

APP/M9496/C/18/3215789

ENF/15/0057

Enforcement Notice Appeal relating to Land at Mickleden Edge, Midhope Moor, Bradfield, South Yorkshire, S36 4GX

Regarding the alleged unauthorised 'engineering operations consisting of the laying of geotextile matting and wooden log 'rafts' on the Land to form a track'.

Proof of Evidence

on behalf of the Appellant Dunlin Ltd

for Ecology and Habitats Regulations Assessment

By

Andrew Baker BSc (Hons) FCIEEM



**baker** *consultants*



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# 1 Qualifications and Experience

- 1.1 I am Andrew Baker and I am Director of the ecological consultancy Baker Consultants Limited, which I established in March 2009. I hold the degree of Bachelor of Science with Honours in Botany from the University of Nottingham (1986). I have been a member of the Chartered Institute of Ecology and Environmental Management (CIEEM) since 1994.
- 1.2 I have been a practising ecologist for over 30 years, having worked throughout the UK for organisations such as English Nature (now Natural England), local Wildlife Trusts, Peak District National Park, large civil engineering consultancies and private ecological firms. Much of my work involves providing expert advice to clients on Environmental Impact Assessments (EIA) and Habitats Regulations Assessments (HRA) of the impacts of proposals on international sites (Special Protection Areas (SPA), Special Areas of Conservation (SAC) and Ramsar sites) and Sites of Special Scientific Interest (SSSI).
- 1.3 In my work in private practice my clients come from the public, private and voluntary sectors. Public sector clients include English Nature (as was), the Department of the Environment Transport and the Regions (as was), the Environment Agency and Local Planning Authorities. My work for private clients includes numerous residential projects ranging from small schemes of two or three dwellings to large urban extensions of 2000 plus units. I have also worked on many leisure projects (theme parks, caravan sites and hotels) and large port and airport developments.
- 1.4 I am actively involved in the development of the ecological profession. I have published articles on EIA and protected species legislation. I am a member of the United Kingdom Environmental Law Association (UKELA) and a former Convenor of its Nature Conservation Working Group. As Convenor of the working group I was

responsible for coordinating comments on emerging wildlife legislation and policy, such as the now superseded Planning Policy Statement 9. In 2003 I was a member of the then Highways Agency's (now Highways England) Translocation Steering Group, which subsequently published a best practice guide on habitat translocation. More recently I was a member of the steering group working with the British Standards Institute and the Association of Local Government Ecologists to produce a 'Publicly Available Specification' that provides recommendations for the integration of biodiversity conservation into land use and spatial planning in the UK. This was the forerunner of British Standard BS42020.

- 1.5 I am currently a standing member on CIEEM's disciplinary board and I am frequently called upon to hear cases that are brought against members of the profession, often chairing the hearings.
- 1.6 I have considerable expertise in the practical application of nature conservation law and I have published widely on the subject including (along with Browne Jacobson Solicitors) the 2nd Edition of 'A Manual of Nature Conservation Law' edited by Michael Fry. Through my involvement in the UKELA I have been actively involved in the development of nature conservation law and planning policy that affects ecological issues. I have specific expertise of the practical application of this area of law and I teach on European and domestic nature conservation law and its associated guidance and policy. In 2015 I was made a Fellow of CIEEM in recognition of my contribution to this field of work.
- 1.7 I have significant experience of the application of the Conservation of Habitats and Species Regulations 2017 (as amended) (the Habitats Regulations), and the preceding legislation, and in particular those parts of the Habitats Regulations that relate to the protection of European sites (SPAs, SACs and Ramsar sites). I have completed numerous Habitats Regulations Assessments (HRAs) of local plans and

projects on behalf of competent authorities (Local Planning Authorities) and 'shadow HRAs' of projects for private developers.

1.8 I am frequently called upon to give evidence to both local plan examinations and public inquiries into individual planning applications. I have also presented evidence to a Parliamentary Select Committee on the proposed ABLE UK port development on the Humber.

1.9 Many of the HRAs I have completed involve the assessment of potential impacts of recreational pressure upon populations of birds and the provision of mitigation measures to address any such potential impacts. I have presented evidence to public inquiries in relation to impacts upon birds, particularly with regards to protected sites such as SPAs and SSSIs.

1.10 I also have considerable experience in moorland ecology. While at University my tutor was Dr J O Rieley, at the time one of the leading experts in peatlands conservation; much of the third-year field work was carried out on the Derbyshire Moors, the Scottish Highlands and upland and lowland bogs of Bavaria. Dr Rieley was one of the UK leading phytosociologists (the study of plant communities that is used in Europe and underpins the Habitats Directive) and I was schooled in this methodology of habitat classification. In my early career I went on to work for English Nature (the forerunner of Natural England), where I was responsible for the renotification of the Leek Moors SSSI, which is part of the South Pennine Moors Phase 1 Special Protection Area (SPA) and the South Pennine Moors Special Area of Conservation (SAC). Later I worked for the Peak District National Park as a field botanist where my work frequently involved surveys of moorland sites. In more recent times I have completed two Habitat Regulations Assessments of Local Plans within the Teesside area which included assessing access issues on upland sites.

1.11 In this proof of evidence I rely on a report that has been compiled by my colleague Mark Woods who is employed by my company as Principal Ecologist. Mr Woods is

our most senior botanist and is the Botanical Society of Britain and Ireland (BSBI) joint Vice County Recorder for Nottinghamshire; he is also highly experienced in moorland management and restoration and has contributed to catchment scale management research projects at Nottingham Trent University. Mark assisted me on my site visit and wrote up our condition assessment of the track and the surrounding moorland (Appendix 1).

