

New Forest National Park Authority
Lymington Town Hall
Avenue Road
Hampshire SO41 9ZG

Attn. Steve Avery (copy by email)
Copied to Alison Barnes and Julie Mutlow (by email only)

Our ref: MCF1-001/LF

2 April 2014

Dear Sirs

Latchmore Brook Restoration Project

We refer to your email dated 6 March 2014 stating that the National Park Authority (NPA) does not intend to carry out an Appropriate Assessment (AA) under the Habitats Directive and Conservation of Species and Habitats Regulations 2010 for the engineering works to Latchmore Brook planned by the Forestry Commission (FC). We understand that your reasoning is that "some" of the works are necessary for the management of some of the qualifying European features and, therefore, fall outside the Habitats screening and assessment regime. Plainly, if there are aspects of the project that are not necessary for the management of the site then one would expect that an AA is at least necessary for those aspects of the project. With respect, the brief email of 6 March 2014 does not answer the points we have raised in our correspondence, despite you having had over a year to consider the position. The terse statement lacks any reasoning to explain why what we say is wrong. In particular, you fail to provide:

1. Any evidence to explain why removing the existing man-made features is necessary for the management of any of the relevant qualifying European features in the area concerned, whether or not the unit is in favourable status; and
2. Any evidence to support the assertion that "there will be no detrimental likely significant effects arising from the project on any of the qualifying European features either alone or in-combination with other plans or projects." The particular concern here arises because of the hydrological connection between the Latchmore Brook units and the other units that compose the whole of this catchment area. For example, is the work going to impact on the downstream Huckles Brook and the River Avon?

The "project" area we are concerned with is the proposed works to Latchmore Brook, including SSSI units 28, 43, 44, 48 and 49, ostensibly to restore the Brook to its original, natural, meandering course, reconnecting the stream to the floodplain and reducing further erosion by slowing the flow (FC letter to NFNPA dated 27 November 2012).

As we said in our previous correspondence, the works will cause permanent damage to the ecosystems of those parts of the existing stream and tributaries that may be filled in, and short-

term damage to adjacent vegetation and its associated fauna. It will, by design, cause long-term changes to the hydrological status of both the stream and the adjacent vegetated areas with, at present, unknown consequences. The effects on fish, birds, and invertebrates, including the SAC species Southern Damselfly (*Coenagrion mercuriale*) (SDF) (Annex II), and on vegetation will be significant, with possible benefits for some species and adverse effects on others.

Are the works necessary to the management of the site?

Without a response to the substance, we consider that the NPA's conclusion that no AA is necessary for these engineering works to be wholly unsupported in fact and in law. We have previously set out, in our letter to you of 12 December 2012, the likely serious adverse environmental effects on the SSSI and Special Area of Conservation (SAC) qualifying features that make it plain that the project, which will damage the site, cannot be rationally considered to be necessary for the management of some of the site. We also wrote to Natural England (NE) (copied to you) on 31 January 2013, again setting out reasons why damaging works cannot be necessary for the management of the site. Our letter to NE also referred to the Attorney General's opinion in Case C-258/11 (Sweetman). Neither you nor NE has responded in substance in the past 18 months.

It is irresponsible and, indeed, irrational in law to consider these works necessary for the management of a site and thereby avoiding the need for an AA (a) whether or not the SSSI unit is in favourable status; (b) when the works would result in the destruction of habitats hosting an Annex II species; (c) the decision is being made in the context of a large programme of works affecting multiple SSSI units; and (d) the FC has said that the upstream enclosures should be "restored" before any works take place in Latchmore Brook. Plainly, you cannot make the decision about the need for an AA in isolation in this context but this appears to be the approach being relied on.

Units condition

According to the most recent postings on the NE website, all of the units are either "favourable" or "unfavourable recovering". We understand from the NE notes that the assessment of "unfavourable recovering" applies to any unit which is identified as having a "modified channel" and is planned for restoration, i.e. this works, our clients say, should not happen because of the damaging effects. This strikes us that an unfavourable recovering assessment, based on an assumption of future works, is not an objective statement of the current condition and is circular reasoning to justify the works. We refer you to the Court's judgment in Sweetman at [37]

"37 In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future."

