Is nature taking over?

By David Brock

1 Introduction

The planning system proceeds on the basis that planning authorities weigh all the material considerations in deciding whether to grant planning permission. The natural environment is an important material consideration and there are many non-planning designations designed to afford it protection. These include at the National and European level Sites of Special Scientific Interest, Special Protection Areas for birds, Special Areas of Conservation and local non-statutory designations such as Sites of Importance for Nature Conservation.

Some practitioners feel however that the scales are loaded unfairly in favour of nature conservation. Opponents of development proposals not uncommonly unearth nature conservation issues, and may lobby those responsible for conservation to designate sites so as to frustrate development or at least make it more difficult.

These designations are generally made by experts on the basis of scientific and factual evidence. The designation stage rarely takes account of the development policy and probably it should not. Whether a site with a nature conservation interest should be developed is a planning policy decision. Often, however, considerable weight is given in development plans to the fact of designation. As a result, designation is an important step in the development process. The designation process and the use of designations throws up questions such as whether it is right for the designations to be made by experts, should those affected have a greater role, who is actually taking the decision and how should the planning authority treat the designation? This paper looks at these questions, the key designations, their effect and the rights of landowners with particular reference to recent court cases. It will consider the safeguards and checks on the decision making process and proffer a conclusion how to address nature conservation issues in the planning process.

2 Effects and Process of Designations

2.1 The effects of designation

2.1.1 Designation imposes serious constraints on the landowner's right to deal with law and to develop it. It is instructive to look at legal and policy effects separately for each type of designation.

(a) SSSIs

The main legal effect of designation as an SSSI is that it becomes unlawful to carry out specified operations without the consent of English Nature or a planning permission. There is a right of appeal to the Secretary of State if consent is refused or granted with conditions. Either party can insist on an inquiry or hearing.

English Nature can request the owner to enter into a management agreement and if one cannot be concluded on reasonable terms English Nature has compulsory purchase powers. If a management agreement is not complied with, a management notice may be served and again there is a right of appeal.

(b) SACs and SPAs

In the case of candidate SACs and potential SPAs Government policy is to treat them for policy purposes as European site from the moment they are publicly proposed.[1]

The circumstances in which planning permission may be granted on European Sites are then limited and permitted development rights are curtailed. Existing planning permissions may be modified or revoked.

Before granting planning permission for development or use which is likely to have a significant effect on a European Site,[2] the LPA must make an assessment of the implications for the site in view of that site's conservation objectives.[3]

Having consulted the appropriate country agency under Reg.48(3)[4] the LPA may only grant the permission if they have ascertained that the development or use will not adversely affect the integrity of the European site.[5]

If they conclude however that the proposed development or use does adversely affect the integrity of the European site, they can only grant permission if, for imperative reasons of overriding public interest, the development or use must be permitted.[6]

What is an "overriding public interest"? It may be of a social or economic nature.[7] It must relate to human health, public safety or be of a primary importance to the environment. It may also relate to any other reason which in the opinion of the European Commission is an imperative reason of "overriding public interest".[8]

If it is intended to grant planning permission despite the adverse risks to a European Site, the LPA must notify the Secretary of State to give him the opportunity to call-in the application.[9]

Under Reg.53, the Secretary of State shall secure that compensatory measures are taken if the planning permission is granted following an assessment which has shown that there are negative implications for a European site. Such compensatory measures are to ensure that the overall coherence of Natura 2000 is protected. They can involve providing replacement sites. Existing planning permissions are also affected.

Regulation 50(1) imposes an obligation on LPAs to review planning permissions affecting European Sites,[10] which were granted before the Site attained "European Site" status, or if later, the commencement of the Regulations. The LPA must review its decision and either affirm, modify or revoke it. This is done by carrying out an assessment as laid out in Reg.48(2) to (4) referred to above. Just as with the grant of a new planning permission, if the existing permission would have an adverse effect on the integrity of European Site, it must be revoked or modified. Only if there are overriding public interest considerations may it be left intact. In such a case, compensatory measures must be implemented.