1.12 The evidence I have prepared and provided to this inquiry is true and I confirm that the opinions I express here are my true and professional judgements based on scientific evidence and my professional experience.

## 2 Background

- 2.1 My involvement with this case began in July 2020 when I was asked by Dunlin Ltd to review the ecological evidence around the case, carry out a site visit to evaluate the current status of the track from an ecological point of view and to give my expert advice to the inquiry. Prior to this I had no involvement nor knowledge of the case.
- 2.2 The section of track which is the subject of the enforcement notice is located entirely within three overlapping designations, which protect the wildlife of the moorland. These designations are: Dark Peak Site of Special Scientific Interest (SSSI) (Site Ref: 15 WKZ) protected under the Wildlife and Countryside Act 1981 (as amended); the South Pennine Moors Phase 1 Special Protection Area (SPA) (UK9007021), and the South Pennine Moors Special Area of Conservation (SAC) (UK0030280). The SPA and SAC are 'Habitats Sites' (NPPF, 2019) both protected under the Conservation of Habitats and Species Regulations 2017 (as amended). The Natural England Conservation Objectives or SSSI citation for each of these sites is appended (see Appendix 2).
- 2.3 The sequence of events leading up to the serving of the enforcement notice is common ground and I will not repeat the chronology of events here. What is pertinent to my evidence is that the track, which is the subject of the enforcement notice, has been in use for many years. This is evident from the aerial photographs (see Photographs 1 – 4 of Mr Nick Leeming) the to ) which show evidence of use as far back as 1999; the use of the track is therefore well established. Secondly it is clear that the track is necessary for the management of the moor both for the ongoing restoration of the blanket mire and for Dunlin Ltd's lawful use of the moor. Natural England granted consent in 2014 under the Wildlife and Countryside Act 1981 (as amended) for the Site Delivery Plan which included capital works to the access track (installation of plastic netting) to facilitate habitat restoration work on the moor.

## 3 Scope of Evidence

3.1 My evidence here considers the potential effects of the proposed enforcement notice on the ecology of the area and the potential for these impacts to be significant in the context of the protection afforded to the area under both the SSSI designation and the two Habitats Site designations. I also consider the effects of the 'development' i.e. the installation of the matting and the timber rafts, upon the ecology of the site.

3.2 My evidence has been informed by my review of the documentation, which has been provided to the inquiry, and a site visit which I carried out with my colleague Mark Woods on September 9<sup>th</sup> 2020.

3.3 Based on the written evidence and the results of our field survey I will present my professional opinion on;

- the current state of the track,
- my assessment of the requirements of the enforcement notice, in particular paragraph 5 (a to f), and, specifically, the damage that would be caused if the enforcement notice were to be implemented, and
- my assessment of the legal steps that would need to be met before enforcement can be implemented without contravention of the Wildlife and Countryside Act 1981 (as amended) and the Habitats Regulations 2017.

3.4 I will also comment on the steps which are proposed for the continued maintenance and improvement of the track as set out in the appellants Statement of Case.

## 4 Evidence of historical use of the track

4.1 The available aerial photographs clearly show that the track was being used in 1999, albeit in some areas not following the precise alignment of the current route, as there is evidence of some limited damage to the vegetation. By 2005 the route is clearly

visible from the air and it is possible to see evidence of peat erosion correlated to the steeper and wetter parts of the track. The 2009 aerial photographs clearly show areas of braiding where the track has been broadened out as people attempt to avoid wetter and more rutted areas. Dunlin Ltd took ownership of the site in 2012 and with support from Natural England implemented a High Level Stewardship agreement which included the installation of the consented reinforcement matting (hereafter referred to as 'matting') and cord sections of the track. By 2017 the matting is clearly visible on the photograph and it is also evident that the areas that were previously braided and eroded have started to restore their vegetation cover.

## 5 Ecological Survey and Assessment

- 5.1 In order to get up-to-date information on the condition of the track and assess the potential effect of its removal, I visited the site on September 9<sup>th</sup> with my colleague Mark Woods. Mr Woods and I completed a botanical survey of the track and its surrounds in order to record the vegetation present and to assess the ecological condition of the habitats within the area. Our survey followed the standard Joint Nature Conservation Committee (JNCC) Common Standards Monitoring for Upland Habitats condition assessment methodology, which was developed in order to assess the condition of SSSIs. The full condition assessment report can be found in Appendix 1.
- 5.2 The track was found to be in a good condition for the majority of its length, being substantially revegetated with acid grassland and along several sections, heather had re-established along the centre of the track. The current state of the track is illustrated in photographs 1 to 7 of Appendix 1. In a few areas where the matting was either missing or had not been put in place there was obvious erosion of the underlying peat/mineral soil. These areas of erosion illustrate how effective the matting has been at stabilising the track and allowing the vegetation to recover (see Photograph 1 below).

5.3 Adjacent to the track the heathland vegetation was in favourable condition. However, there were short sections of the track where braiding had previously occurred, which were in unfavourable condition, but were recovering towards a favourable condition. Similarly, the sampled flush was in an unfavourable condition, because of an incomplete cover of suitable vegetation, but was recovering towards favourable condition. The braiding which is evident on the aerial photographs was mostly revegetated, particularly in wetter areas where the timber rafts track has been placed (see photograph 2 below).

