

**Planning Inspectorate Reference:**

**APP/W9500/W/17/178824**

**Local Planning Authority Reference:**

**NYM/2017/0032/FL**

**21 November 2017**

## **North York Moors National Park Authority**

### **Town and Country Planning Act 1990**

**Appeal by:** Mr Robert Walker

**Location:** South Moor Farm YO13 0LW

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### **Final Comments by Local Planning Authority**

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The invitation to attend the Hearing was accompanied by an invitation to make any final comments in response to the Appellant's case. The Authorities original written representation still stands although the Inspector's attention is drawn to the possible need to take account of the new, consolidated version of 'The Conservation of Species and Habitats Regulations 2017' which were laid before Parliament on 31 October and which will come into force on 30 November 2017. It should, however, make little practical difference to the Hearing.

However, the North York Moors National Park Authority (the Authority) has chosen to produce the following statement in response to the points made by the appellant in their written representation. The numbering of this statement follows that adopted by the appellant in their response to the Authority's Statement of Case, sent to the Authority by the Planning Inspector on 10<sup>th</sup> October 2017.

Many references are made to 'Circular 06/05'<sup>1</sup> which provides important guidance on how development proposals affecting sites of high biodiversity value are evaluated.

Taking their points in turn, we offer the following:

- 1.5 Motor Rallying takes place in September and November and has been going on for decades, pre-dating any known biodiversity interest.
- 4.5 An Article 4 direction has now been served (confirmed on 21 September 2017, coming into force on 14<sup>th</sup> April 2018. This removes permitted development rights relating to the use of the land as an airfield including the taking off and landing of any form of aircraft). Consequently, there is no fall-back position.
- 5.6 Distance, alone, is not always a reliable indicator of the scale of harm that can result from a range of activities. Whilst the magnitude of simple visual and noise disturbance does of course decline over distance, the actual effect is heavily influenced by temporal and spatial factors, amongst others, and, not least, the sensitivity of the species. For instance, the discharge of

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<sup>1</sup> Circular 06/05: Biodiversity and Geological Conservation – Statutory Obligations and Their Impact Within the Planning System.

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polluted water to a stream may have adverse consequences for a sensitive feature many, many kilometres downstream.

Therefore, when exploring potential impacts of the proposed development, the bird assessment should not rely on distance alone as a reason to avoid assessing impacts on the SPA. Indeed, when establishing a 'zone of influence' (Zol), best practice encourages the use of first principles to identify which features could be threatened and how. For instance, Box 9 of the current CIEEM guidance on Ecological Impact Assessment<sup>2</sup> encourages practitioners to identify '*What 'important' ecological features ... are known to occur within the project site and the surrounding area*' whilst s2.22 subsequently identifies that '*boundaries [of the study area] should be drawn to include areas within the zone(s) of influence however remote from the project site*'.

In terms of impacts on the SPA, activities confined to the airfield, such as take-off and landing, are actually of no consequence precisely *because* of distance. However, we mustn't forget that although the airfield may lie 6km from the SPA, the aircraft flightpaths deliver noise and visual disturbance to perhaps within just a few hundred feet above the protected site and its associated population of breeding birds.

Consequently, the Authorities concerns remain, as does its belief that the Habitats Regulations apply. In turn, we believe this justifies our request that the appellant provided information to allow the necessary Habitats Regulations Assessment (HRA) to be completed.

Even if HRA is not considered appropriate, Regulation 10(1) of the Habitats Regulations<sup>3</sup> may still apply. This requires appropriate authorities to '*take such steps in the exercise of their functions as they consider appropriate to secure the objective in paragraph (3)*' which in turn states: '*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 (measures to maintain the population of bird species)*'.

Lessons can also be drawn perhaps from the Basses Corbieres case. In 2007, the ECJ (Case C-374/98) explored the level of protection to be afforded to sites that qualified as but had not been, designated as SPAs. Amongst other reasons, the ECJ found that France had failed to classify the Basses Corbieres site even though it was identified as an Important Bird Area (IBA), and by not adopting sufficient conservation measures. The ruling confirmed that such areas are still protected under Article 4(4) of the Habitats Directive which is even stricter than that applied to classified sites<sup>4</sup>.

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<sup>2</sup> CIEEM (2016) Guidelines for Ecological Impact Assessment in the UK and Ireland: Terrestrial, Freshwater and Coastal, 2nd Edition. Chartered Institute of Ecology and Environmental Management, Winchester. Chartered Institute of Ecology and Environmental Management, Winchester (pp10-11)

<sup>3</sup> The Conservation of Habitats and Species Regulations 2017

<sup>4</sup> Farmer, A. M. (2012) (Editor) Manual of European Environmental Policy. 1043pp. Routledge, London.

