

# Advice Note to Local Planning Authorities regarding the consideration of likely effects on the breeding population of nightjar and woodlark in the Sherwood Forest region



March 2014

This advice note updates and replaces the previous note dated 5 September 2012 to reflect the introduction of the National Planning Policy Framework ('NPPF') and amendments to the Conservation of Habitats and Species Regulations 2010 ('the Habitats Regulations').

## Summary

While no conclusion has yet been reached about the possible future classification of parts of Sherwood Forest as a Special Protection Area (SPA) for its breeding bird (nightjar and woodlark) interest, Natural England advise those affected Local Planning Authorities (LPAs) to be mindful of the Secretary of State's decision in 2011, following Public Inquiry, to refuse to grant planning permission for an Energy Recovery Facility at Rainworth where the potential impacts on these birds and their supporting habitats was given significant weight.

In light of this decision we therefore recommend a precautionary approach should be adopted by LPAs which ensures that reasonable and proportionate steps have been taken in order to avoid or minimise, as far as possible, any potential adverse effects from development on the breeding populations of nightjar and woodlark in the Sherwood Forest area. This will help to ensure that any future need to comply with the provisions of the 2010 Regulations is met with a robust set of measures already in place.

This Advice Note provides a brief explanation of the background to the current situation and suggests a 'risk-based' approach that could be followed to help future-proof decision-making on plans and projects. In addition a summary of the current LPA statutory duties in relation to birds is provided for clarity and there are links to further information relating to the legislation and policy that affects SPAs. The document is set out as follows:

- Background – including reference to planning case law
- Current situation
- The recommended 'risk-based' approach
- Existing statutory duties relevant to birds
- Further information
- Map highlighting the areas of greatest ornithological interest for breeding nightjar and woodlark

## Background – the possibility of a protected area (Special Protection Area) for nightjar and woodlark in Sherwood and Rufford Energy Recovery Facility planning case law

The UK government is required by European law to identify how it can contribute to the conservation of particular bird species across their natural range in Europe through the protection of suitable sites. In doing this exercise it has identified that the populations of nightjar and woodlark in Sherwood may warrant such protection. A final decision has not been made and it remains under consideration as part of a UK-wide SPA Review Programme being led by the Joint Nature Conservation Committee<sup>1</sup>. The possibility of the area becoming an SPA creates a risk for spatial planning in the Sherwood area. This is because any formalisation of the site as a Special Protection Area (SPA) would place a legal

<sup>1</sup>See <http://archive.defra.gov.uk/rural/documents/protected/spareview-tor.pdf>

obligation on decision-taking bodies requiring past decisions to be reviewed and potentially modified.

In 2011, following a Public Inquiry, the Secretary of State decided to refuse to grant planning permission for an Energy Recovery Facility on land at the former Rufford Colliery site at Rainworth. The likely effect on the breeding populations of woodlark and nightjar was a key consideration in the Secretary of State's decision<sup>2</sup>.

The Secretary of State agreed that whilst the application site was not within an area currently identified as a Special Protection Area (SPA), there was merit in following the formal approach required for SPAs. He agreed that when considering the impact of the development on the use of the area by the bird species listed on Annex 1 of the European Wild Birds Directive – in this case woodlark and nightjar - an approach similar to that set out in the relevant legislation (Regulation 61 of the Habitats Regulations<sup>3</sup>) should be adopted. The Secretary of State concluded that he could not be sure that the proposed development would not harm the integrity of the area used by the birds and that the conflict this created with the aims of the Regional Spatial Strategy and the potential harm to the integrity of the habitat used by woodlark and nightjar weighed significantly against the proposal.

### **Current situation**

Until the SPA Review concludes and provides further guidance as to whether new SPAs for nightjar and/or woodlark should be classified in the UK to meet the obligations of the Wild Birds Directive, there continues to be uncertainty about the future classification of an SPA in the Sherwood Forest area. However it is our view that, based on the evidence from the most recent national nightjar and woodlark surveys in 2004 and 2006 and the interpretation of that data, there remains a possibility of an area of Sherwood Forest being recommended for future classification.

We recognise that in the interim this creates difficulty for LPAs in how they should consider land allocations and policies in Development Plans and individual planning applications within the Sherwood Forest area. How local authorities choose to confront this issue is ultimately a matter for them, however Natural England advise that LPAs should adopt a form of 'risk based approach' or similar of the kind taken by the Secretary of State in the case referred to above. This should provide decision-making with a degree of future-proofing until such a time that there is greater certainty on whether the Sherwood Forest area is to be afforded pSPA or SPA status and whether the provisions of the 2010 Regulations are to take effect as a matter of policy or law.

