

SECTION 62A OF THE TOWN AND COUNTRY PLANNING ACT 1990

SITE ADDRESS: LAND AT BERDEN HALL FARM, GINNS ROAD, BERDEN

APPLICANT: BERDEN SOLAR LIMITED

APPLICATION REFERENCE: S62A/22/0006

FINAL COMMENTS ON BEHALF OF THE APPLICANT

18 APRIL 2024

1. INTRODUCTION

- 1.1 These final comments are made on behalf of the Applicant, Berden Solar Limited in response to the written submissions made by CPREssex and Protect the Pelhams (“PtP”) following the application hearing which took place on 26 March 2024. At the hearing, the Inspector decided that additional time was required for responses to be submitted in relation to the updated site selection report submitted by the Applicant.
- 1.2 The comments that were submitted by CPREssex on 11 April 2024 relate to the Applicant’s site selection report.
- 1.3 The comments submitted by PtP on 11th April 2024 relate to the Applicant’s site selection report and the approach to providing skylark mitigation.
- 1.4 The Applicant is very disappointed to see additional material submitted in relation to skylark mitigation. The proposed mitigation was not subject to any change in the lead up to the hearing and the Inspector did not grant permission for additional information relating to anything other than responses to the Applicant’s site selection report to be submitted. Notwithstanding that it has been prejudiced, the Applicant has commissioned a rapid response from its ecologist and this is attached to these final comments.

2. FINAL COMMENTS IN RELATION TO SITE SELECTION

- 2.1 The written submissions provided by CPREssex and PtP in relation to site selection are both based on a fundamental misunderstanding of the legal position in relation to site selection and the purpose of the site selection report submitted by the Applicant (the “SSR”).

The approach to site selection

- 2.2 The legal position on site selection is clear. The very recent decision in *Bramley Solar Power Residents Group v SSLUHC* [2023] EWHC 2842 (Admin) (found at hearing document 7) is binding on this hearing and settles the law. In dismissing the claim for a statutory challenge, Lang J held that in the case of a solar farm, neither the Planning Practice Guidance (“PPG”) nor National Policy Statement EN-1 (“EN-1”) mandates a consideration of alternative sites. Still less do they require a sequential test to be applied. Lang J specifically rejected the submission that the PPG and/or EN-1 imposed such a duty whenever permission is sought for a solar farm. Both the PPG and EN-1 are material considerations in the present case.

- 2.3 In short, the decision in *Bramley* is clear that there is no requirement to consider alternative sites or undertake a sequential test when selecting a site for a solar farm in England.
- 2.4 At paragraph 18 of its submissions, PtP attempt to distinguish the circumstances in *Bramley* from those arising in relation to this application. The Applicant submits that the approach taken by PtP demonstrates a failure to understand the legal position. The fact that a search for alternative sites within a search area that was of a different size to that in the current case was made prior to a planning application being submitted in *Bramley* is irrelevant to the question of whether there is a legal requirement to undertake an assessment of alternative sites.
- 2.5 Indeed, in the appeal decision at *Kemberton* (hearing document 26), the Inspector was clear at paragraph 48 that there is no requirement to undertake an assessment of alternative sites and for this to be submitted with the planning application. In the appeal at *Kemberton*, such report was submitted much later in the process but was relied on by the Inspector as evidence of the site selection exercise which had been undertaken.
- 2.6 The important consideration is that selection of the site is understood and justified rather than as a relative assessment of how the site may perform against other potential alternatives. There is a material difference between justification of site selection on the one hand and a relative assessment of alternatives on the other. Both CPRESsex and PtP fail to understand this distinction.
- 2.7 This is an application under the Town and Country Planning Act 1990 and EN-1 and National Policy Statement EN-3 (“EN-3”) are material considerations. In the event that an assessment of alternative sites is provided, EN-1 provides guidance as to how such assessment should be taken into account by a decision maker. Paragraph 4.3.22 emphasises that any assessment should be undertaken proportionately and that only alternatives that meet the objectives of the development need be considered. Furthermore, EN-1 goes on to state that:
- “4.3.23 The Secretary of State should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security, climate change, and other environmental benefits) in the same timescale as the proposed development.*
- 4.3.24 The Secretary of State should not refuse an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and should have regard as appropriate to the possibility that all suitable sites for energy infrastructure of the type proposed may be needed for future proposals.”*
- As above, the interpretation of meaning of the wording in EN-1 was dealt with by Lang J in the *Bramley* decision.
- 2.8 EN-3 recognises that access to a viable grid connection is critical for any solar farm. Without it, no solar farm is going to get built. There is also a very well documented shortage of grid connections nationally, which is hampering the nation’s ability to deliver the level of renewable energy infrastructure that is required. The *Scruton* appeal decision (at hearing document 20) is helpful in setting out the approach to consideration of a viable grid connection. At paragraph 28 of that decision, the Inspector found that:
- “given the proposal is seeking to use the spare grid capacity at this sub-station, and bearing in mind the limited opportunities that currently exist for grid connections nationally, I*

consider it is, in this case, justified to only consider sites within an area that could also make use of this capacity, rather than capacity that may exist at other substations elsewhere.”

