> attempted to calculate the area that might be required, were compensation for loss of nightingales at Lodge Hill to be accepted. The BTO suggested that it was in the range 300-400 ha of good habitat, although as has been pointed out (by EBL and Natural England<sup>19</sup>), their analysis did not take into account some risk elements. EBL produced a range of figures from 466ha to 851ha, the latter referring to habitat creation alone with no habitat restoration, which could be the case with the NCL at Shoeburyness/Foulness or a similar area.
- 4.65. The ES mentions the existence of these earlier calculations, but does not report the land areas suggested. No plausible reason is given for discarding their assessments, and a new calculation is made. There is insufficient information to demonstrate the Applicant has addressed the list of uncertainties associated with the creation of nightingale habitat (see above).
- 4.66. Document 5U, section 7, concludes that between 224 ha and 304 ha are needed to accommodate 66 nightingale territories. There is lack of clarity regarding the size of 'uplift' allowances made for various risks. Elsewhere, including chapter 5 (Ecology), it is usually only the mid point (264ha) that tends to be quoted, and in document 5V, 2.2.3 one place 264 ha is said to be the "maximum compensation requirement" – an example of progressive deviation from a precautionary approach.
- 4.67. The metrics/multipliers used applied by the Applicant (see section 6, Document 5U) to address key identified risks (time lag, habitat quality, colonisation) are arbitrary and mechanistic. Rather, the approach outlined glosses over fundamental ecological risks. The Applicant assumes that any fundamental problem can simply be overcome by a small increase in habitat area. Creating more of the same will do nothing to address any inherent weakness in what is a highly experimental "scheme".

#### Site selection

- 4.68. There is both ambivalence and considerable ambiguity over whether the Shoeburyness/Foulness area is merely one of a number of potential locations for the NCL, or the site that has been selected. Often it is referred to as "a potential" location but the context of these statements leaves little doubt that it is strongly preferred: the compensation described for adverse ecological effects and risks for nightingales refer specifically to Shoeburyness/Foulness, and at least once it is described as the 'proposed' area for NCL (see Appendix 1 of ES Appendix 5V, Risk 3).

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<sup>16</sup> Medway Core Strategy Examination 2012/3. Document EX60: BTO (2012) Factors Potentially Affecting the Viability and Success of Biodiversity Offsetting to Compensate for Nightingale Habitat Loss (pages 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20/21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33 and 34) and Document EX61 Additional advice supplied by BTO to EBL, November 2012 (paragraphs 3, 4 and 5).

<sup>17</sup> Hewson and Fuller (2012). Factors Potentially Affecting the Viability and Success of Biodiversity Offsetting to Compensate for Nightingale Habitat Loss. BTO.

<sup>18</sup> Environment Bank Limited (2012). Biodiversity Offsetting to compensate for nightingale habitat loss at Lodge Hill, Kent. EBL.

<sup>19</sup> Letter dated 30 November 2012 from Rob Cameron (Natural England) to Tom Tew (EBL).

- 4.69. In the absence of a submitted planning application accompanied by full information, there is insufficient information provided to determine whether the net effects of the changes in land use, habitats and species will be positive or negative. In the case of the 'potential' NCL at Shoeburyness/Foulness, it is implied (see section 4.5, ES, Appendix 5W) that negative effects could be avoided or mitigated, despite an evident lack of information and with baseline studies as yet incomplete. As stated above, it is also recognised in the RPS, paragraph 6.333 that some of the works necessary to provide the compensatory habitat at the NCL, particularly under site preparation, may constitute 'development', thereby requiring planning permission. The RSPB agrees.

*Risks relating to habitat creation and management*

- 4.70. Appendices 5V and 5W describe schemes for habitat creation and management at the NCL. The following comments draw attention to some of the shortcomings of the analysis of the risks involved, and of the habitat proposals.

*Time lag*

- 4.71. The predictions for the speed with which the newly created habitat could be colonised by nightingales are optimistic. Records of the speed of colonisation of scrub tend to indicate first colonists of naturally regenerated scrub arriving after 10-15 years. Planting schemes may attract birds sooner; BTO suggest that it could be as early as four years but – aside from the lower likelihood that such habitat will be suitable – timescales of that nature would probably involve some woody habitat already being present within individual territories. There are examples of areas that have not attracted nightingales until ten years or more after planting.
- 4.72. It is also important to remember that the time lag before first colonisation is not the same as the time lag before peak carrying capacity is reached. In the case of natural regeneration it may require another 10-15 years before peak numbers occur. Table 8 of document 5W suggests that optimal condition of NCL scrub is anticipated 13 years after planting, following first colonisation at 5-9 years. Such a trend would be exceptional and, if achieved, might forewarn of management problems in the longer term. Therefore it should not be relied upon.