*Photograph 1 Section of missing matting.*



5.4 The condition survey found no evidence that there had been any demonstrable impact of either the matting or the timber rafts sections on the hydrology of the site either impeding drainage or causing surface erosion. Where the matting has been placed on the shallow dry peat/mineral ground (such as photograph 1 above) it has evidently helped to prevent surface erosion and stabilise the vegetation. In the flush areas (Photograph 2 below) water was percolating through and under the timber rafts without causing erosion to the substrate or the vegetation. Indeed, the previous damage to the flush areas where the track had become braided will evidently have damaged the vegetation and also interrupted the drainage in the area compacting the wet peat and causing erosion in the ruts. Such damage is the reason why rushes have become dominant in flushed areas, where sphagnum dominated vegetation would be expected in the absence of disturbance. The installation of the matting and timber rafts has both prevented further damage to the moorland around the track and allowed the natural drainage to recover from the previous damage.

*Photograph 2 Vegetation on and around the wetter timber raft sections of track*



## 6 Ecological effects of the ‘development’

- 6.1 As set out above, the aerial photographs show that prior to the installation of the matting and the timber rafts there was extensive damage to the moorland especially in those areas which the track is steep and where the ground conditions are wet. This damage is particularly evident in the form of braiding where vehicles have attempted to avoid existing ruts and found an alternative route, causing more damage to the vegetation and peat.
- 6.2 The installation of the matting and the timber rafts was specifically done with the aim of providing a stable route designed to allow access without causing damage to the moorland habitats.
- 6.3 The effect of the ‘development’ was positive in that it narrowed the track to a narrower, defined route and allowed the surrounding vegetation to recover. Again, this is evidenced by the aerial photographs.
- 6.4 While I do not have first-hand knowledge of the site prior to the ‘development’ being implemented, in my professional view, the damage that is evident from the aerial photographs would have caused localised damage to the hydrology of the area impeding the drainage in areas where the ruts were parallel to the slope, and causing gullying and erosion where the ruts ran with the slope. The installation of the matting and the timber rafts clearly allowed the drainage to revert back to its previous condition as the ruts revegetated and became filled in.
- 6.5 In summary, the ‘development’ was entirely positive for the ecology of both the track and the surrounding moorland. Indeed, it is apparent that that was also the view of Natural England which not only part-funded the ‘development’ but also carried out a positive Habitats Regulations Assessment of the ‘development’ (21<sup>st</sup> August 2013).

## 7 Ecological Effects of Track Removal

7.1 The fundamental question that must be asked is what will be the ecological effects of removing the matting and timber rafts from the track, as required by the enforcement notice. The following assessment is based in part on the in part-premise that the track is necessary for the continued management of the Moor as well as the restoration of blanket bog under the HLS agreement (see Natural England email to PDNPA, 13<sup>th</sup> April 2018 ref 239465) and the track will continue to be used for future restoration as well as for management and emergency access. In the next sections I consider both the damage that will be caused by the act of the removal of the matting and timber rafts and the continued use of the track once the matting and timber rafts are removed.

### Removal of the matting and timber rafts.

7.2 It may be possible that the matting and timber rafts can be removed by working back from the western end and working entirely from the intact track, however my view, based on experience of such site work, is that such a method of working is fraught with practical difficulties and that the machines and vehicles will inevitably need to move off the track for unplanned reasons. There is a high likelihood in my view that the impacts of the removing the track will not be confined to the track area but, in places, will extend for 2 or 3 meters either side of the track.

7.3 The removal of the matting will strip the existing vegetation as well as the matting. In most areas (as can be seen from the condition assessment at Appendix 1) vegetation has grown through the matting, and as it is pulled up the vegetation will be removed with it. Furthermore, the upper layer of the underlying peat substrate will also be removed as this will be bound to the roots of the vegetation.

7.4 Once removed, the remaining bare peat will be exposed and prone to erosion. To stop such erosion the exposed track would have to be immediately protected by placing heather brash and netting over the exposed track. In addition, material may

need to be brought in to replace the lost peat which risks importing non-native or inappropriate species into the area.

- 7.5 Even with appropriate mitigation, my estimate is that the areas that are covered by matting will take a least five years to recover to a state which is comparable with the current condition of the track.
- 7.6 Within the flushed areas where the timber rafts have been placed, removal has an associated high risk of initiating erosion and disrupting the hydrology of the flushes. Removal will leave a scar of wet peat which will be unprotected by vegetation and highly susceptible to losing its structure, becoming liquid and being washed away. Again, these areas would need to be protected with some form of protective mat or similar geotextile while the vegetation becomes re-established.
- 7.7 In summary, the removal of the track matting and the timber rafts would damage habitats and run the risk of initiating localised erosion of the moorland which would require further remedial action.
- 7.8 The damage that will be caused to the moorland by the removal of the track has been acknowledged by PDNPA in its enforcement notice at paragraph 5 which requires the appellant to carry out a raft of mitigating procedures including, placement of 30-35 cubic meters of heather brash, planting of Sphagnum moss and spraying of grass seed mix. All these measures are required to correct the damage which will be caused by the removal of the track and for the most part would be unnecessary if the track were to be retained.
- 7.9 The wholesale removal of the track and the measures proposed in paragraph 5 would present a high level of risk of failure, particularly on steeper ground where exposure of the peat, even with the mitigation measures put in place, could easily become eroded before any vegetation has time to become established. In the scenario further major works would be required to repair these areas.

