RSPB response to Davies Commission report: Inner Thames Estuary Feasibility Study 1: Environmental Impacts (July 2014)

[redacted]

The RSPB has confined its comments to the Commission's question on factual accuracy. In this context, we have included questions of clarification where necessary. We have concentrated on section 4 (Ecology) and section 5 (Estuarine process and geomorphology) and associated annexes.

Location	Suggested edit/comment
p7, s2.1 para 2, last sentence	Saline lagoons are used by wildfowl as well as wading birds
p18, para 3	Requires clarification in respect of reference to priority species and habitats, as defined by the Habitats Directive, as this (i) excludes species and habitats protected under the Habitats Directives but which are not marked as priority in Annexes I & II, and (ii) excludes bird species. Article 4 of the Birds Directive identifies Annex I and regularly occurring migratory species are requiring special conservation measures, including the classification of Special Protection Areas.
Table 4.1	This requires various edits to ensure accuracy. **International legislation** *Habitats Directive* This introduced Special Areas of Conservation and the concept of the Natura 2000 network (comprising both SACs and SPAs (from the Birds Directive). It did not introduce protected areas per se. At a European level, it was the Birds Directive that introduced protected areas through the general requirements set out in Article 3 BD and more specific requirements of Article 4 to classify Special Protection Areas. While the aim of the Habitats Directive in respect of sites in the Natura 2000 network is to avoid adverse effects on site integrity, derogations are permitted in exceptional circumstances (i.e. no alternative solutions, imperative reasons of overriding public interest and securing of necessary compensatory measures). *Birds Directive* Adopted in 1979 and codified in 2009. Created network of Special Protection Areas (SPAs).

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	Ramsar Convention Add specific reference to Ramsar sites as the name of the wetlands designated. **National legislation** *Conservation of Habitats and Species Regulations 2010* Only transposes the two EU directives in part. Parts of the Birds Directive are transposed by the Wildlife and Countryside Act 1981. *Wildlife and Countryside Act 1981* Implemented part of the Birds Directive: specifically species protection and implementation of a revised, strengthened system of Sites of Special Scientific Interest (SSSIs) to fulfil Article 3 and Article 4 Birds Directive requirements.
p19/20, s4.2.1, 1st para	Last sentence is not quite right in its description. The HRA process is a parochial term used in England to describe the process from the likely significant effect test (Stage 1 described on p20) through to compensatory measures (Stage 5 described on p20). The purpose of the Appropriate Assessment is to determine whether or not it is possible to avoid an adverse effect on the integrity of an SAC or SPA (or European site or European offshore marine site in Habitats Regulations terms). It is not concerned with the integrity of the Natura 2000 network – that consideration only comes in during the Article 6(4) tests (esp. those relating to alternative solutions and compensatory measures). The last sentence of this para should probably be deleted or replaced entirely as it does not make sense. As noted above, the purpose of the AA to determine whether or not it is possible to avoid an adverse effect on the integrity of an SAC or SPA, in view of the site's conservation objectives.
p20, s4.2.1, 2nd para	This paragraph is slightly confused. We suggest that it is reworded along the following lines. *European sites and European offshore marine sites include Special Areas of Conservation (SAC) and Special Protection Areas (SPA). The network of SACs and SPAs at a European level is known as the Natura 2000 network. In England, it is Government policy to give the same level of protection to Ramsar sites.*

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p20, s4.2.1, 3rd para	Stage 2: Appropriate assessment The question is incorrectly worded and omits the precautionary element inherent in Article 6(3) of the Habitats Directive. We suggest the following wording: *Can an adverse effect on the integrity of a European site be ruled out?* Stage 5: Securing compensatory measures We suggest that the wording is amended as follows to reflect the test more accurately: *Have the necessary compensatory measures been secured to protect the coherence of the Natura 2000 network?*
p20, s4.2.1, last para	Suggest re-word as follows: *Regulations 62 and 66 (Stages 3-5 above) provide a derogation process if plans or projects would have an adverse effect on the integrity of a European Site (or there is uncertainty as to the absence of such) and if, in the absence of alternative solutions, the plan or project must still be carried out for imperative reasons of overriding public interest (IROPI). The necessary compensatory measures to protect the overall coherence of the Natura 2000 network must be secured for the plan or project to be allowed to proceed.*
p21, s4.2.2, 1st para	Rather than refer to case law in other Member States, it would be more accurate to refer to case law in the European Court of Justice.
p21, s4.2.3, 1st para	The incorrect test is given for Stage 2 (see earlier comments) as the AA test is more precautionary than stated. Suggest reword first sentence as follows: *Stage 2 Appropriate Assessment requires the project to be assessed as to whether it is possible to rule out an adverse effect on the integrity of any European Sites, or the risk of one.*
p22, s4.2.4, sub-section (ii)	We consider the suggested scope of the alternative solutions test is too narrow by being constrained to just sites, rather than alternative solutions including different processes (as is correctly stated in sub-section (i). Please see our earlier submitted comments on this issue in the RSPB's responses to (i) the draft Terms of Reference for the Inner Thames Estuary Airport Feasibility Studies and (ii) the Appraisal Framework. Please clarify why reference is made to some legal commentators