[1] PPG9 Annex C para.C7.
[2] and which is also not directly connected with or necessary to the management of the site–Reg.48(1).
[3] Reg.48(1) Conservation and Natural Habitats etc. Regulations 1994.
[4] *i.e.* English Nature; Countrywide Council for Wales or Scottish Nature. It is interesting to note that Reg.48(4) states that the LPA may consult the general public for its opinion, in addition to the country nature agency.
[5] Reg.48(5).
[6] Reg.49(1).
[7] Reg.49(1).
[8] Reg.49(2) (a) and (b).
[9] Reg.49(5).
[10] as *per* Reg.48(1), see above.

The existing statutory powers are used to revoke or modify permissions, that is to say revocation, modification or discontinuance orders under ss.97 and 102 of the Town and Country Planning Act 1990. Voluntary arrangements under s.106 are also encouraged but there is little incentive on the landowner to enter into these as they carry no rights to compensation.

Compensation is of course payable for the revocation or modification of a planning permission under ss.91 and 102 in the usual way following a review by the LPA.

An example of what happens is given by an appeal decision at Barksore Marshes (November 19, 1998).[11] In that case a planning permission for the disposal of dredgings was modified because it affected the Medway Estuary and Marshes Special Protection Area. The inspector reviewed the development permitted and its effect on the SPA. He concluded that it would result in the loss of breeding and wintering habitats for avocets and habitats for annexe 1 species. He decided that there was likely to be an adverse effect on the integrity of the SPA. That then led him to a consideration of alternative ways of disposing of dredgings which he concluded were available, at a cost, allowing him to decide that there was no "imperative reason of overriding public interest" for continued deposit of dredgings. The SPA designation itself, of course, could not be questioned in this process. He dismissed the appeal against modification.

Permitted development rights are also curtailed and there are similar effects on enterprise zones, simplified planning zones and special development orders. Any planning permission granted by a general development order relating to development which is likely to have a significant effect on a European site and which is not directly connected with the management of the site is subject to the condition that development permitted under it may not begin until the developer has received written notification from the LPA.

Details of the development should be sent in writing to an appropriate nature conservation body for consideration as to whether the development is likely to have a significant effect on a European site.[12] The nature conservation body then notify the applicant and LPA of its opinion.[13] Regulation 61(5) states that the opinion of the nature conservation body that the development will not have a significant effect on a European site will be conclusive of the legitimate reliance on the planning permission granted by the GDO.

The LPA liaises with the nature conservation body consulted and takes account of any representations made by them.[14]

Where the nature conservation body consider that the development may have a significant effect on a European site, the LPA takes account of any representations made and then only approves the development if it ascertains that it will not adversely affect the integrity of the site.[15]

There are similar provisions in relation to special development orders, simplified planning zones and enterprise zones.

[11] I am grateful to David Hawkins of Nabarro Nathanson for providing a copy of this appeal decision.
[12] Reg.61.
[13] Reg.61(3).
[14] Reg.62(4).
[15] Reg.62(6).

Two cases serve to illustrate the legal effect of designations as an SPA or SAC. In *ADT Auctions Ltd v Secretary of State*, [2000] J.P.L. 1155, ADT sought planning permission for 42 houses near a proposed SPA. There were two inquiries. At the first the inspector held that the evidence was not persuasive enough to support the argument that there would be no significant adverse effect. At the second, after an environmental statement had been prepared the inspector concluded there would be too many factors posing a real threat to the integrity of the pSPA.

More recently, in *R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions*[16] (on the failure to include Gatwick in the consultation over airport expansion in the South East) it was held to be irrational to fail to include Gatwick when development of one of the proposed sites, Cliffe, could have significant adverse effects on an SPA. Gatwick, the Court held, should be included because of the obligation to consider alternatives before granting permission which would have an adverse effect.

(c) Local Designations

The non-statutory designations do not, of course, have any direct legal effect in terms of express restrictions on operations. PPG9 and the Defra document "Local Site Systems" advise that local sites should be protected by policies in development plans.