7.10 By contrast, the appellant in their Statement of Case (paragraph 20 a – e) has proposed to put in place measures to maintain the track matting and remediate those areas (such as that shown in Photograph 1 above), where the existing track is in poor condition. The scale of this work is very localised and in my view would be easily achieved causing no disruption to moorland habitat. Because of the small scale of the areas involved, this work is much more likely to be successful when compared to the removal of the track, and unlikely to result in further erosion.

### Use of the track following removal of the matting and timber rafts.

7.11 The restoration of the moor as set out in the HLS Site Delivery Plan requires further access to the moor. Once the track is removed it will not be possible to use the current route to access the upper moorland for the purpose of restoring the blanket bog without causing further damage to the track. Clearly an alternative will need to be found, which will inevitably cause further damage to protected habitats. Indeed, any alternative track will run the same risk of damage to dry heath, and braiding in the wet flush areas as was the case for the existing track prior to the matting being installed. The removal of the matting will entirely undo the restoration gains which were apparent since the matting was installed.

7.12 The track also provides better access for the control of wild fires which is an increasing problem on the South Pennine Moors. Wildfires (as opposed to controlled heather burning) can be particularly destructive to the moors as they can cover a large area and if they burn too hot can destroy the dwarf heath vegetation and ignite the peat. The track matting and timber rafts provide an access route for tackling such fires, including access to a water supply.

## 8 Legal implications for the protected sites.

8.1 In this section I will explore the implications of removing the track from the designated sites (SAC, SPA and SSSI) in the context of the relevant legal protection afforded to them.

### European Protected Sites

8.2 The SPA and the SAC are both protected under the Habitats Regulations 2017 (as amended). Regulation 63 requires competent authorities to carry out a Habitats Regulations Assessment for any project that may affect a European site ('Habitats Site'). The process entails specific legal tests that must be met, which have been clarified through extensive case law and guidance. The process is summarised in Figure 1 below.

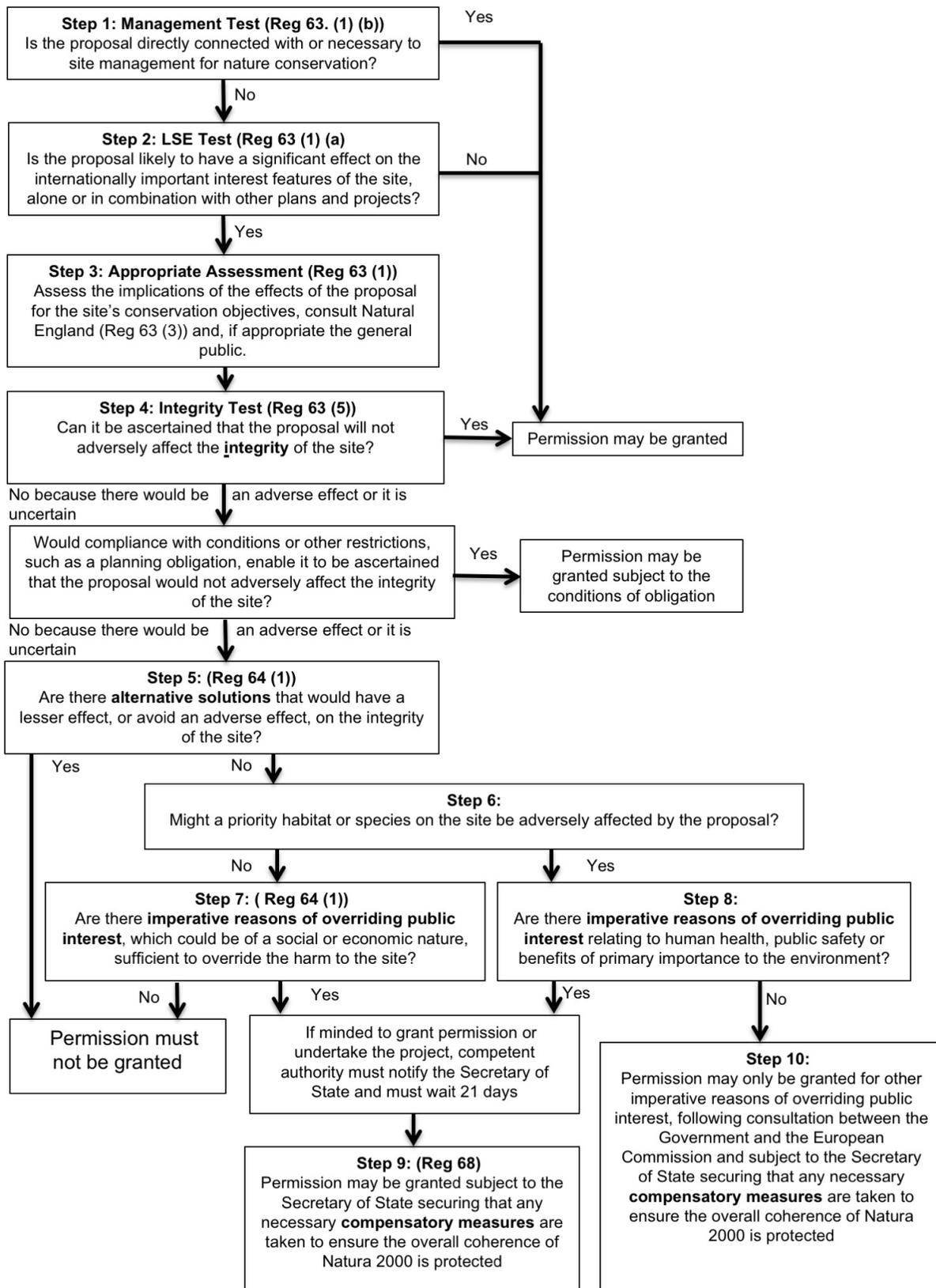
8.3 There have been some recent changes of approach arising from case law handed down from the CJEU.

