


Your Ref:
Our Ref: PSSL/TE/KMA/HFS/PA/008

8th December 2015


Head of Planning Services
North Yorkshire County Council
County Hall
Racecourse Lane
Northallerton
DL7 8AH

Dear 

PLANNING APPLICATION TO HYDRAULICALLY STIMULATE AND TEST THE VARIOUS GEOLOGICAL FORMATIONS PREVIOUSLY IDENTIFIED DURING THE 2013 KM8 DRILLING OPERATION, FOLLOWED BY THE PRODUCTION OF GAS FROM ONE OR MORE OF THESE FORMATIONS INTO THE EXISTING PRODUCTION FACILITIES, FOLLOWED BY WELLSITE RESTORATION. PLANT AND MACHINERY TO BE USED INCLUDES A WORKOVER RIG (MAXIMUM HEIGHT 37M) HYDRAULIC FRACTURE EQUIPMENT, COIL TUBING UNIT, WIRELINE UNIT, WELL TESTING EQUIPMENT, HIGH PRESSURE FLOWLINE, TEMPORARY FLOWLINE PIPE SUPPORTS, PERMANENT HIGH PRESSURE FLOWLINE AND PERMANENT PIPE SUPPORTS ON LAND AT KMA WELLSITE, ALMA FARM, OFF HABTON ROAD, KIRBY MISPERTON, NORTH YORKSHIRE ON BEHALF OF THIRD ENERGY UK GAS LTD

I write with regard to the above planning application submitted on behalf of our client, Third Energy UK Gas Limited.

The North Yorkshire County Council Planning Register shows a copy of a letter dated 3rd November 2015 from the Friends of the Earth, legal adviser.

Having reviewed the content of the letter and consulted with our legal team and ecological specialist we enclose our response addressing those points to which we consider a response is required. We have presented the response as a report from our ecological specialist addressing points 7 – 21 of that correspondence.

Should you require any additional information or clarification then please do not hesitate to contact me.

Yours sincerely
for **Third Energy UK Gas Limited**


Senior Town Planner

Tel: 
Mob: 
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KMA Wellsite, Kirby Misperton

**POST ES
SUBMISSION:
RESPONSES TO
COMMENTS FROM
FRIENDS OF THE
EARTH ON
ECOLOGY**

December 2015

Ref: 47073367

Prepared for:

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1. INTRODUCTION

1.1 Introduction

AECOM was commissioned by Third Energy UK Gas Ltd to provide responses to comments received from legal representatives for Friends of the Earth on the Ecology documents submitted as part of the planning application to North Yorkshire County Council (NYCC) for hydraulic fracture and exploration of the KMA gas well at Kirby Misperton, North Yorkshire.

1.2 Purpose of This Document

The purpose of this document is to provide a response to each of the comments received from Friends of the Earth in their letter to North Yorkshire County Council dated 3rd November 2015, on the Ecology Chapter of the Environmental Statement and accompanying technical appendices.

The document aims to clarify the position of Third Energy UK Ltd in respect of the issues raised, and to assist the planning authority in determining whether the issues raised are material to the outcome of the assessment in respect of ecology to enable an informed decision to be made in the granting or otherwise of planning permission. This document seeks to respond to the comments with facts and without prejudice, to enable a balanced decision to be made.

1.3 Site Description

The KM8 well was constructed in 2013 as an extension to a pre-existing wellsite formally known as KM1, which produces and transmits natural gas from the KM1 well and wider Marishes gas field to the Knapton Generating Station via an underground pipeline. Together, the site is referred to as KMA wellsite. On completion of exploratory drilling at KM8 well, the borehole was capped and is not currently in use.

The KM1 wellsite is surrounded by screening plantation woodland that has become relatively well established, having been planted in the late 1980s/ early 1990s when KM1 was constructed. Similarly, screening plantation woodland has been planted around the KM8 well extension implemented through a planning condition for the original application. These trees are still small and within their rabbit guards, having been planted in March 2014.