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	arguing that it is possible to take account of IROPI at the alternative solution stage. This argument has not been supported in ECJ case law.
p25, s4.2.6, para 3	We have the following comments on the list of measures that could comprise compensatory measures: *Restoration* This is not quite right. Restoration of the type described is already required in order to meet the site's conservation objectives. However, there has been a recent European Court judgment (Case C-521/12 *Briels*) which is relevant to the scenario described. It is logical in this context that any such restoration would need to be over and above that already required to maintain the conservation value of the SPA/SAC feature. Habitat restoration is also relevant as a compensation measure where it is restoring undesignated habitat outside the SPA/SAC network to a conservation value equivalent to that lost due to the plan or project. This is similar to creation, but where you are dealing with a degraded form of the required habitat. *Preservation* This is only relevant to SACs which are selected on a representative basis. Any site which is considered "a most suitable territory" under Article 4 of the Birds Directive must be classified as an SPA – therefore it is not feasible to identify additional sites to "preserve" areas that are already of SPA quality.
p26, Table 4.2	Potential zone of influence – Habitat fragmentation would occur at landscape scale i.e. out to 25km, and not simply within the footprint (c.f. para 5 on p39 of the report). Air pollution would occur more widely than within 1km of the footprint.
p27, s4.4.2	The second sentence is incorrect in stating that SSSIs and NNRs are designated for different features of interest to Natura 2000 sites. The majority of SPA and SAC features will also be features of underlying SSSIs and probably NNRs. Where there are discrepancies, this is being addressed by Natural England's SSSI Detailed Notification Review.

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p27, s4.4.3, 1st para	It is not clear what is meant by the reference to protected sites in the last sentence. We suggest it is deleted as it is confusing. Where EPS or nationally protected species are also features of European or national protected areas, they will be primary reasons for the selection of those sites.
p29, Table 4.3	The Natura sites qualifying features contains errors and does not agree with information in Appendix tables A2.1 and A3a (e.g. Outer Thames estuary qualifying features is incorrect and should read red-throated diver. Foulness qualifying features differ to those listed on JNCC designation (listed as breeding avocet, common, sandwich and little terns, and common ringed plover, as well as a number of wintering species - http://jncc.defra.gov.uk/pdf/SPA/UK9009246.pdf). We suggest cross-checking against NE's submission.
p30, section (i) Birds, 1st para	In second sentence, delete Natura 2000 sites and replace with "SPAs, Ramsar sites and SSSIs in the area…". Birds are not features of SACs and therefore it is not relevant to refer to Natura 2000 sites.
p30, Table 4.4	Breeding birds designated on Natura sites. We recommend this heading is changed to refer to SPAs only, not Natura 2000 sites, as birds are not relevant to SACs. Please specify which Natura sites are included as 'on or near the Hoo peninsula' - is it the same listed in table 4.3?
p31, Table 4.5	Clarification of what areas 'Thames and adjacent Estuaries' covers would be helpful. The total numbers of waterfowl presented here will exclude non-breeding gulls, of which there will be a very significant population within the Thames and adjacent estuaries. Therefore the estimate of a quarter of a million birds is likely to be a substantial underestimate. Traditionally, non-breeding gulls have not been considered for inclusion within the UK SPA network. However, the RSPB understands that this is under active consideration as part of the ongoing review of the UK SPA network. Therefore, within the lifetime of any mooted Inner TEA Airport, it is entirely possible that the large gull populations supported by the various SPAs and adjacent land would be assessed as to whether they should be included within the relevant SPA. This could significantly increase the total numbers of waterbirds of recognised conservation value that could be impacted. Notwithstanding the SPA issue, the large gull population would

