

APPENDIX 10A: ECOLOGY LEGISLATION AND PLANNING POLICY

South Humber Bank Energy Centre Project

Planning Inspectorate Reference: EN010107

South Marsh Road, Stallingborough, DN41 8BZ

The South Humber Bank Energy Centre Order

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Legislation and Planning Policy

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017
(as amended)

The Infrastructure Planning (Applications: Prescribed Forms and Procedure)
Regulations 2009 - Regulation 5(2)(a)



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1.0 UK WILDLIFE LEGISLATION

1.1 Wildlife and Countryside Act 1981 (as amended)

1.1.1 Part 1 of the Wildlife and Countryside Act (WCA) affords general protection to all species of wild bird and specific protection to flora and fauna listed in Schedules 1 (birds protected by special penalties), 5 (other animals), and 8 (flora, fungi and lichens). It is an offence (subject to exceptions) to:

- kill, injure, or take any wild bird;
- take, damage or destroy the nest of any wild bird while that nest is in use or being built;
- take or destroy an egg of any wild bird;
- disturb any wild bird listed on Schedule 1 of the WCA while nesting, or disturb the dependent young of such a bird (e.g. quail);
- kill, injure or take any wild animal listed on Schedule 5 (e.g. bats, great crested newt, common lizard);
- damage, destroy or obstruct places used for shelter or protection by wild animals listed on Schedule 5 and covered by Part 4A of the WCA (e.g. bats and great crested newt);
- intentionally disturb wild animals listed in Schedule 5, and covered by Part 4A of the WCA, that are occupying places of shelter and protection (e.g. bats and great crested newt); and
- pick, uproot or destroy any plant, fungi or lichen listed in Schedule 8.

1.1.2 In certain circumstances, licences can be granted to permit some actions prohibited under the WCA.

1.1.3 Schedule 9 provides lists of non-native flora and fauna that it is an offence to release or cause to spread in the wild. Of primary relevance in the context of proposed developments are flora e.g. invasive non-native plant species.

1.1.4 Part 2 of the WCA details the law regarding SSSIs and other protected areas within Great Britain.

1.2 Countryside & Rights of Way Act 2000 (CRoW)

1.2.1 Schedule 9 of the CRoW amends the SSSI provisions of the WCA, including increased powers for their protection and management of SSSIs. These strengthened provisions extend powers for entering into management agreements; place a duty on public bodies to further the conservation and enhancement of SSSIs; increase penalties on conviction where the provisions are breached; and introduce a new offence whereby third parties can be convicted for damaging SSSIs.

1.2.2 Schedule 12 of the CRoW amends the species provisions of the WCA, strengthening the legal protection for threatened species. The provisions make certain offences 'arrestable', and create a new offence of reckless disturbance.

1.3 Natural Environment and Rural Communities Act 2006 (NERC)

1.3.1 The NERC places a duty on Government Departments and public authorities to have regard for the conservation of biodiversity. Habitats and species are listed pursuant to section 41, and this list is to be used by decision-makers, including local authorities, to guide the implementation of their duties under section 40 of the NERC to have regard to the conservation of biodiversity in England, when carrying out their normal functions.

1.4 The Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations)

1.4.1 The Habitats Regulations require the compilation and maintenance of a register of European sites, to include Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) classified under *Council Directive 79/409/EEC on the Conservation of Wild Birds* (the Birds Directive). When considering potentially damaging operations, the precautionary principle applies i.e. consent for the operations cannot be given unless it is demonstrated that there would be no adverse effect on the integrity of the European site.

1.4.2 The Habitats Regulations also afford protection to European Protected Species, e.g. bats and great crested newt, listed in Schedule 2. It is an offence (subject to exceptions) to deliberately capture, kill, disturb, or trade in listed animals. In certain circumstances, licences can be granted to permit some actions prohibited under the Habitats Regulations.

1.4.3 Regulation 9A requires that competent authorities must take such steps in the exercise of their functions as they consider appropriate to secure the preservation, maintenance and re-establishment of sufficient diversity and area of habitat for wild birds as appropriate, and having regard to the requirements of Article 2 of the Birds Directive.

1.5 Protection of Badgers Act 1992

1.5.1 The Act makes it an offence to kill or take a badger, to cruelly ill-treat a badger, or to interfere with a badger sett, including disturbing a badger while it is occupying a sett. In certain circumstances, licences can be granted to permit some actions prohibited under the Act.

1.6 Animal Welfare Act 2006

1.6.1 The Act contains the general laws relating to animal welfare. It is an offence to cause unnecessary suffering to any animal. The Act makes owners and keepers (including landowners) responsible for ensuring that the welfare of animals within their control is met.