1.4 Proposed Development

A planning application accompanied by an Environmental Statement was submitted to NYCC in July 2015 requesting permission for the hydraulic stimulation and testing of geological formations using the existing KM8 well, followed by the production of gas and transmission to Knapton Generating Station via existing pipeline infrastructure.

2. DETAILED RESPONSES TO COMMENTS MADE BY FRIENDS OF THE EARTH

2.1 Introduction

For ease of reference, each of comments made by Friends of the Earth in their letter of 3rd November 2015 has been tabulated. The comments and responses are provided in Table 2.1 below.

Comment Reference	Comment from Friends of the Earth	Response from AECOM
(i) European Protected Species		
7	<p>The JBA report which forms part of our client's objection makes clear that Alma Farm near the KMA site contains a number of outbuildings (including a derelict cottage) which have the potential to support bats and nesting birds. Our clients have (video) evidence that bats are in fact roosting in the derelict Sugar Hill bungalow at the Farm. Our client's experience, as local people, is that bats are found in significant numbers in the local area. They note that local planning policy also recognises this fact.</p>	<p>The wellsite is currently of low suitability for bats due to a combination of lack of suitable roost features, poor connectivity to wider landscape due to its location in arable farmland and because the existing baseline includes an operational wellsite that is already lit.</p> <p>On this basis it is highly unlikely that the site would be used by significant numbers of foraging bats or be of high functional importance for foraging bats. Any bats currently present will be foraging in the presence of existing lighting and are therefore demonstrating tolerance to this, and this includes any bats using the adjacent hedgerows for foraging/ commuting that may have originated from the reported roost at the derelict Sugar Hill bungalow. The proposed development will not materially alter this lighting regime (as concluded in the lighting impact assessment completed by Resource and Environmental Consultants Ltd.) and therefore will not materially change the established baseline for bat presence. Given the proposed development is consistent with the existing baseline and requires no new habitat loss, no impact on the nature conservation status of local bat populations would be reasonably expected. The reported presence of roosting bats at Alma Farm is therefore not relevant to the impact assessment.</p> <p>The potential presence of nesting birds at Alma Farm (including the outbuildings and derelict cottage) is not relevant to the impact assessment. This is on the basis that there are no pathways by which the proposed development could affect nesting birds. There will be no loss of nesting bird habitat at Alma Farm as this lies outside the development footprint. Similarly, there is no potential for noise and visual disturbance from the proposed development to affect nesting birds (should they be present at Alma Farm) given that the farm is outside the development footprint, and is approximately 250m from the wellsite. Further discussion in respect of the potential presence of nesting barn owl is provided in the comment against point 17 below.</p> <p>Planning guidance (NPPF) and Standing Advice clearly states that</p>

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		developers are only required to do surveys for protected species where there is a reasonable likelihood of the species being present <u>and</u> significantly affected by the development. This is not the case in the context of the proposed development for the reasons detailed above. The reported presence of bats in the derelict Sugar Hill bungalow at Alma Farm by local people, and the potential presence of nesting birds at Alma Farm are therefore irrelevant in the context of the proposed development.
8	Far from undertaking the necessary survey work to determine whether bats are in fact roosting at the Farm before the application is determined, the applicant appears to propose to use the monitoring strategy, implemented after planning permission has been granted, to determine this fact. This approach is back to front and, our clients consider, potentially unlawful (see further below).	See comments above in response to point 7. The bat monitoring strategy included in Section 11.8.1.2 of the ES has been prepared on a precautionary basis as agreed with the LPA, to validate the embedded mitigation in the lighting design (which is downward directional, as standard). The inclusion of the bat monitoring strategy is not an acknowledgement that the development will result in potential impacts on foraging bats, as this would be contrary to the outcome of the impact assessment in respect of bats.
9	Otter have been sighted in the River Seven and the River Rye as well as in tributaries (becks) not more than 1 mile from the site. Otter are sensitive to vibration and noise and may therefore be impacted by activities at the Site. In addition, as highlighted in the JBA report, otter are also a qualifying feature of the River Derwent which is functionally connected to the Site (via a drain and tributaries) and may be impacted by any pollution of the SAC from the Site. No assessment of these impacts is contained in the Environmental Statement.	Local presence of otter The River Derwent SAC/ SSSI population of otter is identified in Table 11.11 of the ES, which summarises the qualifying features of the designated site. Desk study data returned by NEYEDC indicated the presence of otter in several tributaries of the Derwent including the Rivers Rye and Dove and Costa Beck, and it is stated in Section 11.6.6.8 of the ES that “ <i>Otter is therefore widespread throughout the River Derwent and its catchment.</i> ” Impact assessment (pollution) The impact assessment was undertaken of the wellsite as designed, and embedded mitigation for surface water run-off attenuation was therefore taken into account when undertaking the assessment because it represents the baseline conditions. As identified in Section 11.7.1.7 of the ES, the drainage of surface water from the wellsite is entirely separate and is collected from the area lined with