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Whilst we are not claiming that Dalby Forest should be classified as an SPA, for reasons expressed in our original written representation it is quite possible the site would qualify for SPA status. Consequently, we argue this encourages a cautious approach to decision-making; after all, Dalby Forest has been identified as an IBA<sup>5</sup>. This issue led directly to the outcomes in the Sherwood Forest (or Rufford Incinerator) case referred to in our original written representation.

The appellant provides no evidence to support the statement that military aircraft operations *'will have much more impact than light aircraft'*. This may accord with popular belief but not necessarily with scientific literature. Indeed, p11 of the appellant's bird report contradicts their written representation which uses other evidence to acknowledge that *'Low flying military jets are often considered to be less of an issue ...'*

Indeed, Visser (1986), cited by Smit & Visser (1993)<sup>6</sup> (p11) when comparing the effects of military jets and small, civilian aircraft observed that the evidence *'... shows that helicopters disturb more frequently and over longer distances than jets, even though activities from jets are accompanied by shooting and high sound levels. The relatively mild effects from military jets are also known from other places (Boer et al 1970; de Roos 1972) ... From these data it appears that small civil aircraft cause much more disturbance'*. They went on to state that *'Small and slow flying aircraft are considered to be among the most disturbing phenomena in the Wadden Sea'*.

Elsewhere, Stock (1993)<sup>7</sup> and Smit & Visser (1993) were cited by Davidson & Rothwell (1993) to support their claim that *'Several studies have now found that the most widespread and long-lasting disturbance often comes from aircraft and that the slower the aircraft the worse the disturbance – helicopters, micro-lights and light aircraft (even when not low-flying) disturb more than jets'*.

However, it should be noted that Koolhaas et al (1993)<sup>8</sup>, also cited by Davidson & Rothwell (1993), showed that *'... fast [jet] planes also cause disturbance when flying over feeding grounds and roosts ...'*

Admittedly, these studies examine geese and roosting waders in other habitats rather than the breeding waders of the upland SPA but the broad message is clear that slow, low-flying, light aircraft from the proposed airfield have the potential to adversely affect the breeding bird communities of the SPA – and we do not believe the appellants can rule this out.

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<sup>5</sup> IBAs represent one of the cornerstones of bird conservation world-wide with over 11,000 in 200 countries. A rigorous site selection process ensures they are supported by robust data and, within the EU, it is the intention that these will be promoted as SPAs.

<sup>6</sup> Smit, C. J. & Visser, G. J. M. (1993). Effects of disturbance on shorebirds: a summary of existing knowledge from the Dutch Wadden Sea and Delta area. Wader Study Group Bull. 68 (Special issue).

<sup>7</sup> Stock, M. (1993) Studies on the effects of disturbances on staging Brent Geese: a progress report. Wader Study Group Bull. 60 (Special issue) was cited by Davidson, N. C. & Rothwell, P. I. (1993). Disturbance to waterfowl on estuaries. The conservation and coastal management implications of current knowledge. Wader Study Group Bull. 68: 97-105.

<sup>8</sup> Koolhaas, A., Dekinga, & Piersma, T. (1993). Disturbance of foraging Knots by aircraft in the Dutch Wadden Sea in August-October 1992. Wader Study Group Bull. 68 (Special Issue) was cited by Davidson, N. C. & Rothwell, P. I. (1993). Disturbance to waterfowl on estuaries. The conservation and coastal management implications of current knowledge. Wader Study Group Bull. 68: 97-105.

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One should always be careful when extrapolating the evidence from one study to another species or environment<sup>9</sup> but the possibility that the goshawks, nightjars and turtle doves react similarly to the presence of slow, low-flying light aircraft flying to and from the proposed development cannot be ruled out.

In what is a consistent theme of our evidence, we do not claim that there is overwhelming evidence that activities associated with the airfield will disturb the specific bird populations in the locality and/or further afield - the evidence can be strong or sometimes contradictory - but neither can the appellants show that bird populations won't be disturbed. The range of opinions is also made clear in the appellants' own literature review in the bird report.

The element of certainty, or lack of it, in this case is vital and is explained by further reference to the opinion of the previous Inspector who, in paragraph 27, reminded us that:

*'Circular 06/05 advises us in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development is established before the planning permission is granted.'*

It is our opinion that this burden of proof has not been met in this case.