1.7 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017

1.7.1 The Water Framework Directive (WFD; EC Directive 2000/60/EC) came into force in 2000. The WFD introduced a comprehensive river basin management planning system to protect and improve the ecological and chemical health of our rivers, lakes, estuaries, coastal waters and groundwater. At the heart of the WFD is the philosophy to “make waterbodies better” through sustainable development for the joint benefits of aquatic habitats and the human environment.

- 1.7.2 The WFD requires member states to achieve “good status” for all groundwater and surface waters (rivers, lakes, transitional waters, and coastal waters) by certain target dates. For surface water, overall status comprises two elements: "good ecological status" and "good chemical status". Ecological status is defined by the biological condition or health of a watercourse, in combination with water quality and physical conditions that underpin biological conditions. The classification of ecological status considers biological elements (the abundance of aquatic flora and fauna), physical habitat availability (hydromorphology), and water quality factors such as the availability of nutrients, salinity, temperature and pollution by key chemical pollutants. The biological elements used as indicators of ecological quality include fish, macroinvertebrates, macrophytes and diatoms.
- 1.7.3 Any proposed developments or activities that have the potential to affect the water environment require a WFD Assessment (WFDa). Compliance with the WFD means attainment of good ecological status, prevention of deterioration in status, and prevention of failure to achieve future attainment of good status where it is not already achieved within waterbodies. However, WFD Article 4.7 provides legislation for exemption conditions that could allow implementation of schemes that cause deterioration in ecological status, for example for reasons of overriding public interest.
- 1.7.4 The WFD was originally transposed into UK law through the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003. The 2017 Regulations revoke and replace the 2003 Regulations. The 2017 Regulations serve the dual purpose of consolidating the 2003 Regulations, which had been amended a number of times, and making aspects of the Regulations more detailed and transparent.
- 1.8 The Environment Bill**
- 1.8.1 The forthcoming Environment Bill will mandate biodiversity net gain for development carried out pursuant to a planning permission (such as housing and commercial schemes) but NSIPs are not within the scope of the provisions in the Bill for biodiversity net gain.

2.0 NATIONAL PLANNING POLICY

2.1 National Policy Statement (NPS)

- 2.1.1 The overarching National Policy Statement (NPS) for Energy (EN-1) (Department for Energy and Climate Change (DECC), 2011) sets out national policy for energy infrastructure. Part 5.3 relates to biodiversity and states that where development is subject to EIA, the ES should clearly set out the effects on internationally, nationally and locally designated nature conservation sites, on protected species and on habitats and other species identified as being of principal importance for the conservation of biodiversity. It also requires that the applicant shows how the project has taken advantage of opportunities to conserve and enhance biodiversity, and states that as a general principle developments should aim to avoid significant harm to biodiversity conservation interest, including through mitigation and consideration of alternatives.

2.2 National Planning Policy Framework (NPPF) 2019

- 2.2.1 The NPPF (Ministry for Housing, Communities and Local Government, 2019) states the commitment of the UK Government to minimising impacts on biodiversity and providing net gains in biodiversity where possible, towards halting the overall decline in biodiversity. It specifies the obligations that the Local Authorities and the UK Government have regarding statutory designated sites and protected species under UK and international legislation and how this is to be delivered in the regular planning system under the Town and Country Planning Act 1990. Protected or notable habitats and species can be a material consideration in planning decisions and may therefore make some sites unsuitable for particular types of development, or if development is permitted, mitigation measures may be required to avoid or minimise impacts on certain habitats and species, or where impact is unavoidable, compensation may be required.
- 2.2.2 Paragraph 5 explains that *“The Framework does not contain specific policies for nationally significant infrastructure projects. These are determined in accordance with the decision making framework in the Planning Act 2008 (as amended) and relevant national policy statements for major infrastructure, as well as any other matters that are relevant (which may include the National Planning Policy Framework).”* Therefore the summary of the paragraphs of the NPPF provided below may possess relevance for the Proposed Development, for example in interpreting the NPS documents referred to above, they do not directly apply to the Proposed Development.
- 2.2.3 Paragraph 170 states that *“Planning policies and decisions should contribute to and enhance the natural and local environment by...minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures”*.
- 2.2.4 Paragraph 171 states that *“Plans should: distinguish between the hierarchy of international, national and locally designated sites; allocate land with the least environmental or amenity value, where consistent with other policies in this Framework; take a strategic approach to maintaining and enhancing networks of*

habitats and green infrastructure; and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries.”