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		<p>an impermeable HDPE membrane, stored on site and then removed by tanker: “Surface water collected within the bunded walls will also be captured and stored on-site for off-site disposal via tanker to an Environment Agency permitted waste water treatment facility. There is therefore no potential for silted/polluted surface water run-off to reach the adjacent drainage ditch (Sugar Hill Drain). Furthermore, the legislative compliance measures required to be adopted during the proposed development will minimise the risk of a pollution event occurring as a result of works in close proximity to the watercourse. The Flood Risk Assessment, prepared in support of the planning application concluded that there is no substantial risk of flooding to or from the KMA wellsite during the development that could result in surface water contamination.”</p> <p>There are therefore no pathways for impacts on the adjacent ditch (Sugar Hill Drain) that could ultimately affect the River Derwent SAC/ SSSI, or tributaries within the catchment, resulting in pollution to habitats used by otter.</p> <p>Impact assessment (noise)</p> <p>The potential for noise disturbance to SAC populations of otter have been assessed in Section 11.7.1.4 of the ES, and were scoped out due to the distance between the SAC/ SSSI and the wellsite (approximately 6.8 km). Table 11.13 presents a modelled scenario for noise impacts at each of the designated sites identified within the potential zone of influence of noise disturbance (North York Moors SPA/ SSSI, River Derwent SAC/ SSSI and Low Carr Farm SINC). At all sites, the noise levels are predicted to be within the ambient range during the noisiest phases of works.</p> <p>It is noted that the FOE comment specifically highlights the potential for noise disturbance to otter foraging in habitats closer to the KMA wellsite than the River Derwent SAC/ SSSI. Although the noise modelling has only been undertaken in respect of designated sites, it is important to understand that the highest predicted noise level results from the hydraulic fracture</p>

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		<p>stimulation/well test phase, which will only be undertaken in daytime hours over a short time period (up to 5 hours per zone), thus avoiding the nocturnal period when otter are most likely to be actively foraging/dispersing. It is therefore reasonable to assume that there is no pathway by which foraging/dispersing otter, even in watercourses closer to the Site than the River Derwent SAC/ SSSI, would be adversely affected through noise disturbance.</p> <p>Impact assessment (vibration)</p> <p>There are no impact piling operations that may cause vibrations that may disrupt foraging otter.</p>
10	<p>So far as newts are concerned, the JBA report makes clear that the pond adjacent to the track leading to Alma Farm should be considered with regards to its potential to support Great Crested Newts. The pond is located just 245 metres from the Site but does not appear to be assessed for impacts in the Environmental Statement. Our clients advise that Yorkshire Wildlife Trust have also commented that there may be great crested newts in the ponds near to the site.</p>	<p>The potential for great crested newts to be affected by the proposed development is considered in Section 11.6.6.3 of the ES, and no pathways for effects were identified. The proposed development will only affect existing hard-standing within the wellsite boundary, and this habitat is not suitable for great crested newts.</p> <p>As discussed above in response to point 7, planning guidance (NPPF) and Standing Advice clearly states that developers are only required to undertake surveys for protected species where there is a reasonable likelihood of the species being present <u>and</u> significantly affected by the development. This is not the case in the context of the proposed development for the reasons detailed above. The potential presence of great crested newts in the pond(s) at Alma Farm is therefore irrelevant in the context of the proposed development, and a specific survey for the species is not required.</p>
Legal Analysis		
11	<p>As you know, these species are protected in EU and English Law. Case law (see the leading case of Morge), makes clear the need for effective assessment of impacts on protected species before a</p>	<p>We maintain that an appropriate level of survey and assessment has been undertaken for the proposed development, and that the scope of works and</p>

