

RICHARD BUXTON

ENVIRONMENTAL & PUBLIC LAW

19B Victoria Street
Cambridge CB1 1JP

Tel: (01223) 328933

Fax: (01223) 301308

www.richardbuxton.co.uk
law@richardbuxton.co.uk

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

Attn. Steve Avery (copy by email)
Copy to Alison Barnes (copy by email)

Our ref: Latchmore1-001/LF

11 July 2014

Dear Sirs

New Forest engineering works: Latchmore Brook North Sluffers application 14/00394

We refer to your letter of 6 June 2014 regarding the Forestry Commission's ("FC") proposed engineering works at Latchmore Brook. We met with our clients recently to review your response, and also to discuss the FC's application for engineering works at North Sluffers, which is scheduled to come before the planning committee for the New Forest National Park Authority ("NFNPA") on 15 July 2014.

North Sluffers

Although the North Sluffers application is within a different location within the New Forest, the proposed engineering works are part of the larger HLS project in the New Forest SAC, SPA and RAMSAR sites promoted by the FC, which includes Latchmore Brook. This is plain from the Officer's Report ("OR") at para 11.4 and the applicant's Planning Statement para 1.1.

In addition, the nature of the engineering works is similar to the proposed engineering works at Latchmore Brook, as the works involve the infill or removal of an existing engineering channel feature over an area of works exceeding 1 km of channel (3169 m total length of channel worked on - FC Screening Request) and the introduction of 5500 tonnes of hogging, gravel, and clay, and other material to reinstate meanders, create new meanders, or partially infill the existing channel and drains (OR para 11.7 and Construction Traffic Management Plan para 4.5).

In relation to Habitats Directive issues, the OR does not specifically refer to the Directive or the Regulations. However, it records (para 11.15) that North Sluffers is within the SAC and that (Natural England ("NE") letter dated 17 June 2014):

"Natural England have raised no objection to the scheme and consider the proposal is 'entirely necessary for the management of the European site interest features for nature conservation purposes, enabling the maintenance or restoration of those features and contributing to the achievement of the sites Conservation Objectives."

Nowhere in the OR has the NFNPA, as Competent Authority, stated whether it adopts the NE position and it has failed to form a view whether the works require an appropriate assessment under the Habitats Directive.

EIA issues

In relation to EIA issues, the NFNPA screened the North Sluffers application and reached the view the works are not EIA development (Screening Opinion dated 12 February 2014, "North Sluffers SO"). The North Sluffers SO failed to consider the points in our letter of 31 January 2013 identifying the Latchmore Brook engineering works as falling within the Environmental Impact Assessment (Agricultural)(England) No2 Regulations 2006 (Agriculture EIA Regulations). The North Sluffers SO also fails to take account of the fact that NE has previously obtained legal advice that an EIA is required for the Latchmore works. The North Sluffers SO also fails to consider the wider cumulative effects of this project or of the other engineering projects proposed for the New Forest, although the OR plainly accepts that the North Sluffers works are part of a wider scheme of engineering works.

On this basis our preliminary view is that the NPA will act unlawfully to proceed to determine the North Sluffers application without carrying out an Appropriate Assessment ("AA") and without treating the application as EIA development and requiring the FC to carry out a full Environmental Impact Assessment.

Our principle concern, which also arises in relation to the proposed engineering works at Latchmore Brook, is the FC's approach to seeking consent for the New Forest engineering works through piece-meal applications when it is plain the schemes are being promoted by the FC as one wetland restoration project, funded by funds from the European Union CAP and administered by NE under the umbrella project Rural Development Programme for England.

The European Commission's approach toward individual applications, which are part of a wider scheme of works, as here, is that the individual applications constitutes "salami-slicing" and may constitute an unlawful approach under EU law in respect of the EIA directive, especially as there is no EIA for North Sluffers, as far as our clients are aware. See CJEU Case C-142/07.

European Protected Species Licence

On a related issue, has the FC applied for an EPS licence in respect of EU-protected species affected by the proposed works? We have copied to NE's solicitor for her input on that particular issue and general observations on the approach being adopted for North Sluffers.