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	be a relevant factor in bird control management to minimise the risk of air strike.
p33, Table 4.6	**Column 5 – numbers in sectors that overlap potential airport (WeBS, 5 year peak mean).** Please state the WeBS 5 year peak mean used. **Row 31** Bird Populations on Natura sites table contains an error on row 31. 'avocet' appears to have been copied down incorrectly form row 14. We think this should instead refer to the "non-breeding assemblage". In relation to the non-breeding assemblage population count for the Thames Estuary and Marshes SPA, this repeats a known error in the JNCC Standard Data Form for this feature on this SPA. The correct population, of 33,433 waterbirds is given in the relevant site account of JNCC (2001), available online at: http://jncc.defra.gov.uk/default.aspx?page=2042
p35, para 3	The reference to Figure 4.7 should be to Figure 4.8
p36, para 3	The reference to "Mitigation for predicted effects" should be to "Compensation for predicted effects"
p39, section (i), 2nd para	Should refer to mortality arising from displacement due to habitat loss (c.f. studies relating to redshank mortality following closure of Cardiff Bay Barrage.
p48, Table 4.9	London Gateway Port Should refer to Site A compensation area (now known as Stanford Wharf Nature Reserve) as this is within the 13km safeguarding zone and could be affected by bird control management.
p49, Table 4.11	Reference to "Shrone Marshes" should be corrected to refer to "Shorne Marshes"
p49, s4.6.4, para 1	This should refer to the London Gateway Site A compensation area (now known as Stanford Wharf Nature Reserve) as this is within the 13km safeguarding zone and could be affected by bird control management
p52, paras 2-4	Important to note that under para 118 of the NPPF, sites identified as required to provide compensatory measures for damage to Natura 2000 sites are afforded the same protection as those sites.

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p54, Table 4.12	The RSPB welcomes recognition of the potential impact of functional loss of habitat loss for SPA birds through disturbance. However, it is limited to within 1km of the airport footprint. A full assessment would require consideration of the impacts of such functional habitat loss over a wider radius and consideration of additional disturbance impacts arising from the greatly increased population required to service the airport.
p56, s4.7, 1st para	The reference to "likely significant effects" in line 4 should be replaced with "predicted adverse effects on site integrity"
p56, s4.7 and s4.7.1	**The proper use of "offsetting"** The text in section 4.7 and its subsections incorrectly used the term "offsetting" to include reference to "mitigation" measures. Offsetting is widely understood to only address residual adverse effects on biodiversity after all mitigation measures have been considered i.e. offsetting is, in the context of this report, equivalent to compensatory measures. *Section 4.7* In s4.7, para 3, the first line should be edited to begin as follows: *Avoiding adverse effects could only be achieved through mitigation…* *Sub-section 4.7.1* We recommend that the heading "4.7.1 Offsetting through mitigation" be deleted in its entirety as it is incorrect and misleading. The phrase "*or near the site itself"* should be deleted from the last sentence of para 2 as if the mitigation is outside the site, it will not reduce or avoid the impacts on the site and therefore could not be considered mitigation. The 3rd para should be deleted in its entirety for the reasons given above i.e. offsetting (compensation) is only considered once mitigation measures have been exhausted.
p57, Table 4.13	**London Gateway – rationale** We suggest this is described as "*compensatory habitat for adverse changes in function to the SPA/Ramsar intertidal mudflats - the latter were predicted to be retained but at a reduced value within SPA/Ramsar*"
p58, Table 4.14	**London Gateway – compensation required** The legal agreement for this scheme states a "minimum of 74ha".

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p58, 3rd para	Should refer to Site A compensation area (now known as Stanford Wharf Nature Reserve) as this is within the 13km safeguarding zone and could be affected by bird control management.
p61, Table 4.17	Roosting habitat for birds – add tick for coastal lagoon
P63, (ii) Potential for compensatory habitat provision	A parameter not identified in the study, but which is relevant to consideration of impacts and associated compensatory habitat provision is the value of sites being functionally interlinked. This would be a strong influence on decisions relating to the location, size and composition of compensatory habitat in order to replicate the complex functional linkages that would be damaged or destroyed by an Inner Thames Estuary Airport.
p64, s4.7.3 (ii), 3rd para	This paragraph should also refer to the legal, financial and governance challenges in securing, implementing and enforcing compensation measures in other Member States. This is a fundamental reason why such an approach would prove very difficult, if not impossible, to secure.
p65, (iii) Compensation costs, 1st para	The reference in line 7 to Public Enquiries should be to Public Inquiries
p67, 3rd para	Replace the reference to "impact on the integrity" to "adverse effect on the integrity…"
p67, (ii) Alternative solutions and IROPI	We agree with the reasons given as to why the Secretary of State justified consent for the Bathside Bay development, based on the best available information at that time. However, we note that that development, along with several other major container port consents in the same time period, has been delayed significantly due to the impact of the global economic collapse on container demand. This raises a note of caution in relation to the level of reliance placed on long-term supply and demand modelling.
p69, 3rd para	The reference in line 4 to "impact on the integrity of the Thames Estuary and Marshes SPA/Ramsar site" should be replaced with "adverse effect on the integrity…"
p80, 2nd para	The need for Foster and Partners to source large quantities of material from the North Sea raises the need for considering the impacts on the Outer Thames Estuary SPA, the main source of marine-dredged aggregates.