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	planning authority decides to grant planning permission. Thus in Morge, Baroness Hale made clear that planning officer's reports <i>"obviously have to be clear and full enough to enable them (i.e. the planning authority) to understand the issues and make up their minds within the limits that the law allows them."</i>	the impact assessment were agreed with the LPA through pre-application consultation.
12	Similarly in Woolley, the court found that the licensing process undertaken by Natural England (in relation to bats) was no substitute for the proper consideration of impacts on protected species by the planning authority. The approach set out in Morge was endorsed by the court in Bagshaw.	The impact assessment found that there was no reasonable likelihood of adverse impacts on European Protected Species (EPS). The proposed development does not trigger the requirement for EPS mitigation licensing and therefore reference to previous case law in respect of this matter is irrelevant.
13	Our clients believe that the assessment of impacts on these species fails to comply with the standards laid down in case law, in particular because it overlooks a number of important examples of protected species in the vicinity of the site, or a real possibility that such species are present which have not been considered. If these gaps are not addressed, they would render any decision to grant planning permission on the basis of the Environmental Statement potentially unsafe.	We would reiterate that the impact assessment did not identify any potential for adverse effects on bats, otters or great crested newts. As discussed above in response to point 7, planning guidance (NPPF) and Standing Advice clearly states that developers are only required to undertake surveys for protected species where there is a reasonable likelihood of the species being present <u>and</u> significantly affected by the development. This is not the case in the context of the proposed development for the reasons detailed above.
14	The applicant's proposals to assess impacts on bats after planning permission is granted is particularly troubling. Either the impacts on bats are minimal and the post-permission measures are unnecessary, or the data provided to the Council to date is inadequate and the applicant is seeking to address the deficiency after the event. The latter approach is clearly unlawful (contrary to Morge and subsequent case law) and would render the grant of planning permission unsafe.	The bat monitoring strategy included in Section 11.8.1.2 of the ES has been agreed with the LPA to validate the embedded mitigation in the lighting design (which is downward directional, as standard). The inclusion of the bat monitoring strategy is not an acknowledgement that the development will result in potential impacts on foraging bats, as this would be contrary to the outcome of the impact assessment in respect of bats.
15	JBA make clear that the fact that the ecology survey was undertaken	The 2015 updated Phase 1 Habitat survey was undertaken to ground truth

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	(on one day) in the midst of winter is unsatisfactory and the limitation on findings re: bats (as a result) is not identified in the Statement, contrary to the requirement in Annex IV(8) of the EIA Directive (2011/92). JBA argue that the 2012 assessment of bats on which the applicant relies is relatively outdated. Finally our clients remind you of the precautionary approach required to be adopted to the assessment of impacts on nature under the Habitats Directive.	<p>the original survey undertaken in 2012, which was undertaken at the optimal time of year to accompany the planning application for the construction of the KM8 well (an extension to the KM1 wellsite). The only changes in habitats recorded in the 2015 survey were an increased area of hard-standing and young screening plantation woodland around the extended wellsite (resulting from the construction of the KM8 well), and reasonably the value of these habitats to nature conservation could be fully appraised during a January survey.</p> <p>Given that the 2012 survey is only 3 years old there is no reasonable likelihood of the value of the site for protected species e.g. bats having altered (increased) significantly between 2012 and 2015. This was confirmed through the ground truthing update survey completed in 2015, and therefore the impact assessment was undertaken on the basis of the most recent baseline information (including an updated desk study). No limitations to the undertaking of the updated Phase 1 habitat survey in January were therefore identified (as stated in Section 11.5.2 of the ES).</p>
16	In the circumstances, our clients believe that full assessment of the impacts on such species is required and at a time of year when it will be possible to determine the true extent of the relevant species present and the likely degree of impacts from the proposed activities.	See responses above to points 7 – 15.
(ii) Species protected under domestic law		
17	Our clients have evidence that barn owls nest (and have done so for a number of years) in the barns at Alma Farm, near the KMA site. The suitability of the habitat for barn owls is also highlighted in the JBA report. The assessment is flawed since it seems to overlook this fact and potential impacts on this species almost entirely. Barn owls are designated under Schedule 1 of the Wildlife and Countryside Act 1981. Further assessment is therefore required.	<p>There is no suitable habitat within the site boundary for barn owl.</p> <p>No records of nesting/ roosting barn owl were returned by NEYEDC through the desk study, although the limitations of desk study records is acknowledged in the ES. Regardless of the reported presence of nesting/ roosting barn owl at Alma Farm, any barn owls currently present will be foraging in the presence of existing lighting at the wellsite (which is operational) and are therefore demonstrating tolerance to this.</p> <p>Section 11.7.1.5 of the ES considers the potential pathway for impacts on nocturnal foraging animals including owls, and concludes that “<i>The proposed</i></p>