8.4 In Case C-323/17 People Over Wind, Peter Sweetman v Coillte Teoranta, (12<sup>th</sup> April 2018) the CJEU concluded that 'in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site'.

Figure 1.

## Habitats Regulations 2017 decision chart

based on ODPM Circular 06/2005 Defra Circular 01/2205 Figure 1



- 8.5 To date, three Habitats Regulations Assessments have been carried out. The first was the HRA carried out by Natural England (21<sup>st</sup> August 2013) of the Midhope HLS agreement under the Habitats Regulations 2010, under Regulation 21. Natural England has claimed that the track element of the project was screened out of the HRA *'as it was concluded that the work was not on the SAC feature(s)'* (Natural England Midhope Moor HLS Track Casework Summary March 2019). As there is no specific mention of the track within the HRA of the HLS Moorland Agreement, it is presumed that the track was screened out prior to the likely significant effect test. The HRA ultimately concludes that the HLS could be granted consent.
- 8.6 The second HRA was carried out by the PDNPA when it considered the Retrospective Planning application presented to the Planning Committee for adoption on 15<sup>th</sup> June 2018 (item 6 on the agenda pp13-17). This HRA is flawed throughout. In the first instance, this assessment was done under the wrong Regulations, referring to the 2010 Regulations, which were superseded in 2017.
- 8.7 Furthermore, the second Recommendation in the document (p14) is contradictory. On the one hand it says, *'It is determined that restoration and repair of previously damaged access route including the laying of plastic access matting to facilitate vehicular access to the open moorland site, Midhope Moor, has potential to have a significant effect on the integrity of a European designated site'*. While in the next sentence it states *'Thus, approval of application NP/S/1217/1304, the subject of a separate report to Planning Committee, would not be contrary to the provisions of Regulation 61 of the Conservation of Habitats and Species Regulations 2010(as amended) (the 'Habitats Regulations') and the EU Habitats Directive and an Appropriate Assessment is not considered necessary.'*
- 8.8 I cannot understand how these two conclusions can be reconciled. The first sentence is saying that the repair of the access route has the potential to have a significant effect upon the integrity of the site; a statement which contradicts Natural

England's assessment of 2013, which did not even consider the track to give rise to likely significant effects. The second sentence directly contradicts the first when it is stated that approval of the retrospective planning application would not be contrary to the Habitats Regulations 2010. The second statement is consistent with Natural England's 2013 assessment. I can only conclude that the first sentence contains typographical errors, as the conclusion of the HRA agrees with the second sentence (and Natural England's earlier assessment), and states;

#### 8.9 'Conclusion

*It is concluded at Stage 1 of the HRA that the information presented with the application is sufficient to demonstrate that in the event of the grant of planning permission for the development, or alternatively enforcement action to remedy the breach of planning control, conditions and requirements can be specified to ensure that the development is unlikely to have significant effects on the integrity of the Peak District Moors SPA and South Pennine Moors SAC. Thus, the development is not considered to be contrary to the provisions of Regulation 61 of the Conservation of Habitats and Species Regulations 2010 and the EU Habitats Directive, and an Appropriate Assessment is not considered necessary.'*

8.10 Due process was, however, not followed because the HRA did not first consider whether the project was '*directly connected with or necessary for the conservation of the site*'. It is mentioned in the committee report, but there is no detailed consideration of this point. Given that further restoration work was and is planned (see the proof of evidence of Mr Richmond-Watson and Natural England's letter emailed to PDNPA 13<sup>th</sup> April 2018 ref 239465) it is clear that the Retrospective Planning application meets the first test of the Habitats Regulations 2017 (as amended) and further assessment is not required.

8.11 Notwithstanding the fact that the Step 1 management test was not considered, I do concur with the conclusions that were set out in the HRA that was put before the

committee on 15<sup>th</sup> June 2018 that the proposed 'development' - the laying of the track - would not give rise to likely significant effects or an adverse effect upon the integrity of the site, as the installation of the matting and the wooden rafts has had and will continue to have a beneficial effect upon the moorland habitats.

8.12 Despite giving the planning application a clean bill of health under the Habitats Regulations Assessment, the recommendation under the planning application (item 7 of the 15<sup>th</sup> June agenda) is for refusal as with the final reason being; '*Harm to the moorland ecology and habitat along the length of the application site from the initial installation of the matting and associated groundworks coupled with the damage caused subsequently from the increased vehicle use of the route contrary to policies L2 and LC17.*' This conclusion is illogical. The Habitats Regulations is the highest level of legal protection that can be afforded to a site. It includes the most stringent of legal tests designed to ensure that SPAs and SACs are not damaged. The PDNPA had already concluded that the retrospective planning application would not even give rise to Likely Significant Effects upon the SPA/SAC and it is, therefore, unfathomable as to why the committee report recommended refusal on grounds of harm to the moorland ecology.

8.13 The third HRA that was carried out was presented to the PDNPA planning committee on Friday 14<sup>th</sup> September 2018 and purported to be an HRA of the proposed enforcement action (Agenda item 16). This HRA is entirely at odds with the previous PDNPA HRA and that of Natural England's 2013 HRA.