In the decision at *Canon Barns Road* (hearing document 28), the Inspector found at paragraph 92 that the requirement for grid capacity and a viable connection was the basis of a rational approach to take towards site selection. These are all matters of planning judgement for the Inspector and Secretary of State.

2.9 What is clear from the guidance in EN-1 and EN-3, as well as the *Bramley* decision, is that the important point in any assessment of alternatives is to understand the project objectives guiding site selection; only those sites that would meet such objectives need to be considered.

2.10 In relation to site selection, the Applicant’s primary search objectives were set out in paragraph 2.1 of the SSR. These were:

2.10.1 The availability of a 132kv grid connection,

2.10.2 The proximity to a substation, and

2.10.3 The timeframe for a grid connection.

In addition to these primary objectives, the ability to make use of the existing battery storage connection and grid infrastructure was also an important factor. These objectives have put forward throughout the application process (see Appendix A to the SSR) as the basis for the selection of the site.

2.11 Policy does not dictate any particular size of search area. It will depend on the scheme and is a matter of planning judgement. Different schemes have different objectives and so require different search areas. For example, in the appeal decision at *Wisbech* (hearing document 27), a 3.5km search area was seen to be appropriate. Indeed, even in the *Berrington* decision (relied upon by PtP in relation to skylark mitigation), the search area put forward and accepted by the Inspector was 3km. There is no law or guidance in any appeal decision cited by CPRESsex or PtP that mandates a particular geographic area.

2.12 In this context, there can be no doubt that the SSR does comply with the legal position and guidance. The 3km search radius for site selection is in line with other decisions where a site selection report has been considered. Site selection criteria have been set clearly so that the process is transparent. The importance of proximity to the substation and the availability of a grid connection when making that assessment is a legitimate and sensible primary criterion. Any sites suggested that fall outside of this search area would not meet the objectives of the project and have been discounted. That is a perfectly legitimate and understandable outcome.

2.13 The decision in *Lullington Solar Park v SSLUHC* [2024] EWHC 295 (Admin) which is cited by PtP does not assist in relation to how a site selection process should be undertaken. The decision does not purport to lay down general guidance for site selection. That case involved a very narrow legal point of challenge to an Inspector’s decision regarding ALC classification which was brought on the basis of rationality. On the facts of that decision letter, the very high threshold was not reached.

2.14 The approach taken to site selection in that case related to a different set of circumstances and objectives and so it is not applicable to the present case. It is for the decision maker in this case to determine whether or not the selection of the application site has been justified sufficiently or not.

Best and Most Versatile Agricultural Land

2.15 The submissions give rise to a related but separate consideration which is the potential underutilisation of Best and Most Versatile Agricultural Land (“**BMV land**”).

2.16 Policy ENV5 requires that:

“Development of the best and most versatile agricultural land will only be permitted where opportunities have been assessed for accommodating development on previously development sites or within existing development limits. Where development of agricultural land is required, developers should seek to use areas of poorer quality agricultural land except where other sustainability considerations suggest otherwise.”

Reference should be had to paragraphs 4.17 to 4.20 of the representations for redetermination on behalf of the Applicant dated 15 November 2023 as these set out the further detail on the policy framework in respect to BMV land. There is no need to repeat them here.

2.17 Whilst very long in the tooth, the Written Ministerial Statement (“the **WMS**”) on solar energy (25 March 2015) has not been withdrawn. Bearing in mind that the actual guidance which the WMS was announcing was in the Planning Practice Guidance itself, it is one piece of policy guidance amongst a number of others. The WMS does however indicate that the use of BMV land for solar farms has to be justified by “the most compelling evidence”. The PPG itself sets out a list of planning considerations that relate to large scale ground mounted solar development.

2.18 These include, encouraging the effective use of land by focussing such developments on previously developed and non-agricultural land provided it is not of high environmental value; and where a proposal involves greenfield land, whether (i) the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land; and (ii) the proposal allows for continued agricultural use where applicable and/or encourages biodiversity improvements around arrays.

2.19 Accordingly, in this case, in relation to BMV, the following policy and guidance needs to be considered by the decision maker:

- (1) Policy ENV 5;
- (2) WMS;
- (3) PPG;
- (4) NPPF; and
- (5) EN-3

Pursuant to Policy ENV 5, developers should seek to use areas of poorer quality agricultural land except where other sustainability considerations suggest otherwise. This is generally in accordance with the WMS, PPG and NPPF. EN-3 makes clear that classification of land is not likely to be a determinative issue in relation to the location of solar farms.

2.20 However, what none of this policy says is that development of solar farms on BMV Land is prohibited. Policy clearly sets out guidance for what decision makers should consider in order to assess whether development on BMV Land has been sufficiently justified and the weight

to be attached any such underutilisation of BMV Land for the lifetime of the project where it has been so justified.