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p82, s5, bullet 1	We seriously question the reference to the airport having a 30 year life time. Please confirm the assumed full life time of an Inner Thames Estuary Airport. The modelling work should reflect that full period. A 30-year period does not seem credible.
p83, s5	Recommendations on further work – add that this needs to be carried out for the lifetime of the development.
s6 - general	The potential for flooding in Kent as a result of the airport hindering drainage is considered. However, there is no mention of impacts on terrestrial flooding in Essex. Impacts may include effects on water draining through gravity sluices.
p96, s6 and p100, s6.4.1	Two TE2100 action zones on the Hoo peninsular are identified as directly affected by the footprint of the airport (p 96). Related to this, s6.4.1 outlines likely sources of increased flooding impact. Should the airport be constructed, these sources (such as volumetric capacity) are likely to increase flood risk to other actions zones quicker than would have occurred if the airport was not built. Given the infrastructure in Essex which is located in flood risk zone 3, we would like clarity of what the term 'directly affected' means and ensure proper assessment is given to the flood risk impacts elsewhere in the estuary.
p95, 6.2 (i)	The report does not make an assessment of whether current recommendations for action zones in TE2100 will be relevant should the airport go ahead. Given the potential increase in flood risk caused by the construction of the airport (in addition to that posed by climate change), an assessment of whether the entire set of TE2100 and SMP proposals would remain fit for purpose may be required, given that they are currently based on Met Office modelling which may not be reliable should an airport make a significant difference to sea levels during storm events.
p103, s6.4.4. (i) para 5	We support the conclusion of the report on flood risk carried out by HR Wallingford that extensive additional modelling is required. The report identifies increased flood risk to the northern bank and should be an area of focus in addition to impacts on the southern bank and the Medway estuary which are explored more thoroughly.
p104, S6.4.4 (ii)	There is no mention of how infrastructure associated with the airport (such as housing and transport links) could affect flood risk. Coastal wet grassland habitats some distance outside of the footprint of the airport site may be affected.
p105, s6.5	TE2100 requires sea walls to be raised by 2035 to 2049, but the reports notes that the increase in sea level will require both the

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	timescale to be brought forward and the height to be raised further. Should the airport proposal go ahead, raising sea walls higher and earlier may not be a sustainable or cost effective solution. A consideration of the benefits of creating a naturally functioning coastline should be considered.
Appendix A1/CS2	"Argument against" should note that the RSPB did not accept this downgrading. The RSPB maintained its view that it had no confidence that the ecological function lost would be replaced through the compensation package.
Appendix A1/CS3	It should be noted that the RSPB was a major challenger in respect of the alternative solutions and IROPI case to ensure that issue was fully tested at a time when multiple major container port schemes were being considered which would damage Natura 2000 sites. The RSPB and English Nature had separately agreed a mitigation and compensation package with the applicant. While the proposed compensation measures would provide value within 1-2 years, it was recognised at the time that it would take longer to mature to be of similar value to Bathside Bay.
Appendix 1/CS9	Description The 250ha of grassland was recognised as functionally linked to the SPA/Ramsar site as it was used by significant numbers of SPA/Ramsar birds. It was formally notified as a SSSI by English Nature for its waterbird populations.
Appendix 1/CS11	Compensation measures proposed The second site (Site X) is on the northern side of the Hoo Peninsula not on the Isle of Grain. Conclusion and rationale Should refer to lack of alternative solutions, IROPI and securing of compensatory measures.
Appendix 1/CS14	Arguments against These also included the economic costs of the project and the serious implications for flood defences upstream of the barrage.
Appendix 1/CS17	Challenged by The other major challenger to the Cardiff Bay Barrage was the RSPB over a period of 7-8 years, along with local community/community groups. In addition to conservation arguments, local communities were most concerned with social/health issues.

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	The resulting compensation measures were the result of intervention by the European Commission following formal complaint by the RSPB. Important to note that the non-like for like nature of the compensation measures are due to this project pre-dating the adoption of the Habitats Directive in 1992 and its transposition into UK law in 1994, and the constrained area of search within south Wales.
Appendix A2, Table A2.1	Column 3 'summary of designated species/habitats' is repetitive within cells e.g. first row and others repeat 'Over winter the area regularly supports ...'. Be clear if each bullet is meant to signify different designations (ie SPA/Ramsar).
Appendix A2, Table A2.1, Thames Estuary and Marshes	Note that this repeats the error noted under Table 4.6 above in respect of the population for the wintering waterbird assemblage, which is due to an error in the Standard Data Form for this SPA.
Appendix A3b	A3b species of conservation importance – overwintering birds row. Figures are provided for Thames and Swale Estuaries but not Medway.

RSPB
8 August 2014