2.2.5 Paragraph 174 states that *“To protect and enhance biodiversity and geodiversity, plans should:*

a) Identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks, including the hierarchy of international, national and locally designated sites of importance for biodiversity; wildlife corridors and stepping stones that connect them; and areas identified by national and local partnerships for habitat management, enhancement, restoration or creation; and

b) promote the conservation, restoration and enhancement of priority habitats, ecological networks and the protection and recovery of priority species; and identify and pursue opportunities for securing measurable net gains for biodiversity”.

2.2.6 Paragraph 175 states that *“When determining planning applications, local planning authorities should apply the following principles:*

a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;

b) development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination with other developments), should not normally be permitted. The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest;

c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists; and

d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity.”

2.3 Local Planning Policy

2.3.1 The North East Lincolnshire Local Plan was adopted by North East Lincolnshire Council in March 2018. Wildlife and nature conservation policies relevant to the Proposed Development are reproduced below.

Policy 41 – Biodiversity and Geodiversity

“1. The council will have regard to biodiversity and geodiversity when considering development proposals, seeking specifically to:

a) establish and secure appropriate management of long-term mitigation areas within the Estuary Employment Zone, managed specifically to protect the integrity

of the internationally important biodiversity sites (see Policy 9 ‘Habitat Mitigation – South Humber Bank’);

b) designate Local Wildlife Sites (LWSs) and Local Geological Sites (LGSs) in recognition of particular wildlife and geological value;

c) protect, manage and enhance international, national and local sites of biological and geological conservation importance, having regard to the hierarchy of designated sites, and the need for appropriate buffer zones;

d) minimise the loss of biodiversity features, or where loss is unavoidable and justified ensure appropriate mitigation and compensation measures are provided;

e) create opportunities to retain, protect, restore and enhance features of biodiversity value, including priority habitats and species; and

f) take opportunities to retain, protect and restore the connectivity between components of the Borough’s ecological network.

2. Any development which would, either individually or cumulatively, result in significant harm to biodiversity which cannot be avoided, adequately mitigated or as a last resort compensated for, will be refused.”

Policy 9 – Habitat Mitigation – South Humber Bank

2.3.2 Policy 9 relates to the provision of strategic mitigation across the North East Lincolnshire region, to ensure that development in key growth areas can proceed, whilst delivering mitigation for loss of wintering/ passage bird high tide roosting and feeding habitat for Habitats Regulations compliance. Mitigation habitat will be delivered as a coherent package to maximise the benefits to feeding and roosting birds rather than relying on piecemeal mitigation delivery, which may not be as effective, as individual developments progress. The Proposed Development lies within the Estuary Employment Zone to which Policy 9 applies.

2.3.3 Policy 9 is worded as follows:

“1. Within the Mitigation Zone identified on the Policies Map, proposals which adversely affect the Humber Estuary SPA/ Ramsar site due to the loss of functionally linked land will normally be required to provide their own mitigation in order to comply with the requirements of the Habitats Regulations.

2. The Strategic Mitigation sites, circa 120ha, identified on the Policies Map, represent those sites which have been identified to deliver appropriate mitigation which will address the adverse impacts of development within the Mitigation Zone at a strategic level. The identified Mitigation Sites will be safeguarded against development, and appropriate habitat will be delivered and managed on these sites in accordance with the North East Lincolnshire South Humber Gateway Ecological Mitigation Delivery Plan.

3. *Development proposals on greenfield land¹ within the Mitigation Zone will be required to make contributions towards the provision and management of the mitigation sites identified on the Policies Map. Where landowners have contributed to the implementation strategy through the donation of land, the required contribution will be reduced by an equivalent value.*

4. *The Council will secure such contributions, based on a proportional approach relative to the site area. The formula for the calculation of the relevant contribution is as follows:*

$$\text{Contribution (£)} = \text{SA} \times (\text{£MC/ha})^2$$

The Mitigation Contribution (£MC/ha) will be £11,580/ha. This contribution is not index linked.

The Contribution shall be paid when development commences on site, or through agreement with the Council where a phased approach to delivery is accepted by the Council

5. *All other planning requirements will also be expected to be met.*

6. *On an exceptional basis independent alternative mitigation proposals will be considered on sites within the identified Mitigation Zone. Proposals should be supported by evidence that demonstrates that the alternative mitigation contributes to the overall mitigation strategy and ensures that the development avoids adverse effects on the integrity of the SPA/ Ramsar site, alone or in combination. It will be a requirement of any planning consent that mitigation is implemented prior to the commencement of development.”*

¹ Exceptionally, brownfield sites may be required to contribute if evidence identifies that SPA/ Ramsar birds have been using the site in significant numbers.