2.1.2 Policy effects

The designations also have policy effects. The starting point is PPG9 on nature conservation.

Government policy in PPG9 is to contribute to conservation and abundance of British wildlife and habitats, to minimise adverse effects where conflict is unavoidable and to meet international responsibilities (para.2). It recognises nature conservation as a significant material consideration, especially on SSSIs, but planning permission should not be refused if conditions can prevent damaging impacts or if other material factors are sufficient to override nature conservation considerations (para.27). Development likely to affect SSSIs must be subject to special scrutiny (para.29) and of course there are requirements to consult English Nature. Where an LPA proposes to grant permission against the advice of English Nature they are to give English Nature notice so that they can ask for a call in.

It will be seen that, firstly, the PPG adopts the orthodox approach of recognising nature conservation as one of many material considerations, draws attention to SSSIs and then gives special status to advice of English Nature by requiring authorities to notify them when proposing to go against their advice.

This implies that English Nature can give advice on the desirability of the development as a whole, not just on its nature conservation value. If what is contemplated is a disagreement between English Nature and the LPA on the nature conservation interest of the site, such as whether it supports a particular species it is understandable that the issue might have to go to a public inquiry. But if English Nature were to say that a site should not be developed it is less easy to say why that should have added weight as they are not able to consider and weigh all the material considerations.

In relation to sites of local nature conservation importance PPG9 recognises their recreational importance (para.15) and again requires the LPA to have regard to them whilst advising that LPAs should only apply local designations to sites of substantive value, taking care to avoid unnecessary constraints on development.

Development plan policies vary. There are some more or less random examples in Appendix 5.

[16] [2002] EWHC 2516; [2003] J.P.L. 583.

SP12/3 of the Cambridgeshire Structure Plan 1996 applies the test for development on international designations found in the Habitats Regulations not only to international designations but also to Sites of Special Scientific Interest. SP12/5 is a presumption against development which would have a significant adverse effect on interests of nature conservation.

In South Cambridgeshire, policies afford equal protection to national and local designations. The designated sites are to be absolutely safeguarded.

In Warrington, policy GRN20 (SSSIs) gives absolute protection if there is a possibility of harm. The reasons in favour of development must weigh decisively. A slight tipping of the balance will not be adequate.

Their policy GR21 on SINCs is differently worded but also guards against the possibility of harm and requires a decisive advantage from going ahead with the development to be shown.

In Surrey Heath the local plan requires a balance to be struck between the development proposed and nature conservation interests.

The Cornwall Structure Plan 1997 on the other hand prohibits any development which would adversely affect any designated site, international, national or local, to a significant degree.

The Essex and Southend-on-Sea Replacement Structure Plan 2001 requires a balance, with the development proposal having to outweigh clearly the need to safeguard national and local sites.

National sites in Carmarthenshire are absolutely protected unless there are "imperative reasons of overriding public interest for the development".

These examples show a variety of approaches. Some are close to a total ban on development adversely affecting SSSIs and local designations (*e.g.* Cornwall, Carmarthenshire and Cambridgeshire). Others go for a balance, albeit sometimes with the requirements for the scales to come down heavily to allow development to go ahead (*e.g.* Surrey Health and Essex and Southend-on-Sea).

2.2 Given these serious consequences of designation, what are the designation provisions? Do they properly and fairly include those whose rights are being affected?

2.2.1 Sites of Special Scientific Interest

Where English Nature consider than land is of special interest by reason of flora, fauna, geological or physio-graphical features, they are under a duty to "notify" it. The landowner, planning authority and Secretary of State may make representations, or objections, to a notification and there then follows a period of nine months within which the notification is either confirmed or withdrawn.[17] Representations and objections are made in writing. There is in practice often discussion between English Nature and objectors. The decision to confirm, or withdraw, the notification is made by the Council of English Nature. In 2001 they modified their practice so as to allow objectors up to 10 minutes to make oral representations at the Council meeting.