It important that your authority appreciates that they consider the approach you are taking for this part of the New Forest engineering works programme directly bears on how a court could view a legal challenge they may bring to works at Latchmore Brook. For this reason, we consider it essential to set out our thoughts on the North Sluffers application prior to the committee meeting for your consideration.

Latchmore Brook

Your letter of 6 June 2014 fails to answer the points raised in our correspondence, including our letter of 2 April 2014, on the need for an Appropriate Assessment for Latchmore Brook. You refer to a letter dated 20 May 2014 but, as far as we are aware, we have not had sight of this letter and request a copy.

Our 2 April 2014 letter requested copies of notes and any email communications with NE on the need for an AA. Your response is that "Natural England have confirmed to the New Forest National Park Authority that there will be no detrimental likely significant effects arising from the project on any other qualifying European features either alone or in combination with other plans or projects. Furthermore, that the project under consideration is directly connected with and necessary for the management of some of the qualifying European features."

This conclusion is made without reference to the qualifying features. No explanation is given in relation to the phrase "any other qualifying feature" or what the impacts the engineering works would have on any particular qualifying features. Further confusion arises in relation to NE's statement in the same paragraph that "the project ... is directly connected with and necessary for the management of *some* of the qualifying European features." The logical meaning of NE's use of the word "some" is that the works are not necessary for the management of *all* qualifying features. It is also not clear whether this view has been reached in terms of the current project area, including the upstream Inclosures. You are referred to the NE correspondence dated 17 June 2014 in relation to North Sluffters, which explains that the duty of the competent authority is to consider the conservation objectives for each European site in forming a view under the Habitats Directive. This simply has not been done in relation to Latchmore Brook from the correspondence provided to us to date.

This ambiguity is fatal to the NFNPA as competent authority in forming a lawful view under the Habitats Directive. The level of vagueness and ambiguity may explain why NE has said in correspondence dated 21 May 2014 that it cannot form a view until they have a full understanding of the project:

"As you are aware Natural England is not the competent authority in this case, that role falls to the NFNPA. It will consider the proposals once they have been submitted by the Forestry Commission in accordance with the Regulations and NE will formally comment on the proposals at the appropriate time, as per due process. "

The point we continuously make is that until the NFNPA, as competent authority, undertakes a comprehensive science-led assessment of the impacts of the proposed engineering works in relation to *all* of the qualifying features within Latchmore Brook the AA is inadequate as a matter of law. This assessment must consider *inter alia*, the wider cumulative effects arising from engineering works elsewhere in the New Forest, and downstream beyond its boundaries, and the failures of previous similar engineering works carried out by the FC, e.g. at Buckheard Bottom, Amberslade and Ditchend Pittswold, which we are instructed employed the same methods being proposed this time around. If the matter is brought to court through a judicial review on the correspondence to date, the NFNPA simply cannot demonstrate that it has lawfully discharged its duties as Competent Authority under the Habitats Directive. We are presently taking advice from counsel as to whether to apply to the Court for a declaration on the need for an AA and would appreciate your views and whether you would consent to have the matter put before the Court on an early basis to avoid the application proceeding through the consent process on a flawed basis leading to a potential quashing of the planning consent down the road.

This letter is without prejudice to the other concerns raised in our letter of 2 April 2014.

Latchmore EIA scoping

Finally, we understand that a scoping report for an ES for the Latchmore catchment has yet to be released for consultation, although this was last due to be submitted at the end of June

2014 and is now "expected July 2014" posted on the HLS website. For the short reasons set out above, the EIA scoping opinion may need to consider the wider scope of the engineering works, for example in relation to the potential effects on the other sites including the River Avon SAC in the light of the CJEU case law referred to above.

Without prejudice meeting

All parties are aware that we proposed a meeting with the stakeholders to discuss these issues and we continue to consider this a preferable way forward. So far there is no firm response taking up this suggestion. We have chased NE about this numerous times, still to no avail, which is disappointing.

Conclusion

We look forward to your thoughts on these issues. Please inform us of the outcome of the North Sluffers application and send us a copy of the decision notice so we may take instructions.

Yours faithfully

Richard Buxton

RICHARD BUXTON ENVIRONMENTAL & PUBLIC LAW

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