Comment Reference	Comment from Friends of the Earth	Response from AECOM
		<p><i>lighting will be of a similar scale and nature as the existing lighting it will therefore not result in a significant change to the local nocturnal environmental conditions.</i> This conclusion is further strengthened by the lighting impact assessment completed by Resource and Environmental Consultants Ltd, which concludes that the proposed development will not materially alter the baseline lighting regime, and therefore will not materially change the established baseline for barn owl presence. Given the proposed development is consistent with the existing baseline and requires no new habitat loss, no impact on foraging barn owl or nearby nest sites would be reasonably expected as a result of temporary lighting associated with the proposed development.</p> <p>With regards to visual/ noise disturbance to any nesting or roosting site used by barn owl at Alma Farm, any impacts resulting from the proposed development must be considered within the context of the current baseline which includes ongoing agricultural operations in and around the farm. It is therefore reasonable to assume that barn owls, if present, are habituated to anthropogenic activity within close proximity to their nest/ roost site. It is not known in which building(s) at Alma Farm the barn owls are potentially nesting/ roosting, but a precautionary approach has been adopted whereby it is assumed to be the nearest building to the KMA wellsite. Given that this is approximately 250 m west of the wellsite, it is reasonable to assume that there is no pathway by which noise or visual disturbance from the wellsite could result in any disturbance to barn owls on or near their nest/ roost sites, or their dependent young, should works be undertaken within the barn owl nesting season.</p> <p>Planning guidance (NPPF) and Standing Advice clearly states that developers are only required to do surveys for protected species where there is a reasonable likelihood of the species being present and significantly affected by the development. This is not the case in the context of the proposed development for the reasons detailed above and therefore a specific survey of the farm for barn owl is not required.</p>

Comment Reference	Comment from Friends of the Earth	Response from AECOM
18	Our clients argue that the assessment is defective as regards the assessment of impacts on these species for the reasons stated and the Council cannot have regard to all material considerations (in accordance with section 70 of the 1990 Act) in these circumstances. Further assessment is therefore required.	See response to point 17. The reported presence of nesting barn owls at Alma Farm has no material bearing on the outcome of the assessment because there are no pathways by which barn owls could be adversely affected by the proposed development.
(iii) Impacts on River Derwent SAC		
19	Our clients are concerned that the Environmental Statement fails adequately to address impacts on the River Derwent SAC. The JBA report sets out these concerns in full. However, in summary:	
	(a) there is a pathway for pollution from the site to the Derwent SAC – namely the Sugar Hill Drain which is adjacent to the site, which flows into the Costa Beck which flows, in turn, into the Derwent;	As stated in Section 11.7.1.7 of the Ecology Chapter to the ES, the potential for surface water pathways (pollution/ siltation) have been identified and assessed. The KM1 extension wellsite is underlain by an impermeable HDPE membrane and all surface water run-off is captured on site and removed by tanker. There are therefore no pathways for impacts on the adjacent ditch (Sugar Hill Drain) that could ultimately affect the River Derwent SAC/ SSSI. Assessment of this potential impact with regards to the Habitats Regulations is required to be undertaken by the competent authority as part of their Habitats Regulations Assessment (HRA). A signposting document has been provided as Appendix 6 to the ES to assist the competent authority in respect of this matter.
	(b) there is a risk of pollution from the site flowing into the Drain given the site is small, a large amount of equipment will be required to be present (given the nature of fracking) and measures to avoid pollution are considered inadequate;	As discussed above in response to 19 (a), the assessment clearly identifies that there is no pathway under which normal circumstances by which the proposed development could result in pollution/ siltation of the Sugar Hill Drain. The negligible residual risk is adequately mitigated by the embedded measures required for legislative compliance under the operational permit for the site issued by the Environment Agency, as per the current operational requirements. We would respectfully suggest that the Environment Agency is the appropriate regulatory authority to determine whether the site drainage