The Council consists of between 10 and 14 members chosen by the Secretary of State.[18] There are no statutory qualifications for membership. In practice it has some lay members and is mostly made up of eminent nature conservation experts.

A site can also be de-notified under a procedure similar to notification.[19]

[17] s.28 Wildlife and Countryside Act 1981.
[18] Environmental Protection Act 1990 s.128.
[19] s.28D *ibid*.

It is a criminal offence to do any operations proscribed by the notification without the consent of English Nature, or unless it is in accordance with a management agreement.[20] If consent is refused there is now a right of appeal to the Secretary of State.[21]

There is no right of appeal against notification, nor against de-notification, or a refusal to de-notify.

No statutory criteria are specified for the decision to notify other than the question of whether the site is of special interest by reason of flora, fauna, geology or physiography. English Nature does have a duty to take into account the needs of agriculture and forestry and social/economic interests of rural areas. In practice this does not extend to examination of development potential nor a weighing of material considerations in the way in which this is done by planning authorities. The rural qualification on socio-economic factors is an obvious limitation in any case on what can be done.

SSSIs are designated following the rationale published by the Nature Conservancy Council in 1989. The guidelines set out criteria for the selection of biological SSSIs.

2.2.2. Special Protection Areas for Birds

The Directive on the Conservation of Wild Birds (79/409) requires Member States to take "special conservation measures" concerning the habitat of Annex I birds and migratory species. These areas are known as special protection areas.[22]

There is no formal legal process prescribed by the Directive or statute for the designation of an SPA. The Government's policy is that all SPAs must also be SSSIs.[23] The practice is that the Government looks first to English Nature. English Nature is the Government's advisor on nature conservation issues.[24] Their procedure is described in their publication "Special Protection Areas, what they mean to you". Under it, English Nature identify sites which qualify and deal with consultation.

The site selection criteria were set by the Joint Nature Conservation Committee and are summarised in Appendix 1 to this paper. Under the consultation process, landowners are notified that the land is proposed as an SPA and invited to support or object, in writing, within a time limit. English Nature investigate any objections which cover the scientific basis of classification by direct contact with the objector, during which they seek to resolve any differences of opinions. English Nature advise the Government on whether they think the objections are well founded. "Details of the consultation . . .. with the recommendations for amendments, if appropriate" are sent to Government "but only after we have properly considered any objections received".[25]

R. v Secretary of State for the Environment Ex p. RSPB [1997] Q.B. 206 (the Lappel Bank case) ruled that economic issues could not be taken into account in deciding whether or not to designate an SPA.

The actual classification as an SPA is then made by the Government after further considerations. This last process does not involve the landowner. The Government is obliged under Art.12 of the Directive to report progress in complying with the Directive to the European Commission. There is no appeal mechanism.

[20] s.28E *ibid*.
[21] s.28F *ibid*.
[22] Art.4 Birds' Directive.
[23] PPG9 para.13.
[24] Environmental Protection Act 1990 s.132(1).
[25] "Special Protection Areas, what they mean to you" published by English Nature.

2.2.3 Special Areas of Conservation

These are required to be designated under Habitats Directive (92/43). Member States must propose to the European Commission a list of sites for habitats listed in Annex 1 and species in Annex II within three years of notification of the Directive.[26] The Commission then considers the candidate SAC as notified to it and establishes within Member States a draft list of Sites of Community Importance drawn from the lists.

The national designation process was similar to that for SPAs. In short all stakeholders affected by a possible Candidate SAC proposal were contacted and invited to discuss the proposed designation with their local English Nature office. A deadline of October 11, 2000 was given as a final date for any objections to be registered.

If no objections were received, English Nature and Government would draw up formal Natura 2000 forms for the site and submit these with maps to the EU Commission.

If objections were received, English Nature would aim to seek amicable resolution through discussion. However, in the event of intractable differences they would report to Government for the Secretary of State to decide whether to submit Natura 2000 forms and maps.