8.14 It is stated at paragraph 3.2 that the '*The unauthorised development is likely to have a significant effect on the SPA and SAC*'. This is clearly incorrect as the opposite conclusion was reached in the 15<sup>th</sup> June HRA. The same error is stated again at paragraph 7.2 of the HRA: '*One of the conclusions of the assessment [June 15<sup>th</sup>] was that if the Authority was minded to grant permission on a permanent basis, this was likely to have a significant impact on the SPA and SAC and the special qualities*

*for which they are designated.*' Again, this statement was clearly wrong, because the 15<sup>th</sup> June HRA came to the opposite conclusion.

8.15 The 14<sup>th</sup> September HRA concludes (para 7.3) *'In these circumstances, it is concluded at Stage 1 of the HRA that the proposed enforcement action to secure removal of the track would be unlikely to have significant effects on the integrity of the SPA or SAC. Thus the action would not be contrary to the provisions of the Habitat Regulations and the EU Habitats Directive, and an appropriate assessment is not considered necessary.'* Again, they conclude that the project passes at Stage 1 of the HRA process (Step 2, Figure 1).

8.16 The 14<sup>th</sup> September HRA gives no assessment as to the effects of removing the matting and timber rafts track. No assessment is given as to the impact on the vegetation which had colonised the track, nor is there any assessment of the impacts of removing the track on the surrounding vegetation or the hydrology of the area. Para 7.3 also states *'it is not possible to be too prescriptive about the particular method of removal and restoration'* it is clear, therefore, that the PDNPA carried out their HRA without first having established how the matting and timber rafts would be removed. The HRA process requires a high level of certainty, it is a legal requirement that in coming to its conclusion the competent authority must demonstrate that the plan or project will **not** affect the integrity of the site, it must prove the negative. The *Waddenzee* judgement (Case C-127/02) established that the competent authority must be certain that the plan or project will not affect the integrity of the site, the judgement stating that; *"That is the case where no reasonable scientific doubt remains as to the absence of such effects"*. As the PDNPA has not even established the methods to be employed to remove the track, this legal requirement has not been met. In the absence of such certainty PDNPA has no choice but to conclude that the proposed removal of the track will have an adverse effect upon the integrity of the site.

8.1 A further and fundamental flaw in the 14<sup>th</sup> September HRA is that the PDNPA has not considered in the absence of the track how the planned moorland restoration and management work will be delivered. Natural England has identified that the blanket bog restoration program is not yet complete and the retention of the track is fundamental to facilitating that work in the future. Prior to the track being stabilised with the matting and timber rafts, the use of the track was causing significant damage to the vegetation component of the habitats, which are the interest features of the SAC. In addition, the PDNPA has not made any assessment of the continued lawful use of the track for agricultural and non-agricultural uses following removal of the matting and timber rafts. In fact, the continued use of the track does not appear to have been considered at all.

8.2 As I have outlined above, the removal of the track will have significant impact on the SAC and consequently the SPA, because the SAC supports the habitats upon which the qualifying interest features (birds) of the SPA rely. There will be direct loss of habitat, both on the track and the surrounding habitat, and there is also a high risk that once exposed, by removing the matting, further erosion of the track substrate will occur causing damage to SAC habitats. And finally, the use of the track following the removal of the matting and timber rafts would also result in loss of SAC habitat.

### Shadow HRA of the planning application

8.3 It is the appellant's case under their grounds for appeal (section E (a) of the appeal form) that the planning permission should be granted, and I have been asked to consider how the planning application should be considered through each of the HRA tests, as illustrated at Figure 1. As I have set out above, it is clear that the laying of the matting and timber rafts is '*directly connected with or necessary to*' to management of the Habitat Sites in particular the South Pennine Moors SAC as it facilitated the restoration of the blanket bog higher up the moor and allowed for restoration of the ruts, which have been caused prior to the installation of the matting

and timber rafts. The planning application would therefore pass at Step 1 of Figure 1.

- 8.4 If one were to not accept that Step 1 is passed (which I do not accept), the grant of planning permission would also pass the Likely Significant Effects Test (Step 2) as the project allows the restoration of the previous damage to the track. Indeed, the PDNPA concurred with this assessment (see above).
- 8.5 In my view it would also pass the Appropriate Assessment test of having no adverse effects upon the integrity of the SPA/SAC (Steps 3 and 4, Figure 1). This is because the effect of the matting and timber rafts has been to allow previous damage to repair and facilitate restoration of blanket bog. The planning application is entirely beneficial to the SPA/SAC.
- 8.6 Step 5 of the HRA process (should that need to be considered) would also be passed as there are clearly no alternative solutions that would allow access to the blanket bog to then allow for restoration work.
- 8.7 At Step 6 one has to consider if there are imperative reasons of overriding public interest (IROPI) for the proposed project. In this case, there clearly are as restoration and protection of blanket bog clearly meets these criteria. Not only is blanket bog protected under the SAC and supports SPA birds but it also holds a significant carbon reservoir which on degraded moors can be released as the peat dries out and breaks down, leading to the release of carbon dioxide into the atmosphere.
- 8.8 The grant of planning permission is entirely compliant with the tests set out in the Habitats Regulations. Not only was this the conclusion of the PDNPA in its HRA but it was when considering the Environmental Impact Assessment Screening the Secretary of State (SoS) (8<sup>th</sup> March 2019) concluded that the proposed project (laying of matting and timber rafts) did not require an EIA because the proposal was

not likely to have significant effects on the environment. In coming to this conclusion, the SoS has clearly considered the location of the proposal within a SSSI, SAC and SPA.