It is, therefore, essential for an objective assessment to be made using this standard and most certainly *without* regard to the planned works. Perhaps NE could instruct an independent consultant, not connected with the project, to undertake this assessment to give guidance on the fundamental question of whether, in fact, these works are necessary to achieve a favourable status.

The Southern Damselfly

You may also be aware that, in July 2013, one of the Friends of Latchmore Brook surveyed the area in relation to the Southern Damselfly and his data recorded that the population distribution was much more widespread than previously recorded. The data is presently with the British Dragonfly Society for updating the record. This is important new information that will not have been available when the project was first conceived and the consequences arising from the project, in terms of loss of Southern Damselfly habitat, is considered significant.

Moreover, this decision on this FC project has been taken in the context of the current "*New Forest - Conservation objectives and definitions of favourable condition for designated features of interest - February 2012*" for the Southern Damselfly. However, there are serious concerns that these are non-compliant with the Conservation Objectives of the Habitats Directive. The primary concerns are set out in the attached note, but in summary are:

1. These local SDF Conservation Objectives do not follow published national SDF Guidelines (2003), or the Common Standards Monitoring Manual (CSM) (2004), or CSM Guidance for Terrestrial and freshwater invertebrates (2008);
2. There is no (published) audit trail as a rationale and justification for them; and
3. As an example, the New Forest "Site Specific Target range and Measures" for SDF state "No more than 25% reduction in extent of larval habitat, i.e. areas of unshaded slow-flowing alkaline water with suitable substrate." This conflicts with the additional entry in the Comments column that "Indications of a year-on-year reduction of channels, runnels or the area of seepages should be assessed as unfavourable condition."

What you are requested to do

You will appreciate that our clients include well-informed scientists and naturalists/observers with a high level of local knowledge about the flora and fauna in the Latchmore Brook area. They collectively regard the standard of evidence and argument provided in support of the approach the NFNPA has adopted toward the Habitats process to lack the necessary scientific rigor and rationale required for this important EU site. Whilst they do not wish to initiate judicial review proceedings unnecessarily, they may have no choice but to seek judicial supervision to stop unnecessary damage to the Latchmore Brook SSSI/SAC and ensure compliance with relevant legislation.

We also ask that NE consider and review the Conservation Objectives for the Southern Damselfly as they do not comply with the Habitats Directive and provide us with the evidence and an explanation to the points we have raised to supplement the short email from yourselves of 6 March 2014.

Finally, you state in your email of 6 March 2014 that you have "discussed" this issue of the need for an AA with NE. Please provide copies of your notes and any email communications with Natural England on this point. If necessary, you can consider this a request under the EIR/FOI procedures. If you do not comply, we will take the matter to the Information Commissioner as there can be no good reason to withhold this correspondence. In any event, we know from correspondence we have seen that, as recently as August 2013, NE reconfirmed its position to the NFNPA (relating to an earlier letter we have not had sight of) that NE considers that the proposed development is likely to have a significant effect on the development, following advice

from its lawyers. It, therefore, remains to be explained how NE could form that view on the one hand and advise that the works do not require an AA on the other. We are copying this to NE for their observations on these points.

Finally, our clients have asked us to make it clear that their concerns stretch beyond the Habitats Regulations issues identified in this letter and include a concern that, given the disregard for necessary evidence apparent so far, there is a serious risk that the EIA being carried out for the FC will lack substance and a sound evidentiary base and will, in effect, be so poor as to not provide adequate information about the environmental effects of the project.

Timing for response

Given the lengthy lapse in correspondence we would appreciate a response to these points by 17 April.

Yours faithfully

Richard Buxton

RICHARD BUXTON

cc. Natural England Attn Julie Lunt, copies Andrew Wood, Andy McDonald (by email only)
Forestry Commisison Attn Mike Seddon (by email only)
Verderers Attn Dominic May (by email only)