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		<p>arrangement adequately minimises the risk of surface-water pollution.</p> <p>It is also not appropriate to make a link between the size of the site and the risk of a pollution event occurring, as the legislative compliance measures required for the operation of this (or any other) site, would be the same regardless of its size, albeit of a differing magnitude in terms of surface water storage capacity.</p>
	(c) assessment of impacts on species for which the SAC is designated (lamprey and Otter) is insufficient since pollution could affect fish stocks, which in turn would affect otter;	As discussed above in response to 19 (a), there is no surface water pathway to Sugar Hill Drain and the Derwent SAC that could result in pollution or contamination of the Derwent. There is therefore no potential for habitats used by otter or lamprey along this (or other watercourses that fall within the catchment but outside the SAC boundary and which are downstream of the wellsite) to be adversely affected.
	(d) assessment of water bodies outside the SAC is inadequate insofar as these are used by designated species.	The presence or potential presence of designated species in waterbodies that are outside the SAC boundary but which are functionally connected to it (i.e. those waterbodies within the catchment) is irrelevant because no pathways by which they could be affected were identified in the assessment (taking into account the embedded mitigation for pollution risk, as required for legislative compliance for the operation of the site).
Legal analysis		
20	<p>As you know SACs are protected under EU and English law and EUCJ case law makes clear that Member States must adopt a precautionary approach to assessment – that is, assessment is required save where all reasonable doubt about impacts may be ruled out. Further in Sweetman, the Court made clear that:</p> <p><i>“Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site</i></p>	<p>This matter will be addressed through the Habitats Regulations Assessment (HRA) undertaken by the competent authority (in this case, North Yorkshire County Council), which examines in the first instance whether the proposed development has the potential to result in likely significant effects on the River Derwent SAC. If likely significant effects are identified, only then would an ‘appropriate assessment’ consider in detail the potential effects on the integrity of the designated site. This is the second stage in the HRA process.</p> <p>As discussed above in response to 19 (a), there is no potential for the proposed development to result in pollution/ contamination to the SAC via</p>

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	<i>concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site”.</i>	Sugar Hill Drain. No other pathways by which the SAC could be adversely affected were identified in the assessment. A HRA Signposting document has been provided as Appendix 6 to the ES to assist the competent authority in undertaking its HRA.
21	Given the clear the presence of a sensitive receptor (the SAC), a clear pathway to the receptor and the risk of pollution being generated at the KMA site, it seems clear that impacts on the protected area cannot be ruled out and that a Habitats Regulations Assessment is therefore required. Grant of planning permission without a Habitats Regulations Assessment on the impacts of this new and (in this country) largely untested technology at a site connected to a European site would be potentially unsafe and at risk of challenge.	As discussed above in response to 19 (a), there is no potential for the proposed development to result in pollution/ contamination to the SAC via Sugar Hill Drain. It is anticipated that a HRA will be undertaken by the competent authority (NYCC), and a HRA Signposting document has been prepared to assist them in this matter.