The criteria are set out in the JNCC guidelines entitled "The Habitat's Directive: selection of Special Areas of Conservation in the UK".

The general criteria laid out in Annexes I–III of the Habitats Directive are similar to the specific UK criteria on SAC selection in that they both lay down sets of principles by which to judge the conservational importance of sites.

In para.1.5.2.2 of the Background to Site Selection, the JNCC recognises that the conservation agencies are dubious about undertaking "any new, untried, quantitative rule-based approach"[27] and that they prefer the

> "... proven approach, which recognises that site selection is essentially a matter of judgement and relies on a group of experts, each of whom understands the aims and guiding principles of the exercise, to make informed judgements to select an agreed list of sites...".[28]

This method of decision making is referred to as "best expert judgement" and is acknowledged as an appropriate means of selecting sites by the European Commission.[29]

As with SPAs, there is no appeal mechanism. The domestic law decisions as to which sites are put forward to the European Commission as SPAs and SACs are taken by the Government through the Secretary of State. He is accountable to Parliament.

2.2.4 Sites of Importance for Nature Conservation or Local Designations

In addition to statutory designations there are non-statutory local areas. These have a variety of names the most common being wildlife sites, sites of interest for nature conservation (SINCs) and sites of nature conservation interest (SNCI). The importance of the designations is that development plan policies protect them. Being non-statutory the designation processes are less prescribed and vary.

There are a number of difficulties with the local designation system. It is not clear who is the designating

[26] Art.4.
[27] para.1.5.2.2 (p.12), the Background to Site Selection (*supra.*).
[28] para.1.5.2.2 (p.13), the Background to Site Selection (*supra.*).
[29] Natura 2000 Standard Data Form (European Commission DCXI 1995).

body. The procedures for involving landowners are not uniform. Nor is there a uniform approach to whether landowners should be involved.

Defra have issued a draft document (Local Site Systems) which explains how local sites should be selected.[30] It emphasises that to be credible systems must operate in a fair, open and transparent way.

It recommends that local authorities lead and establish countywide systems. The system should be run by a partnership which includes landowners, local authorities, statutory bodies and voluntary organisations. It recommends that wherever private land is involved there should be full and appropriate liaison with landowners and the involvement of landowners in contributing to and showing the results of the surveys. In particular paras 5.6 and 5.7 say:

> "5.6 prior to formal endorsement of a list of sites by the Partnership, owners of land should be given the opportunity to make observations relating to whether or not the site contains the species, habitats or features stated, and meets the criteria. Other factors not directly related to the qualification of the site against the criteria should not be covered in this consultation.
>
> 5.7 the Partnership needs to set out a formal process for considering these observations (if any are made) and the view of the panel before it endorses the selection of each site."

It is not, however, clear who the decision-maker is intended to be. The panel carries out assessment and the partnership is to endorse the list of sites. The partnership is not of course a legal entity and is made up of several different legal persons.

An annual survey of the way in which local site systems work has been carried out for three years by The Wildlife Trusts. The latest 2002 survey contains much very useful information. It contains the following statistics about the involvement of landowners. The percentages have been rounded.

Sharing Survey Results with Landowners—The UK wide Position

Action	*Percentage of systems which do*
Always Send	40
Usually Send	13
Send on Request	8
Sometimes Send	7
Don't know	10
Never Send	3
No answer	19

Interestingly when these figures are broken down into England, Wales and Scotland 84 per cent in Scotland always send, 29 per cent in England but only 18 per cent in Wales.

On giving opportunities to comment, the statistics are:

[30] The word "system" is used to describe the selection process and decision making body rather than a group of selected sites.

Action	*Percentage of systems which do*
Always	32
Usually	6
Sometimes	5
Don't know	16
Never	21
No answer	19

Again, Scotland scores highly with 84 per cent always given the opportunity to comment, England scores 21 per cent and Wales only 18 per cent.

There also a strange anomaly in England where 29 per cent of systems always send the report to the landowner but only 21 per cent always allow the landowner to comment.