² Where SA = Gross site area of the development proposal in hectares, £MC/ha = Mitigation Contribution per ha (TC/TL), TC = Total Cost of the Strategic Mitigation Scheme (for clarity including all land acquisitions and leases, costs of works, associated fees and maintenance costs), TL = Total area of the Land included in the Strategic Mitigation Scheme.

2.4 Local Biodiversity Action Plan (BAP)

2.4.1 The Lincolnshire Biodiversity Action Plan (BAP) sets out the habitat and species action plans for the county, and includes those habitats and species considered threatened or rare/ notable within the county (Lincolnshire Biodiversity Partnership, 2011).

Table 10A.1: Screening of Lincolnshire BAP habitats and species for relevance to the Proposed Development

Habitat/ Species Action Plan	Relevant/ Potentially Relevant to Proposed Development?	Rationale
Coastal sand dunes	✓	May be indirectly affected through air quality impacts
Peat and clay exposures	×	Not present
Sabellaria spinulosa reefs	×	Not present
Saline lagoons	×	Not present
Saltmarsh	✓	May be indirectly affected by air quality impacts
Arable field margins	×	Not present
Grazing marsh	×	Not present
Hedgerows and hedgerow trees	×	Hedgerows within Proposed Development area are not species-rich and are not considered examples of LBAP habitats.
Lowland calcareous grassland	×	Not present
Lowland meadows	×	Only refers to species-rich grasslands of high nature conservation importance.
Heathland and peatland	×	Not present
Lowland dry acid grassland	×	Not present
Chalk streams and blow wells	×	Not present
Fens	×	Not present

Habitat/ Species Action Plan	Relevant/ Potentially Relevant to Proposed Development?	Rationale
Ponds, lakes and reservoirs	x	Not present
Reedbeds and bittern	x	Not present
Rivers, canals and drains	✓	Drains are present around the perimeter of the Proposed Development and may be directly or indirectly affected.
Springs and flushes	x	Not present
Lowland and mixed deciduous woodland	x	Not present
Traditional orchards	x	Not present
Wet woodland	x	Not present
Wood-pasture and parkland	x	Not present
Brownfield	x	Not present
Churchyards and cemeteries	x	Not present
Gardens and allotments	x	Not present
Parks and open spaces	x	Not present
Bats	x	Habitats unsuitable to support important numbers of foraging bats, and there is no roosting habitat.
Commercial fish (marine)	x	Not present
Farmland birds	✓	May be nesting in grassland areas
Freshwater fish	x	Not present
Greater water-parsnip	x	Not present
Natterjack toad	x	No suitable habitat present

Habitat/ Species Action Plan	Relevant/ Potentially Relevant to Proposed Development?	Rationale
Newts	x	GCN absent, smooth or palmate newts may be present in artificial hibernaculum
Seals	x	No suitable habitat
Urban birds	✓	Suitable habitat present within the site scrub, broadleaved woodland and building to the north-east of Site.
Water vole	✓	Present in ditches within Proposed Development area
White-clawed crayfish	x	No suitable habitat
Invasive non-native species	x	None recorded

2.5 Natural England and Defra Standing Advice

Protected Sites and Species

2.5.1 The purpose of standing advice is to guide decision-makers on the determination of proposals with potential to affect protected sites, habitats and species. This includes guidance on providing and protecting wild bird habitats to address legal requirements set out in the Habitats Regulations.

2.5.2 This guidance sets out responsibilities and minimum requirements for survey and mitigation, including the need to consider objectives for no net loss and provision of net gain. Where impacts cannot be avoided, then planning applications should be determined with regard to ensuring:

- no more habitat is lost than is replaced (no net loss);
- as a minimum like-for-like habitat replacements; and
- consideration of options to secure better alternative habitat in terms of quality or area, compared to what would be lost.

3.0 REFERENCES

Department for Energy and Climate Change (2011) National Policy Statement for Energy (EN-1).

Ministry for Housing, Communities and Local Government (2019) *National Planning Policy Framework*

European Commission (2007) *Guidance Document on Article 6(4) of the 'Habitats Directive' 92/43/EEC*. Published on the internet at: http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

European Commission (2001) *Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC*.

Lincolnshire Biodiversity Partnership (2011) *Lincolnshire Biodiversity Action Plan 2011 – 2020 Third Edition*. Lincolnshire Biodiversity Partnership, Horncastle, Lincolnshire.