### **The recommended 'risk-based' approach**

The 'risk based' approach advocated by Natural England was endorsed by the Secretary of State in coming to his decision on the development proposal at the former Rufford Colliery.

Natural England suggest that in taking a risk-based approach to development plan making and decision-making, LPAs seek to ensure that plans and proposals are accompanied by an additional and robust assessment of the likely impacts arising from the proposals on breeding nightjar and woodlark in the Sherwood Forest area. This should ideally cover the potential direct, indirect and cumulative impacts which may include, but may not be limited to, the following;

- disturbance to breeding birds from people, their pets and traffic
- loss, fragmentation and/or damage to breeding and/or feeding habitat
- bird mortality arising from domestic pets and/or predatory mammals and birds
- bird mortality arising from road traffic and/or wind turbines

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<sup>2</sup> See <http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planning-callins/pdf/1914959.pdf>

<sup>3</sup> See <http://www.legislation.gov.uk/ukxi/2010/490/made>

- pollution and/or nutrient enrichment of breeding habitats

No formal assessments of the boundary of any future SPA have been made; therefore it is not possible to definitively identify whether individual application sites would fall inside or outside any possible future designated area. However the enclosed map, which highlights the areas of greatest ornithological interest for breeding nightjar and woodlark, was submitted as evidence to the Rufford ERF Public Inquiry and could be of assistance to your Authority in this regard<sup>4</sup>. It is worth noting that the Inspector at the Rufford ERF Inquiry decided it appropriate to consider both boundaries to inform his recommendations.

We also advise that LPAs should seek to satisfy themselves that planning applications contain sufficient objective information to ensure that all potential impacts on the breeding nightjar and woodlark populations have been adequately avoided or minimised as far as is possible using appropriate measures and safeguards. It may be necessary to obtain ecological advice in relation to the potential impacts of a proposal and any possible avoidance or mitigation measures.

Natural England would encourage those LPAs in the Sherwood Forest area to work together, in compliance with the duty to cooperate, to consider the combined effect of their plans and proposals in order to gain a strategic overview and develop a collaborative approach. We are of the view that taking the approach outlined above represents good planning practice which will assist your Authority should the site be classified as SPA in limiting the number of plans and projects which would need to be re-considered as part of the review of consents process required by the 2010 Regulations.

### **Existing biodiversity and wild bird duties**

In addition to advising that a risk based approach will assist LPAs in future-proofing plans and decisions, Natural England advises that there are other relevant duties in legislation and policy that direct you to consider the protection and enhancement of nightjar and woodlark populations in the Sherwood area.

Your Authority must discharge its statutory duty given under Section 40 of the Natural Environment and Rural Communities Act 2006 to have regard to the purpose of conserving biodiversity. It follows that your authority should have regard to conserving nightjar and woodlark, owing to their inclusion as Species of Principal [conservation] Importance in England<sup>5</sup>.

Your Authority should also have regard to new duties given under regulation 9A of the Habitats Regulations, which requires LPAs to apply all reasonable endeavours to avoid the deterioration of wild bird habitat (including that of nightjar and woodlark) when exercising their statutory functions. The presence of either or both species and any effects on them is a material consideration when considering planning applications, regardless of whether the Sherwood area is put forward for classification as an SPA in due course.

### **Further information**

Information on the legislation, policy and classification process affecting Special Protection Areas (SPAs) is available from the following websites:

- JNCC <http://jncc.defra.gov.uk/page-162>
- Natural England  
<http://www.naturalengland.org.uk/ourwork/conservation/designations/spa/default.aspx>
- Defra <https://www.gov.uk/protected-or-designated-areas>

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<sup>4</sup> <http://www.nottinghamshire.gov.uk/planningsearch/plandisp.aspx?AppNo=ES/1144%20>