- 2.21 It has to be accepted that a commercial scale solar farm of this size will be located in the open countryside, there are no opportunities for accommodating the development on previously developed sites or within existing development limits. As set out in the SSR, the Brownfield Register has been examined. Accepting the need for the development to be in a rural location, the Applicant has submitted “the most compelling” evidence as to why there will be underutilisation of BMV Land for the duration of the scheme. Again, this is a matter of planning judgement for the Inspector and Secretary of State.
- 2.22 There has been some criticism that the Applicant has not undertaken soil surveys on alternative sites. As above, based on the *Bramley* case, such criticism runs contrary to the law that no sequential testing or alternative site analysis is required. Undertaking widespread, off-site, intrusive soil surveys is neither required nor proportionate. The decision at *Lullington* that seems to be relied on in relation to this point does not purport to lay down any general requirement for off-site auguring. Moreover, as shown by the ALC land mapping, land falling within the search area is highly likely to be BMV land.
- 2.23 The SSR sets out that there has been an assessment of the land required and notwithstanding that there is no requirement to do so, has considered whether there is lower quality land within the search area. Given the proximity to and availability of the grid connection point, the Applicant has demonstrated that use of the land is necessary and within the terms of the assessment that there is no poorer quality land available. Accordingly, what the Applicant has done complies with Policy ENV 5, the WMS, PPG, NPPF, EN-1 and EN-3.

Response to the submissions from CPRESsex

- 2.24 As well as the general comments above, the Applicant has a number of additional specific comments to make in relation to the approach taken by CPRESsex.
- 2.25 As above, the Applicant has clearly set out its site selection criteria. Given that proximity to the substation and availability of a grid connection are of fundamental importance, these are the proper basis for undertaking the SSR and any claim made by CPRESsex to the contrary is not accepted. There is no need to consider alternatives outside of a search area which has been justified.
- 2.26 CPRESsex make reference to the appeal decision at *Wherstead* when considering the approach that should be taken to identification of a search area. *Wherstead* is now 10 years old and whilst it is a material consideration, it is but one of a large number of appeal decisions on this topic which are before the Inspector and Secretary of State. It pre-dates the decision in *Bramley* and the designation of EN-1 and EN-3 by almost 10 years. Different and the Applicant would suggest preferable approaches have been taken in the up-to-date policy context at sites such as *Scruton, Kemberton, Wisbech and Berrington*. These are all matters for the Inspector and Secretary of State.
- 2.27 There is no requirement in policy or guidance at any level upon the Applicant to provide confidential financial modelling as part of a planning application. Different schemes need to consider different questions when it comes to assessing viability. Any consideration of other schemes and the size of such schemes is irrelevant to any consideration of the viability of this scheme.

- 2.28 The CPREssex comments about the assessment undertaken of alternative sites, and the proposed site, again contain a number of errors and misunderstandings. There is no requirement to undertake soil surveys for alternative sites. In the context of this application, it is appropriate and proportionate to use the Natural England ALC mapping as the basis for considering alternatives.
- 2.29 Equally the suggestion that there is no suitable route for construction traffic is wrong given that Essex County Council has previously provided confirmation that the Construction Traffic Plan is acceptable.
- 2.30 The Applicant has also provided clear evidence on the levels of harm arising in relation to heritage and landscape considerations as part of its application, all of which demonstrate that the approach taken by CPREssex in response to how the SSR has analysed the proposed site is wrong. Such questions relate to issues to be considered as part of the planning balance, not how an Applicant should assess a site when considering site selection.

Response to the submissions from PtP

- 2.31 In the *Kemberton* decision, the Inspector was satisfied that a site selection report submitted after the date on which the application was made was robust and provided reliable justification of why the site had been chosen. Paragraph 4 of the PtP submission seems to make something of the submission date of the SSR but the Applicant submits that the position is the same as it was in *Kemberton*. Given the legal position in relation to site selection, the comments made by PtP in paragraphs 4 to 9 of its representations do not assist the Inspector or Secretary of State.
- 2.32 In response to paragraph 10 of the PtP submission, the Applicant denies that its email dated 22 February 2023 is misleading. Indeed, the documents submitted as part of its application have been clear in relation to the amount of BMV land forming the proposed development.
- 2.33 From paragraph 11 onwards, the PtP submission considers whether “the most compelling evidence” has been supplied in relation to the use of BMV land. As above, PtP has failed to understand the approach taken in the SSR. There was no requirement to assess land to the east of Berden and based on the ALC mapping within the search area, it is proportionate and reasonable to conclude that there is no poorer quality agricultural land available. The Applicants comments in relation to the size of the search area in response to paragraphs 17-19 of the PtP submission do not need repeating.
- 2.34 The PtP submissions from paragraph 20 onwards do not assist. In undertaking a forensic analysis of the SSR, PtP again shows a failure to understand its purpose or the work undertaken. There are no prescribed guidelines for preparing a site selection report. What has been done is clear, compelling and proportionate. The SSR considers how each of the constraints applies to each site in the context of its key objectives and sets out some high level, overview conclusions of the position reached. There is no requirement to go beyond this.
- 2.35 PtP have provided a legal opinion from Meyric Lewis dated 17 December 2021 in relation to site selection. This opinion (from 2021) pre-dates the decision in *Bramley* and the designation of EN-1 and EN-3. The approach taken by Meyric Lewis is out of date and respectfully does not reflect the current approach in guidance or law. It does not assist.