## Damage to the Dark Peak SSSI

8.9 The SSSI citation for the Dark Peak SSSI (Appendix 2) lists seepage lines, dry heath, and acid grassland in the citation. As set out above, all three of these habitats would be damaged by the removal of the track and by the subsequent damage caused by the passage of vehicles following removal of the matting and timber rafts. By contrast, the appeal development has not damaged or destroyed any of the interest features of the SSSI.

8.10 Section 28 E (1) of the Wildlife and Countryside Act 1981 (as amended) requires that owners or occupiers of a SSSI must notify and gain consent from Natural England before carrying out specified operations. The list of '*operations likely to damage the special interest*' includes at item 21, '*Construction, removal or destruction of roads, tracks, walls, fences, hardstands, banks, ditches or other earthworks, or the laying, maintenance or removal of pipelines and cables, above or below ground.*' [my emphasis]. The specified operations clearly anticipate the damage that removal of a track would cause and seek to regulate such activities through the legal protection afforded to SSSIs under Section 28 E (1). Contravention of Section 28 E (1) would give rise to an offence under Section 28 P (1). Furthermore, the removal of the track without first gaining the necessary consents under Section 28 E (1) would also be considered an offence under Section 28 P (6) and under Section 28 P (6a).

8.11 It should be noted that the removal of the matting was never anticipated by either the HLS agreement or the SSSI consent which was granted when the matting was installed. Indeed, there is no mention in the HLS agreement of the matting being temporary and the need for its removal at any point. I would have expected this to

have been expressly set out as, clearly, removal of the matting at some point in the future would have significant consequences as highlighted above.

## 9 Policy Assessment

- 9.1 In the following section I have reviewed the removal of the track against the relevant national and PDNPA planning policies on biodiversity.

### National Policies on Biodiversity.

- 9.2 Since the planning application was submitted, the National Planning Policy Framework (NPPF) has been updated. The following policies of NPPF (2019) are relevant to the ecological assessment of the enforcement action.

Para 170: 'Planning policies and decisions should contribute to and enhance the natural and local environment by:

- a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);
- b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland;
- c) maintaining the character of the undeveloped coast, while improving public access to it where appropriate;
- d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures; .....

- 9.3 The proposed enforcement action is not compliant with paragraph 170 of the NPPF.

Notably the enforcement action will cause damage to a site of biodiversity value.

Para 175. 'When determining planning applications, local planning authorities should apply the following principles:

- a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;
- b) development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination with other developments), should not normally be permitted. The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest;
- c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists; and
- d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and

around developments should be encouraged, especially where this can secure measurable net gains for biodiversity. ‘

- 9.4 The proposed enforcement action is contrary to paragraphs 175 a), b) of the Framework. The enforcement will result in significant harm to biodiversity which can be avoided. The track matting and timber rafts are protecting biodiversity from damage that would otherwise be caused to the moors by access for restoration and other land management. The damage can clearly be avoided by not removing the matting or the timber rafts. The PDNPA has not applied the mitigation hierarchy (avoid, mitigate, compensate), which is fundamental to this paragraph of the Framework.
- 9.5 The enforcement will clearly cause damage to an SSSI and therefore, should not normally be permitted (175b). The PDNPA has not demonstrated that the benefits of the action clearly outweigh these impacts.

### PDNPA Policies on biodiversity.

- 9.6 Policy L2 of the PDNPA Core Strategy seeks to support the legal protection afforded to sites of biodiversity importance.

#### L2: Sites of biodiversity or geodiversity importance

1. Development must conserve and enhance any sites, features or species of biodiversity importance and where appropriate their setting.
2. Other than in exceptional circumstances development will not be permitted where it is likely to have an adverse impact on any sites, features or species of biodiversity importance or their setting that have statutory designation or are of international or national importance for their biodiversity.
3. Development must conserve and enhance any sites or features of geodiversity importance and where appropriate their setting.
4. Other than in exceptional circumstances, development will not be permitted where it is likely to have an adverse impact on any sites or features of geodiversity importance or their setting that have statutory designation or are of international or national importance for their geodiversity.

- 9.7 The enforcement action is clearly not compliant with any of the relevant paragraphs of Policy L2 as it will damage features of biodiversity importance have an adverse impact on statutory designated sites of international and national importance; and

there are no exceptional circumstances which would justify the adverse impact that will be caused.

- 9.8 The core strategy policies are underpinned by the Development Management Policies of part 2 of the Development Plan. Development Management Policy DMC12 specifically deals with the protection of designated site:

**DMC12 Sites, features or species of wildlife, geological or geomorphological importance**

A. For Internationally designated or candidate sites, or European Protected Species, the exceptional circumstances where development may be permitted are those where it can be demonstrated that the legislative provisions to protect such sites or species can be fully met.

B. For sites, features or species of national importance, exceptional circumstances are those where development is essential:

- (i) for the management of those sites, features or species; or
- (ii) for the conservation and enhancement of the National Park's valued characteristics; or
- (iii) where the benefits of the development at a site clearly outweigh the impacts on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs.

C. For all other sites, features and species, development will only be permitted where:

- (i) significant harm can be avoided and the conservation status of the population of the species or habitat concerned is maintained; and
- (ii) the need for, and the benefits of, the development in that location clearly outweigh any adverse effect.