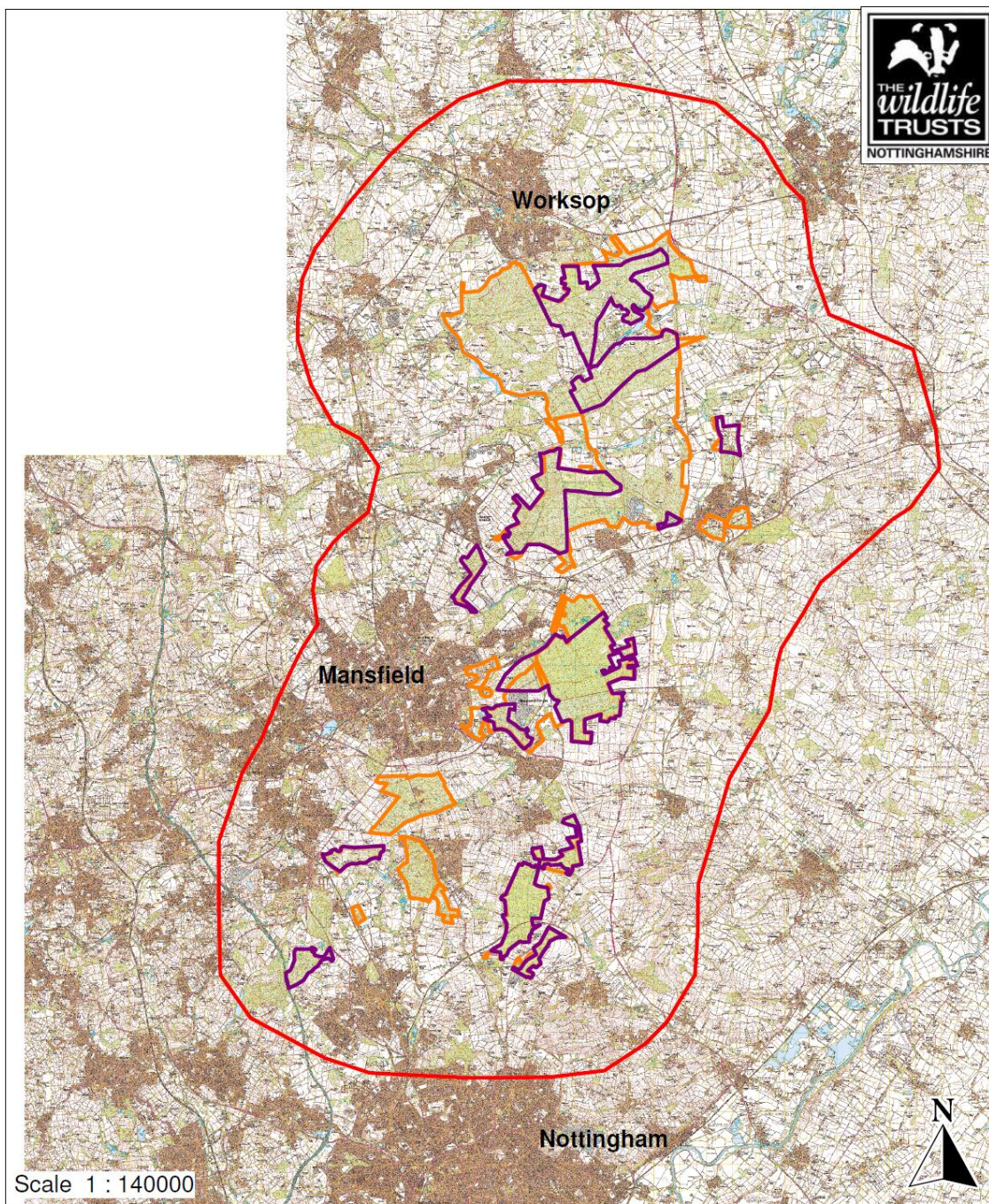
<sup>5</sup> As listed in section 41 of the Natural Environment and Rural Communities Act 2006 to guide decision-makers such as public bodies, including local and regional authorities, in implementing their duty under section 40 of that Act

We hope this advice is helpful and provides further assistance. Should Natural England be in a position to update these views and advice, we will do so and notify you accordingly.

If you have any queries about this advice, please contact either Liz Newman [elizabeth.newman@naturalengland.org.uk](mailto:elizabeth.newman@naturalengland.org.uk) or Ryan Hildred [ryan.hildred@naturalengland.org.uk](mailto:ryan.hildred@naturalengland.org.uk)

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Map highlighting the areas of greatest ornithological interest for breeding nightjar and woodlark, submitted as evidence to the Rufford ERF Public Inquiry 2010



- Key**
- RSPB IBA Boundary with 5Km buffer
  - NE Indicative Core Area
  - RSPB IBA Boundary

Plan 1

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