3. FINAL COMMENTS IN RELATION TO THE APPROACH TO SECURING SKYLARK MITIGATION

3.1 The legal position on Skylark is set out in the Natural Environment and Rural Communities Act 2006 (“NERC”) and the Wildlife and Countryside Act 1981 (the “WCA”). Skylark is also a species on the Red List (i.e. the most at threat) in “Birds of Conservation Concern in the UK”.

3.2 NERC designates Skylark as a species of principal importance for the purpose of conserving or enhancing biodiversity in England under s.41. Under s.41(3) the Secretary of State must—

“(a) take such steps as appear to the Secretary of State to be reasonably practicable to further the conservation of the living organisms and types of habitat included in any list published under this section, or

(b) promote the taking by others of such steps.”

3.3 NERC also provides for a general biodiversity objective under s.40 as follows (and so far as relevant):

“40 Duty to conserve and enhance biodiversity

(A1) For the purposes of this section ‘the general biodiversity objective’ is the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England.

(1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.”

3.4 Specific protection for Skylarks is found in the WCA, which protects them from deliberate disturbance and their nests and eggs from destruction in precisely the same way as all wild birds under s.1. To breach this section is a criminal offence.

3.5 The NPPF provides at paragraph 186:

“(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.”

3.6 Natural England has provided standing advice on protected species (which the Skylark is, falling under NERC). This provides, so far as relevant:

“If avoidance or mitigation measures are not possible, as a last resort you should agree compensation measures with the developer and put these in place as part of the planning permission. These should:

(a) make sure that no more habitat is lost than is replaced (‘no net loss’) and aim to provide a better alternative in terms of quality or area compared to the habitat that would be lost

(b) provide like-for-like habitat replacements next to or near existing species populations and in a safe position to provide a long-term habitat

(c) provide alternative habitats further away from the impacted population if the natural range of the species is not going to be adversely affected.”

- 3.7 References to “no net loss” / “like-for-like” within the guidance do not refer to individual members of a species, and represent aspirations in relation to habitat loss set out in generic advice. This is not a legal or policy obligation.
- 3.8 Nowhere within the legislative or policy framework is a pair-for-pair / like-for-like replacement of individual members of a sub-species population required. Even in the case of Great Crested Newts which are protected by Annex 1 of the Habitats Directive and therefore given the highest level of international legal protection available, there is no obligation for individual animal-for-animal replacement. The legal protection for newts means that individuals can be subject to DNA-testing when establishing degree of harm and mitigation requirements but even in that case, the requirements do not go as far as individual animal-for-animal replacement.
- 3.9 In accordance with the legislative and policy framework, the Applicant put forward a Skylark Mitigation Strategy. The Applicant has proposed that Skylark Mitigation can be secured by way of planning condition and Unilateral Undertaking. A completed copy of the Unilateral Undertaking is submitted alongside these final comments.
- 3.10 PtP has highlighted an appeal decision on *Land West of Berrington* as part of its response to the Applicants Unilateral Undertaking. Importantly, it should be noted that at *Berrington*, the proposed mitigation was to be secured by way of Grampian Condition requiring a skylark mitigation strategy to be prepared along with a Unilateral Undertaking to secure the land required for mitigation. Such approach was required because the Council did not agree that the skylark mitigation plan put forward was appropriate to mitigate for impacts on a Priority Species. Impacts on skylarks and the inadequacy of mitigation proposed formed a reason for refusal and was contested by both the Council and Rule 6 party.
- 3.11 This is a very significant difference from the circumstances and approach taken in this case. Here, the Skylark Mitigation Strategy is agreed by the Council. It is this agreed strategy that is secured by way of Condition and Unilateral Undertaking.
- 3.12 The Applicant has instructed its ecologist to prepare a written response to the PtP submissions in relation to Skylark Mitigation. This response deals with each of the points raised by PtP in detail and is at **Appendix 1**. As will be seen, the ecologist concludes that the distinguishing features between the mitigation proposed at *Berrington* and the mitigation proposed here are such that planning permission can be safely granted.

4. CONCLUSION

- 4.1 For the reasons set out above, the Applicant considers that the representations submitted by CPREssex and PtP are not of material assistance to the Inspector and Secretary of State. They are based on a misunderstanding of a number of key principles and seek to take away from the ability of the Inspector and Secretary of State to apply discretionary planning judgment. Whilst all of the considerations that they jointly raise need to be taken into account in the decision making process, none of the points raised would prevent planning permission from being granted.
- 4.2 As a result of the evidence submitted, along with the representations made at the hearing on the 26 March 2024 and these final comments, the Applicant requests that planning permission is granted without delay in the form sought.