5.7 The disturbance and displacement of breeding birds can take many forms, some generated by repeated activity, some by the occasional. It is also influenced by the sensitivity of individual species especially during the nest building and chick-rearing phases.

It is not unknown for prospective nesting pairs to be more susceptible to disturbance before they have fully occupied a nest and laid eggs (Petty (1996)<sup>10</sup> states that '*Goshawks are more tolerant of disturbance the further they get into the nesting cycle*') perhaps because, at this stage in the breeding process, there is still time to find an alternative, if less attractive site elsewhere. However, intermittent disturbance especially early in the breeding season can effectively sterilise potential nesting sites as they are repeatedly adopted by new pairs of birds and then abandoned as disturbance episodes occur. The net result is that ideal nesting sites can remain unproductive and/or pairs of adults are unable to breed.

Once eggs have been laid or young hatched, there is often insufficient time or energy to repeat the process elsewhere and so adults are often observed to tolerate more disturbance than earlier in the breeding cycle.<sup>11</sup>

Early in the breeding season, therefore, a range of flightpaths may not provide any mitigation at all and could instead introduce adverse effects over a larger area.

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<sup>9</sup> Woodfield, E. & Langston, R. (2004). Literature Review on the impact on bird population of disturbance due to human access on foot. RSPB Research Report No. 9. The RSPB, Sandy. (p4)

<sup>10</sup> Petty, S. J. (1996). Reducing disturbance to goshawks during the breeding season. Forestry Commission Research Information Note 267.

<sup>11</sup> Petty, S. J. (1996). Reducing disturbance to goshawks during the breeding season. Forestry Commission Research Information Note 267.

5.13 It is agreed that there is little, if any, applied research which provides compelling evidence to show whether goshawk and nightjar '*are vulnerable to .. disturbance and noise ... from*' airfields or not; it isn't surprising that such an applied area of research hasn't been explored.

However, the impact of slow, low-flying, light aircraft has been discussed above and, as said, with appropriate levels of caution, the outcomes can be applied to the proposed airfield.

Both goshawk and nightjar can be vulnerable to disturbance by human activity (albeit not related to airfield activity). Goshawk behaviour varies across its range from North America to Europe. A literature review by Scottish Natural Heritage<sup>12</sup> described a range of responses to disturbance from highly tolerant urban goshawks in Europe to more intolerant responses in the UK – the effect of persecution often being blamed for the latter. The review cites several papers including Rutz et al (2006)<sup>13</sup> to suggest that '*.. tolerance and habituation of individual goshawks may depend on the normal levels of breeding site disturbance and ... whether disturbance sources are different from the "norm"*'.

Petty (1996)<sup>14</sup> adds: '*The type of disturbance most likely to affect goshawks is when a sudden change occurs in the nesting environment.*' He also adds that '*Goshawks can become conditioned to some types of more regular disturbance; for instance pairs will occasionally nest close to busy roads or recreation areas, but in these cases disturbance was present from the start ...*'

There is abundant research on nightjar and disturbance with Lily & Clarke (2003)<sup>15</sup> often quoted to suggest that declines in numbers on Dorset heathlands '*... are at least partly due to actual human presence ...*' although again, this doesn't reflect airfield activity.

However, reference to Stow Maries Aerodrome does not compare like with like. It does indeed appear to support a varied breeding bird community, including many which are not found in Dalby Forest, but sits in a very different arable landscape which can prompt different behaviours within the same species. It also lies at the heart of both the Turtle Dove and Goshawk populations in England, most unlike Dalby Forest which represents one of the most northerly populations of both species in England.

Furthermore, Stow Maries is an aerodrome of long-standing where conspicuous nature conservation management has been introduced as opposed to South Moor Farm which seeks to introduce a much busier airstrip into an existing forest landscape which is already of high biodiversity interest. The circumstances are, therefore, very different and, it should be noted, the proposed airfield is not accompanied by any proposals for conservation management.

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<sup>12</sup> Ruddock, M. & Whitfield, D. P. (2007). A Review of Disturbance Distances in Selected Bird Species. A report from Natural Research (Projects) Ltd to Scottish Natural Heritage.

<sup>13</sup> Rutz, C., Bijlsma, R.G., Marquiss, M. & Kenward, R.E. (2006). Population limitation in the northern goshawk in Europe: a review with case studies. *Studies in Avian Biology*, 31, 158–197.

<sup>14</sup> Petty, S. J. (1996). Reducing disturbance to goshawks during the breeding season. Forestry Commission Research Information Note 267.