*Habitat creation, management and quality*

- 4.73. The RSPB has considerable doubts over the likelihood that the proposed techniques for habitat establishment and long-term management would be successful, and that the habitat would attract sufficient birds in the timescales described.
- 4.74. There are numerous examples of nightingales colonising newly established scrub and young woodland, and the ES mentions some of these, concentrating on those that have held relatively high densities. Broadly, the mix of habitats envisaged for the NCL would be suitable for nightingales. However, the many uncertainties are played down.
- 4.75. For example, the proposals obscure the variable response of nightingales to new habitat by referring only to the most successful cases, all involving natural regeneration rather than planting (the method proposed here). The BTO's advice is that natural regeneration is most likely to provide high quality habitat, and while the species will occupy planted habitats they usually do not hold such high densities and are probably sub-optimal. The planting schemes appear to be untried, and it is not convincing that they would produce the desired structure as described.



- 4.76. We regard almost all elements of the practical management of the proposed compensation scheme as experimental, and uncertain in outcome, as indeed is the entire scheme in concept. It is not appropriate to attempt such a scheme for a nationally important population of a single species at a SSSI.

*Flood risk at the NCL*

- 4.77. The Environment Agency's Essex and South Suffolk Shoreline Management Plan has a hold-the-line policy for Foulness and Potton for all three epochs, and responsibility for maintaining these defences rests with the MoD as landowner. However, the area is very exposed to the risk of tidal surges and the current standard of protection is very low on some areas, leaving them very vulnerable to incursion. Although the MoD are currently keen to maintain the defences within this area, there is no guarantee that this will remain economic and therefore viable in the future, or that the level of defence that is maintained will be sufficient to guarantee the protection of compensation habitat in the long term.
- 4.78. While the Applicant correctly notes that the value of the NCL could be affected by coastal realignment (paragraph 4.1.1, Document 5V) they completely fail to address the risk of catastrophic failure of the compensation measures due to tidal surge. Tidal surges, such as that experienced along significant stretches of the Eastern England coast in December 2013, clearly pose a serious risk to the low-lying and relatively poorly defended nature of the Foulness/Shoeburyness area. The RSPB would expect this risk to be fully assessed as part of a planning application for the NCL.

*Monitoring and remedial action*

- 4.79. Programmes for monitoring nightingale numbers and habitat quality in the NCL are outlined in 5W and 5X. The elements involving habitat quality need better definition, but in any case the process appears flawed. The targets are based around the limited range of vegetation structures selected for development, and remedial action merely involves increasing the area or frequency of treatments. If the vegetation in its target condition is not attracting nightingales, then more of the same also is unlikely to do so. By the time failure of the NCL is established, the loss of habitat at Lodge Hill would be irreversible.

*Impacts on the existing nature conservation value of the Nightingale Compensation Land*

- 4.80. In the absence of a properly worked up scheme, setting out the detailed location of the NCL, with full environmental information and impact assessment, it is not possible to make proper comment on the potential impacts of a compensation scheme on the existing nature conservation value. However, we identify some initial concerns in relation to the Foulness SPA/Ramsar site

*Impacts on Foulness Special Protection Area/Ramsar site*

- 4.81. The area of land that is indicated might form the NCL lies adjacent to Foulness SPA/Ramsar site (as well as the Essex Estuaries Special Area of Conservation (**SAC**)). Changing the existing land-use may have a number of direct and indirect impacts on the Foulness SPA/Ramsar, and an AA would need to be carried out unless it can be demonstrated that the NCL would not have a likely significant effect on the interest features of the SPA. Based on the information available, the RSPB does not consider it possible to rule out a likely significant effect on the Foulness SPA/Ramsar site and the Essex Estuaries SAC.

- 4.82. We agree with the statements in document 5V, paragraphs 5.1.3 and 5.1.10 of the ES that increasing the levels of scrub or woodland could increase avian predation. In addition, it may lessen the suitability of SPA/Ramsar site and functionally related land by obscuring flightlines for waders.
- 4.83. The RSPB notes that the Applicant is carrying out a wintering bird survey of Foulness. We consider this is central to understanding the potential impacts of any NCL on Foulness SPA/Ramsar site and its features. The Applicant correctly recognises that SPA/Ramsar birds make regular use of and are dependent on agricultural land on Foulness. However the results of this survey have not been presented. The RSPB would expect them to form part of the information to inform a Habitats Regulations Assessment of a planning application for the NCL. As noted elsewhere, there is no such planning application in front of the relevant planning authority.
- 4.84. We are particularly concerned with the potential impacts of any NCL on land outside the SPA/Ramsar site but functionally related to it through its use by SPA/Ramsar birds e.g. for roosting or foraging. A detailed understanding of the location of the NCL is required in order to understand its potential impacts on these SPA/Ramsar features. That is not currently possible as the Applicant has failed to set out where the NCL will be located.
- 4.85. The Applicant has also failed to consider the potential impacts on the Foulness SPA/Ramsar should their boundaries be extended in future to include such functionally related land. This is a realistic possibility over the next few years as the outputs of the UK SPA Review 2008-2014 in respect of cropped habitats are implemented.