APPENDIX 1 – ECOLOGY RESPONSE

BERDEN HALL SOLAR FARM, ESSEX

ECOLOGY NOTE IN RESPONSE TO PROTECT THE PELHAMS COMMENTS DATED 11 APRIL 2024

**APPLICATION REFERENCE NO: S62A/22/0006
(REDETERMINATION)**

794-ENV-ECO-20922
1.0
18 April 2024

ECOLOGY NOTE

Document status

Version	Purpose of document	Authored by	Reviewed	Review date
1.0	FINAL	Jo Atkinson	David Hardy for CMS	18.04.24

Approval for issue

Jo Atkinson

18 April 2024

The report has been prepared for the exclusive use and benefit of our client and solely for the purpose for which it is provided. Unless otherwise agreed in writing by R P S Group Limited, any of its subsidiaries, or a related entity (collectively 'RPS') no part of this report should be reproduced, distributed or communicated to any third party. RPS does not accept any liability if this report is used for an alternative purpose from which it is intended, nor to any third party in respect of this report. The report does not account for any changes relating to the subject matter of the report, or any legislative or regulatory changes that have occurred since the report was produced and that may affect the report.

The report has been prepared using the information provided to RPS by its client, or others on behalf of its client. To the fullest extent permitted by law, RPS shall not be liable for any loss or damage suffered by the client arising from fraud, misrepresentation, withholding of information material relevant to the report or required by RPS, or other default relating to such information, whether on the client's part or that of the other information sources, unless such fraud, misrepresentation, withholding or such other default is evident to RPS without further enquiry. It is expressly stated that no independent verification of any documents or information supplied by the client or others on behalf of the client has been made. The report shall be used for general information only.

Prepared for:

Berden Solar Limited

ECOLOGY RESPONSE TO PROTECT THE PELHAMS COMMENTS DATED 11 APRIL 2024

1. I have reviewed the ‘*Response to the Unilateral Undertaking for the Skylark Mitigation Strategy submitted in relation to Berden Hall Solar Farm*’ document dated 11 April 2024 submitted to the Planning Inspectorate by Protect the Pelhams (PtP).
2. Considerable reliance is placed by PtP on the recent appeal decision dated 26th March 2024 at Berrington in Shropshire. This decision letter is within the statutory challenge period and I am informed that it is likely to form the subject of a legal challenge based on the Inspector’s treatment of skylarks. The decision was issued by the Planning Inspectorate on 26 March 2024, which was the same day as the Berden Solar Farm planning hearing. It was not therefore available prior to the hearing.
3. Each case has to be determined on its merits. Whilst the Berrington appeal involved skylarks, there are several key differences between it and the Berden Solar Farm Skylark Mitigation Strategies (SMS), which I have summarised in the table below. These important differences are clear and justify a different decision being taken on the facts of this case based on the exercise of judgement by the Inspector and Secretary of State.

Table 1: Comparison of key components of Skylark Mitigation Strategies at Berrington Solar Farm and Berden Solar Farm

Issue	Berrington Solar Farm	Berden Solar Farm
Local Planning Authority support	Shropshire Council - refused permission on the grounds of ecology (due to adverse ecological impact on skylark).	Uttlesford District Council - no objection on the grounds of ecology. Essex County Council – no objection on the grounds of ecology; off-site skylark mitigation strategy agreed with Essex Place Services ecologist.
Baseline habitats within off-site skylark mitigation area	Different land use to solar farm site - cattle grazed pasture under Higher Level Stewardship (HLS).	Same land use as solar farm site - existing arable land under same crop cultivation regime.
Off-site habitat creation and management	Uncertainty around habitat to be created/ managed due to uncertainties over HLS – either conservation grazing management of existing cattle pasture or reversion to arable farmland and creation of skylark plots.	No uncertainty on habitat creation/ management - creation of skylark plots in existing arable land (plots have already been implemented by the landowner).
Mitigation ratios	1 to 1 Skylark territories assumed displaced = 11 Skylark plots to be created = 12	2.5 to 1 Skylark territories assumed displaced = 14 Skylark plots to be created = 36

4. In respect of the adequacy of the Berrington Solar Farm SMS, Inspector Rose stated in paragraph 180 of his decision:

“Whilst having no criticism of the covenant within Schedule 1 as such, I am not convinced that the nature and effectiveness of the intended mitigation measures are sufficiently understood and well-developed to provide sufficient reassurance in respect of the skylark mitigation”.

He then goes on to state that he attached significant weight to the impact of the proposal on skylarks when making his decision to dismiss the Applicant’s appeal. As set out in Table 1 above, there is no lack of certainty surrounding the Berden Solar Farm SMS; the local planning authority has not objected, and its ecological specialist is therefore reassured that the SMS is sufficiently understood

and well-developed to be effective in mitigating for the predicted displacement of skylark breeding territories from the proposal site.