<sup>15</sup> Liley, D. & Clarke, R. T. (2003) The impact of urban development and human disturbance on the numbers of nightjar *Caprimulgus europaeus* on heathlands in Dorset, England. *Biol Conservation*, 114, 219-230

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When faced with potentially adverse effects in the forest, it is simply not sufficient to search for a similar proposal elsewhere where, for whatever reason, different outcomes arise. Rather, new proposals should always be evaluated from first principles and, if common factors arise, then draw on scientific evidence to evaluate the outcomes.

Returning to the appellant's assertion that no evidence has been provided to show the vulnerability of goshawks and nightjars to disturbance from the airfield, the opposite is also true; the appellant has not presented compelling evidence that they won't be. This distinction is very important in terms of the opinion of the previous Inspector who, in paragraph 27, reminded us that:

*'Circular 06/05 advises us in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development is established before the planning permission is granted.'*

In this case, we believe it is not for the Authority to provide evidence of harm, it is for the appellant to provide the evidence to allow properly informed decisions to be made. We don't believe this test has been met in this case.

- 5.14 It is the role of Ecological Impact Assessments (EclA) to explore a wide, but appropriate range of potential impacts. It is right that planning authorities use their knowledge and data to steer applicants towards particular issues – and both honey buzzards or turtle doves were mentioned specifically in the committee reports. However, the Authority does not *'... keep adding further species'*; if true, this would be unreasonable behaviour. The reason for introducing both species into the debate at the written representation stage was addressed in paragraph 6.17 of our original written representation and is not repeated here. Indeed, in paragraph 6.23 we acknowledged that seasonal restrictions would prevent the new survey of turtle doves by the appellant by only raising our disappointment that this important species hadn't been 'considered' rather than fully evaluated. However, we believe it is appropriate that the growing body of knowledge of this species should encourage a more precautionary approach.

It could also be noted that the appellant submitted their final bird report several months after the edition that informed the most recent planning application. The Authority was content to take full account of this latest document as it at least provided some survey data and, consequently, will enable the Hearing to make a decision based on a more thorough, if still sadly lacking, evidence base. The introduction of evidence relating to honey buzzards and turtle doves is offered by the Authority in the same spirit.

- 5.18 The use of the phrase 'could decline' was deliberate. The language chosen suggests an element of uncertainty because we do not have the evidence to show that losses will definitely occur. However, we do not believe that the appellant has provided evidence to show that protected bird species will not be harmed.

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Building on comments made in our original written representation, established best practice CIEEM (2016)<sup>16</sup> recommends on pp3-4 that Ecological Impact Assessments should address a number of core issues as follows:

- Design
- Scoping
- Impact assessment
- Design and mitigation
- Reporting and
- Monitoring

Specific elements of these stages include:

- the need to establish the spatial scope of the study (justifying why areas have been excluded)
- the identification of key ecological features
- the identification of (agreed) survey methodologies that are required to provide the data needed – which should also ensure that gaps in data are filled
- the determination of the importance of ecological features. This is of special importance here as, on p18, it adds '*... [where] an undesignated site is considered to meet published selection criteria for statutory or non-statutory site designation, or have substantive potential to meet them. This should be used to guide the assessment of importance and discussions should be held with the potential designating authority to agree how the site should be treated*'
- describe the extent, magnitude, duration, reversibility, timing and frequency of impacts

The aim of this standardised approach is to provide the planning authority with the confidence that it is making a robust and safe decision based on sound ecological evidence or '*... should clearly and simply describe the significant effects of any project so that all interested parties understand the implications of what is proposed*'.

Section 7.6 of the same document goes onto say: '*It is a well-established principle that the planning authority should ensure it takes account of all material considerations before making its decision .... It is therefore crucial that all information about the potentially significant ecological effects of the proposal is available to the planning authority before it grants permission*'.

In this case, this means preparing a report that surveys both goshawk and nightjars (rather than relying on a habitat survey), and that establishes the real importance of the goshawk, nightjar and turtle dove populations to enable valid impact assessments to be drawn.

However, the choice to limit the zone of influence to the area surrounding the proposed airfield, the lack of a nightjar survey followed by the absence of any evaluation of the features found, such as the possible international importance of the nightjar population of the forest, fundamentally compromises the bird report and casts doubt on its findings.

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<sup>16</sup> CIEEM (2016) Guidelines for Ecological Impact Assessment in the UK and Ireland: Terrestrial, Freshwater and Coastal, 2<sup>nd</sup> Edition. Chartered Institute of Ecology and Environmental Management, Winchester

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The report itself identifies other specific areas of doubt.