- 9.9 Part A of the policy specifically deals with SACs and SPAs and states that development must only be allowed where it can be demonstrated that the legislative provisions are fully met. As I have set out above, the HRA of the enforcement action does not demonstrate that these legal provisions are fully met. Part B deals with sites of national importance (SSSIs). The removal of the track does not fit any of the definitions of exceptional circumstances, because the track removal is not necessary for the management of the site, indeed quite the opposite, since its removal will hinder the planned restoration work on the moor. Furthermore, track removal does not aid the conservation of the moor and does not outweigh the harm to the SSSI. The enforcement action is contrary to policy DMC12.

## 10 Third party representations.

### Royal Society for the Protection of Birds (RSPB)

- 10.1 The RSPB has made representations to the inquiry claiming that the track has caused damage to moorland habitats, Firstly, they claim that the track has been laid on blanket bog habitat. Unfortunately, this claim is fundamentally flawed as the author of the report seemingly has a tenuous understanding of moorland habitats and the definition of 'blanket bog'. The RSPB's assessment is based purely based on peat depth and not the phytosociological structure of the vegetation which is what actually defines blanket bog. The RSPB has assumed that anywhere where the peat depth exceeds 40cm should be considered blanket bog. This is incorrect. Our survey of the track found no blanket bog habitat next to the track but rather the three vegetation types recorded were, acid grassland (Upland); Alpine dwarf-shrub (dry) heath and springhead, rill and flush (upland). None of these vegetation types equate to blanket bog.
- 10.2 The RSPB has also claimed that the original 'development' was damaging to the Habitats Sites and was not necessary to the management of the sites concerned, claiming that heavy machinery for the restoration of the blanket bog used the track before the matting and timber rafts were put down. I cannot comment whether this statement is true or not, however it is clear from Natural England's letter of 13<sup>th</sup> April 2018 to the PDNPA that the restoration works are continuing and the track will be needed for this work.
- 10.3 The RSPB also claims that the 'development' would result in adverse impacts upon the integrity of the Habitats Sites. As I have set out above, I do not agree with this assessment. The RSPB seem to have ignored the fact that Natural England not only paid for the 'development' of the track but also carried out an HRA, which was silent about the track because, as Natural England has confirmed, they did not consider that it had any effect up the Habitat Sites. It should also be noted that the PDNPA

also concluded that the 'development' would not have a likely significant effect upon the Habitats Sites. Further, it is notable that the RSPB does not address whether or not the removal of the track would have an adverse effect upon the integrity of the Habitats Sites.

## Other representations

10.4 A number of other representations have mentioned that the use of the track would harm nesting birds and species such as cuckoo, golden plover and merlin, and other raptors have been mentioned. The use of the track for the management of the Habitat Sites is infrequent and is highly unlikely to disturb nesting birds. The use of the track for general moorland management is also infrequent and what activity does take place is mainly confined to the shooting season, which does not coincide with the bird breeding season. Furthermore, the track is located in close proximity to Cut Gate bridleway which is frequently used by walkers, mountain bikers and horse riders. I can see no reason why the presence or use of the track at its current levels would cause any disturbance to nesting birds.

10.5 Finally, the PDNPA has also implied that the track may affect water voles along Mickleden Beck. The PDNPA has provided no evidence of water voles being present within the Beck but simply refer to '*historical records*'. The track crosses the Beck at a single point and affects only a few meters of the water course. If water vole is present, it is my view that the presence of the track and its use would be entirely inconsequential to this species.

## 11 Summary and Conclusions

11.1 The evidence shows that the Midhope Moor track has been in use for over 15 years, and in which time there is also evidence that use of the track by the previous owners caused significant damage to the moorland on and around the track. The current owners through the HLS agreement, put in place with Natural England's consent

and part funding, sought to improve the track by putting down matting and timber rafts. That reinforcement of the track performed two key functions. Firstly, it allowed for the planned restoration of blanket bog higher up the moor; work which is ongoing. Secondly, the reinforcement of the track allowed the areas of moorland that had previously been damaged to successfully recover and recolonise.

11.2 Our survey of the track found that both the track and the surroundings habitats have substantially revegetated with both dry heath and acid grassland communities. The areas of wet flush had also substantially recovered.

11.3 The HLS agreement, which included the laying of the matting and timber rafts, was the subject of an HRA by Natural England. Natural England has confirmed that the impact of the track was so minor as to not warrant mention in the HRA, that concluded that the HLS agreement would not have an adverse impact upon the integrity of Habitat Sites.

11.4 The PDNPA undertook an HRA of the works to the track, when considering the retrospective planning application which also concluded that the works to the track would not have a likely significant effect on the Habitat Sites.

11.5 PDNPA has carried out an HRA of the enforcement notice (removal of the track) which concluded that the removal would not have an adverse effect upon the integrity of the Habitat Sites. The assessment by the PDNPA is flawed and not legally compliant. I am of view that the removal of the track would result in adverse effects upon the integrity of the Habitats Sites.

11.6 Furthermore, the removal of the track would require consent from Natural England under Section 28 E (1) of the Wildlife and Countryside Act 1981 (as amended), and if carried out without such consent, would be an offence under the same legislation. Removal would also give rise to an offence under Sections 28 P (6) and/or (6A) of the Wildlife and Countryside Act 1981 (as amended).

11.7 The enforcement actions, if carried out, would be contrary to the PDNPA's own planning policies on the protection of biodiversity.

# Appendix 1

## Appendix 2