5. The purpose of the offsite measures set out and clearly stated in the SMS is to enhance the habitats in surrounding arable land, at a quantum proportionate to the impacts of the scheme and informed by standard RSPB/ BTO guidance, to increase the breeding success of the local skylark population, and thus to mitigate the effects of loss/ displacement of breeding pairs from the proposal site. With this mitigation strategy in place, the residual effects of the scheme on skylark are assessed as negligible adverse and not significant, a conclusion which is accepted by the local planning authority.
6. Skylark is subject to the same legal protection under the Wildlife and Countryside Act 1981 afforded to all species of nesting birds concerning deliberate disturbance and damage/ destruction of nests and eggs. Skylark is listed as a species of principal importance under Section 41 of the Natural Environment and Rural Communities (NERC) Act 2006 (as are many hundreds of other individual species¹), for the purpose of conserving or enhancing biodiversity.
7. Referring back to the Berrington Solar Farm appeal dismissal, in para 136 I note that Inspector Rose has adopted a very strict interpretation of Natural England's standing advice on protected species (which includes skylark as a Section 41 NERC Act species) whereby 'no net loss' and 'like for like' is applied to delivering compensation for a specific number of individual skylarks derived from the estimate of breeding territories recorded during surveys. The Berrington SMS therefore fell short in his opinion in para 137, in that
"...If there is to be no net loss, then it would not be unreasonable to provide equivalence through compensation measures to the extent reasonably possible".
It is unreasonable to assume that the standing advice intends that all developments must deliver like-for-like compensation for individuals of a protected species (including Section 41 species) in order to demonstrate compliance with the no net loss policy. This is not the approach taken to other protected species subject to stricter legal protection under the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017, including European Protected Species (EPS) such as great crested newt (*Triturus cristatus*).
8. Nor did Inspector Rose take into account the significant 'incidental' benefits to skylark of the reversion of a large area of arable land to permanent grassland beneath the solar arrays. The cessation of farming activities (that could disturb/ damage skylark nests) and regular pesticide application (that currently results in a crop monoculture of very low botanical diversity), and reversion to species-rich grassland will create ecological niches for a much greater diversity of insects, and thus prey for skylark, than is currently available on the Berrington and Berden proposal sites. This will provide enhanced foraging habitat to support skylarks that are nesting in the fields surrounding the proposal sites.
9. RPS is currently undertaking a programme of breeding bird surveys on the main solar farm site and the skylark mitigation fields on behalf of the Applicant. Preliminary findings to date indicate that the main solar farm site supports around 10 nesting pairs of skylark, which is comparable with but below the estimated number of 14 territories on which the SMS was developed.
10. A response to each of the points raised by PtP is also provided as Appendix A to this note.

¹ Taxon groups listed on Section 41 as species of principal importance (number of species in each taxon in brackets): alga (6), amphibian (4), ant (7), bee (16), beetle (75), bird (49), bryophyte (77), bryozoan (2), bug (10), butterfly (21), caddisfly (4), centipede (1), cetacean (16), cnidarian (11), cricket (3), crustacean (6), damselfly (1), dragonfly (1), fish (bony) (33), fish (jawless) (2), fly (29), fungus (61), grasshopper (1), lichen (96), mammal (18), mayfly (1), millipede (3), mollusc (20), moth (142), reptile (6), shark/ skate/ ray (13), spider (31), stonefly (1), stonewort (9), turtle (2), vascular plant (151), wasp (7) and worm (2).



APPENDICES

Appendix A

Response to Individual Points Raised by Protect the Pelhams in note dated 11 April 2024

ECOLOGY NOTE

PtP Topic	PtP Comments 11.04.24	RPS Comments 18.04.24
1. Skylark a Priority Species	The Applicant's Cherryfield Ecological Assessment does not draw attention to Skylark as a Priority species. The Environmental Statement (ES) by RPS does not draw attention to Skylark as a Priority Species. The species is noted only in ES Table 7.6 as 'BRed,' with no further reference to its conservation status in the ES.	This does not have any bearing on the outcome of the ecological impact assessment, or the development of the skylark mitigation strategy in accordance with standard guidelines.
2. Lack of baseline assessment	<p>Only three site surveys of the Site were carried out by the Applicant's consultants, Cherryfield Ecology, as long ago as June 2019, September 2020 and February 2022. These are now out of date. One additional desk-based and habitat survey by RPS (9th November 2022) was used to support the Applicant's Environmental Statement.</p> <p>The estimate of 14 breeding pairs of Skylark in the SMS is therefore just that: an estimate.</p> <p>Moreover, the figure of 14 breeding pairs is based on a survey of a potential solar farm proposal site in Walpole, Norfolk, carried out in 2021 (SMS 2.2). The justification for this methodology is unclear from the SMS.</p> <p>The SMS claims to be providing a precautionary additional 8 Skylark plots (36 rather than 28), but in the absence of robust data it is not possible to be certain how many plots are needed as compensation for the loss of habitat.</p> <p>On many occasions the number of skylarks observed singing on the Berden Hall Solar Farm Site suggests that the numbers of breeding pairs may be higher than 14 pairs, but in the absence of a full baseline assessment it is not possible to know.</p>	<p>The most recent desk study and habitat survey was undertaken in September 2022; local planning authorities typically consider ecological reports to have a 'shelf life' in planning terms of two years, and therefore the ES and its supporting desk-based and habitat surveys remain sufficiently up-to-date for planning purposes.</p> <p>The estimate of skylark breeding territories in the absence of baseline data is based on the professional judgement and expertise of the ecologist, through personal experience of surveying comparable habitats in the south-east of England; this is stated in SMS paras 2.2 – 2.3.</p> <p>The provision of additional plots compared to estimations of territories lost/ displaced is a precautionary approach to address the absence of baseline data.</p> <p>The number of singing individuals observed does not necessarily equate to the number of breeding territories within the site; even a skilled ornithologist cannot calculate with absolute certainty how many territories occur within a particular site. Therefore, even with a site-specific breeding bird survey, the results will only provide a snapshot in time of a baseline that may vary seasonally and can only ever be an estimate of breeding territories. For this reason, the mitigation strategy is designed to 'over mitigate' to account for baseline variability and to maximise the likelihood of success.</p> <p>The lack of baseline data is currently being addressed through ongoing bird survey work.</p>
3. Lack of wintering bird surveys	The Applicant has carried out no wintering bird surveys. Cherryfield acknowledged the limitations of their three site visits, only one of which took	Having reviewed all the previous ecology documents, I can find no mention of wintering birds, and therefore conclude that it was not a relevant matter in the original application, and