*'... in the absence of surveys during the breeding season, it is not possible to determine how many pairs of breeding nightjars may occur in these areas.'* (p20);

Elsewhere, when describing the distribution of goshawk, it states: *this fast-moving and relatively far-ranging species could hunt anywhere within the study area* (emphasis added);

In addition (p23): *'... up to 4 breeding pairs of goshawk could occur within 500 metres of the proposed sub-500ft flight path'* (emphasis added).

In this case, the shortcomings of the evidence provided by the appellant left the Authority with no alternative but to refuse the application. Even with the submission of the updated bird report of May 2017, this opinion remains unchanged and is explained by further reference to the opinion of the previous Inspector who, in paragraph 27, reminded us that:

*'Circular 06/05 advises us in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development is established before the planning permission is granted.'*

It is our opinion that this burden of proof has not been met in this case.

The reference to 'other airfields' is taken to mean Stow Maries and has been discussed above. If evidence from other airfields was at play here, there is insufficient information provided to debate this and so this point isn't taken further.

6.3 As discussed in 5.6 above, whilst we recognise the Inspector's conclusions, we still believe that the movement of aircraft at low level above the SPA remains the issue not operations at the airfield, 6km distant. Therefore, we maintain that the Habitats Regulations 2017 apply and that an HRA is both justified and required.

6.10 Similar arguments apply as provided in 5.13 above. We do not have evidence of harm, but insufficient evidence has been provided by the appellant to show that it will not occur, so failing to meet the test of Circular 06/05 and the advice of the previous Inspector. Reference to Stow Maries has been addressed in 5.13 above. Broad ranging comments relating to *'Birds are known at other, much busier, airfields ... without harm'* is far too general a statement to be regarded as evidence and could refer to a whole range of species from sparrows to sparrowhawks that are not of relevance here.

6.12 Again, at the risk of repetition, the previous Inspector reminded us in paragraph 27 that:

*'Circular 06/05 advises us in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development is established before the planning permission is granted.'*

It is our opinion that this burden of proof has not been met in this case. The level of certainty suggested by the phrase *'can be mitigated'* is rather at odds with their original thoughts in s5.1 of the bird report (May 2017) where the authors state that *'As mitigation for nightjar, it may be*



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*appropriate to avoid flight activity from 30 minutes before sunset until 30 minutes after sunrise*' (our emphasis). Without any evidence of the abundance, distribution and importance of nightjar this cannot be proposed with great certainty. This reminds us that despite the opportunity in the spring of 2017, the appellants chose not to undertake a nightjar survey.

6.18 It is agreed that there is no evidence to suggest Turtle Doves are susceptible to noise. However, neither is there evidence to show they are not and given the demands of Circular 06/05 for the scale of impacts to be established before consent is granted, we believe that a precautionary approach is justified in these circumstances to safeguard this highly-threatened species.

6.20 We acknowledge that the report is unpublished but attempted to share key findings in our written representation. At the risk of repeating comments made in 6.18 immediately above, we believe the adoption of a precautionary approach is reasonable.

As for motor sports, there are two main events and that both occur in autumn/winter outside the breeding season.

6.25 The appellants statement is confusing but, on the face of it, completely wrong. There is abundant evidence to show that nightjars are very susceptible to disturbance<sup>17</sup>. For the avoidance of doubt, the Authority acknowledges that this is largely related to human disturbance and not aircraft (if this is indeed what was intended). The Authority also acknowledged in paragraph 6.24 there is, understandably, little applied research that has explored the impact of aircraft on this species.

6.26 Similar comments made above in 6.12 also apply here. The 2017 bird report did suggest a degree of uncertainty regarding their survey which '*... suggests there is no known goshawk nest ...*'. Furthermore, as we are reminded in the appellant's written representation, the report concluded that significant effects on goshawks were unlikely. Again, in the context of paragraph 99 of Circular 06/05, this is a bold statement when the distribution of goshawks remains uncertain and, in the Authority's view, fails to meet the tests laid out in the Circular.

## Conclusion

The summary provided in the Authorities original written representation still stands. Drawing both pieces of our evidence together, we remain convinced that the information provided by the appellant fails to meet the standards expected. Adverse effects cannot be ruled out and, without accurate information relating to the abundance and distribution of the species, this harm cannot be mitigated or compensated. The proposed development therefore fails to meet the tests laid out in Circular 06/05 and paragraph 118 of the NPPF and, therefore, we believe that the appeal should be dismissed.

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<sup>17</sup> Liley, D. & Clarke, R. T. (2003) The impact of urban development and human disturbance on the numbers of nightjar *Caprimulgus europaeus* on heathlands in Dorset, England. *Biol Conservation*, 114, 219-230