ECOLOGY NOTE

PtP Topic	PtP Comments 11.04.24	RPS Comments 18.04.24
	<p>place in winter, and RPS's report is a desk study and habitat survey. It is therefore not possible to be certain that the development will not negatively affect any wintering birds using the site, particularly Skylark.</p>	<p>nor was the lack of wintering bird survey or assessment of this ecology feature raised as a concern by Essex Place Services (or Natural England) during the planning application determination. Having reviewed the baseline habitat data, I am content that there is no potential for any aggregations of wintering birds such that they would be considered Important Ecological Features in CIEEM terms (for example as might be expected in arable land if it were close to an SPA/ Ramsar and therefore supported qualifying species of wintering wildfowl/ waders). Skylark and other species may be present on the solar farm site over the winter months, but any displacement would be reasonably only small numbers of common species, which would not be significant in ecological impact assessment terms. Furthermore, the reversion of arable land to permanent grassland within the solar farm site may increase winter foraging opportunities for a wide range of bird species, including skylark, as it would otherwise be typically under crop (winter wheat) in the winter months.</p> <p>Other wintering bird species that may forage in hedgerows and woodland on berry-bearing shrubs and trees (e.g. thrush species) would not be displaced because all of the boundary hedgerows and woodland are being retained.</p>
<p>4. Lack of mitigation land survey</p>	<p>The Applicant has not surveyed the mitigation land, thus there has been no baseline assessment of the two fields proposed as mitigation and no assessment of the potential impact of future development or changing farming practices on or near this land. Neither has the Applicant established that this land is suitable for Skylark.</p>	<p>The mitigation land is under the same arable cultivation regime as the solar farm site, and it is therefore reasonable to assume that it would be similarly suitable for nesting skylark. The long-term management of mitigation land will be secured under the UU, and therefore is legally obliged to be managed as arable land with skylark plots for the lifespan of the solar farm. Any future developments that may be brought forward in the vicinity of the skylark mitigation land would have to consider potential effects upon it in a project-specific ecological impact assessment.</p>
	<p>As in the Berrington case, it is not appropriate to devise a mitigation strategy for a significantly adversely affected species whereby over 63 ha of potentially suitable breeding habitat is lost and only</p>	<p>The total provision of mitigation land is 30.7 ha (17 ha in Field 1 and 13.7 ha in Field 2). The quantum of mitigation land provision has been developed on evidence-based</p>

ECOLOGY NOTE

PtP Topic	PtP Comments 11.04.24	RPS Comments 18.04.24
	14 ha of potentially suitable habitat is proposed as off-site compensation (SMS 3.11).	ecological principles for the creation of skylark plots at a density of 2 plots/ ha (on a 2.5 to 1 replacement ratio) with appropriate 50m offsets from field boundaries/ tramlines. The mitigation land is not intended to provide compensation for losses of breeding territories; the off-site SMS will enhance existing arable land with the intention of increasing the breeding success of skylark, to mitigate for the impact on local skylark populations resulting from the likely displacement of a small number of breeding pairs from within the solar farm site.
5. Lack of robust and credible evidence for BNG	At the Redetermination Hearing on 26 th March it was suggested by the Planning Inspector that some species might benefit from the development even if others were adversely impacted. However, as Ms Corfe points out, <i>'It is agreed that the BNG achieved is likely to be beneficial to a range of species but these habitat improvements do not directly benefit skylark. One of the ten principles of BNG is achieving the best outcomes for biodiversity by using a credible and robust evidence base to deliver compensation that is ecological equivalent and that accounts for the location and timing of losses'</i> (RP 2.45)	The huge net gains in biodiversity units (calculated using the DEFRA metric) on this site cannot be dismissed. I strongly disagree with Ms Corfe's comment that the habitat improvements at Berrington solar farm for BNG purposes would not directly benefit skylark – there is scientific evidence to demonstrate the benefits to many species, including foraging skylark, of the habitat creation proposals that result from the conversion of arable land (which is poor in terms of its biodiversity) to species-rich grassland beneath solar arrays. Although the purpose of the onsite BNG habitat creation is not primarily to provide habitat for skylark, it will clearly deliver direct benefits for this species at Berden (as it would at Berrington).
6. Skylark territory metric	The SMS uses the metric 0.22 Skylark territories per hectare of arable farmland for the Skylark plots proposed, and offers no rationale for using this lower than-accepted metric (SMS 2.4).	The estimate of skylark breeding territories in the absence of baseline data is based on the professional judgement and expertise of the ecologist, through personal experience of surveying comparable habitats in the south-east of England; this is stated in SMS paras 2.2 – 2.3. However, if the 0.28 territories per hectare figure was used instead of 0.22, this would result in an estimate of 18 territories lost/ displaced instead of 14. At a minimum replacement ratio of 2 for 1 this would equate to 36 skylark plots, which is the number to be delivered in the existing SMS.
7. Mitigation land	Although the mitigation land (Fields 1 & 2) for Berden Hall Solar Farm is similar to the Site fields in being arable land, it is not identical habitat. Skylarks are present in modest numbers in various locations around Berden, which is surrounded	The mitigation land is under the same cultivation regime as the solar farm site, and is therefore suitable for the creation of skylark plots in accordance with standard BTO/ RSPB guidance.

ECOLOGY NOTE

PtP Topic	PtP Comments 11.04.24	RPS Comments 18.04.24
	<p>mainly by arable land, but the greatest density of Skylark is on the proposal site fields, which may be why the BTO has records for their presence there over many years. Red kite is known to nest at Arnold Spring (Ancient Woodland) to the north of Berden, which may explain why there are lower numbers of Skylark north of the village. Being large open fields with few trees and other tall structures (which expose ground-nesting birds to predation by birds of prey such as Red kite), the Site is especially suitable habitat for Skylark.</p>	<p>The variability in the various fields in and around Berden to support nesting skylark due to the presence of tall structures/ predators, will also be influenced by other factors such as anthropogenic disturbance, cropping regime etc., as will the number of skylarks nesting on the solar farm site in any given season as this is a mobile species. This was the reason for the delivery of mitigation on a 2:1 basis to account for natural variability in the baseline.</p>
<p>8. Onsite mitigation</p>	<p>Statera have nowhere considered onsite mitigation for Berden Hall Solar Farm, such as setting aside areas within the solar arrays for breeding Skylark.</p>	<p>There is evidence to suggest that skylark will not nest within solar arrays, and therefore onsite mitigation is not appropriate. The gaps between the solar arrays and the boundaries may be inherently suitable for nesting skylark, but for the purposes of designing the mitigation strategy it has been assumed that there will be total displacement of skylark from the solar farm site.</p> <p>A 3 ha temporary grass ley will be converted and managed as permanent grassland within the solar farm site as part of the BNG habitat creation works; this will also create undisturbed (due to the cessation of farming activity) nesting habitat for skylark, which although not its primary reason for creation will undoubtedly enhance the suitability of the site for the species.</p>
<p>9. Offsite mitigation</p>	<p>The mitigation land (Fields 1 & 2) is intensive arable land.</p>	<p>The PtP response refers to a reference from Ms Diane Corfe's Proof of Evidence in the Berrington scheme which states "...<i>that in intensive arable landscapes, there is less likelihood for successful 'absorption' of displaced skylark from impacted sites and that this can accelerate the decline of the species.</i>" The purpose of the skylark plots is to enhance the existing arable land to increase breeding success of skylark, to mitigate for the likely displacement of breeding territories from the solar farm site.</p>
<p>10. Loss of breeding habitat</p>	<p>There are references in the SMS to 'nesting sites' (3.6), 'nests' (3.7) and 'nesting habitats' (3.8) when in fact Skylark plots are intended to increase foraging opportunities for birds - they are not designed as nesting plots. At the</p>	<p>The purpose of the offsite habitat enhancement set out in the SMS is to improve the habitats in surrounding arable land at a quantum proportionate to the impacts of the scheme, and informed by standard RSPB/ BTO guidance to increase the breeding</p>

ECOLOGY NOTE

PtP Topic	PtP Comments 11.04.24	RPS Comments 18.04.24
	<p>Redetermination Hearing at Uttlesford District Council on 26th March the Applicant's own Ecology expert argued that Skylark plots help the birds to breed by increasing their food supplies but she explained that the plots are not intended as nesting plots.</p>	<p>success of the local skylark population. It is not stated anywhere within the SMS that the intention of the strategy is to create replacement nesting sites.</p> <p>SMS para 3.6 states "<i>There is no need to keep the plots weed-free but spot-treating with herbicide in April will help skylarks to access their nesting sites.</i>" This refers to maintaining the open nature of the plots, so that skylarks can land and then access their nest sites. Skylarks exhibit a predator avoidance strategy where they land on the ground some distance away from their nests, and then walk into their nest sites that are very cryptically concealed, to reduce the risk of predators detecting their nests and eggs/young.</p> <p>SMS para 3.7 states "<i>Mechanical weeding of crops containing skylark plots will destroy any nests present and is not recommended.</i>" This refers to management of the mitigation fields as a whole rather than just the individual skylark plots.</p> <p>SMS para 3.8 states "<i>The plots provide Skylarks with suitable access to nesting habitats in winter cereal crops throughout their breeding season.</i>" This paragraph makes no reference to the skylark plots providing suitable nesting habitat; the purpose of the plots is to provide easier access to nesting sites that takes into account the predator avoidance strategy exhibited by skylark whereby they land on the ground some distance away from their nest locations.</p> <p>The skylark plots also provide foraging habitat to support nesting activity, by increasing insect prey biodiversity.</p>