The picture which emerges is that only 68 per cent of systems will give landowners the report and only 43 per cent allow the landowners to comment and be involved. Is this fair, open and transparent?

The survey does not, however, look at the question of who actually takes the decision. Is it the panel, the partnership or the local authority? This is important. Anyone seeking to influence the decision needs to know who to talk to. Anyone who wants to challenge this decision to designate needs to know who the defendant should be.

The Defra document recommends that the partnership should "endorse" the panel's decision. That is not much clearer. In addition, the idea that the partnership as a whole makes the decision sounds unwieldy. Must they be unanimous? What are the voting rules?

Some empirical research done for the purpose of this paper is summarised in Appendix 2. The four systems were essentially chosen at random.

All have a panel or review group. In one,[31] the group decides. A group member updates records and informs the local authority and landowner. The authority, apart from participating in the group, does not appear to be a decision-maker. In the second,[32] the panel makes a decision which they then report to the local authority and their partnership. This the local authority "endorses". In the third[33] the review group makes a recommendation to the authority. The authority then endorses. In the fourth[34] it is unclear whether the working group or the local authority makes the decision.

The second and third cases are particularly interesting because the local authority "endorses". This could suggest that they have no choice, or that they can only accept or reject with little investigation of the position. Where there are "recommendations" it must be fairly clear that the authority is making a real decision. If they are merely "endorsing" the panel decision should be open to the scrutiny of the Court.

[31] West Midlands.
[32] Buckinghamshire and Milton Keynes.
[33] Cambridge City Council.
[34] Lancashire.

2.3 The Joint Nature Conservation Committee

It is useful to note the role, function and make up of the Joint Nature Conservation Committee (JNCC). It is a committee established by the three national nature conservation bodies (English Nature, Countryside Council for Wales and Scottish Natural Heritage) to carry out their "special functions".[35] These functions are principally:

2.3.1 to advise ministers on the development of policies for, or affecting, nature conservation in Great Britain and internationally;
2.3.2 to provide advice and knowledge to anyone on nature conservation issues affecting Great Britain and internationally;
2.3.3 to establish common standards throughout Great Britain for the monitoring of nature conservation and for research into nature conservation and the analysis of the results;
2.3.4 to commission or support research which the Committee deems relevant to the special functions.

The JNCC thus has a significant role in establishing the standards which are used by national nature conservation bodies. The JNCC has 13 members. Six come from the three national agencies. Two are appointed by the Northern Ireland Department of the Environment. One is the Chairman of the Countryside Commission. The Chairman and three other members are chosen by the Secretary of State. Those three must be suitably qualified in nature conservation. Thus the JNCC has a strong element of nature conservation upon it.

The JNCC must make an annual report to the Secretary of State, who lays the report before Parliament.

3 What is the approach of the Courts?

3.1 The designation process for SPAs came before the Court of Appeal in Bown v Secretary of State *(July 31, 2003). In a postscript to the decision of the Court, Carnwath L.J. said:*

> ". . .although the appeal has failed, it has served a useful purpose in exposing an apparent lack of transparency in the procedures for classifying SPAs. EC law does not appear to impose any specific requirements for the decision-making process, although it requires registration once a site is classified. Nonetheless, in fairness to all involved, the procedure needs to be clearly defined and publicly explained".

This is a serious criticism of a process which has such significant consequences.

3.2 There have been a number of cases in which challenges have been made in designations made by English Nature.[36]

In *R. v Nature Conservancy Council Ex p. Bolton* [1996] J.P.L. 203 the original notification majored on the potential state of a peat bog. The objectors thus focused entirely on that aspect. At a late stage it became apparent that the actual current interest was also part, and a significant part, of English Nature's reason for designation. This, the objectors claimed, put them at a disadvantage and they sought judicial review of the decision on the grounds of procedural unfairness. Popplewell J. held that it was just possible to spell out in the original notification the fact that English Nature were addressing current as well as future interests. It was easy to see how a different view could have been taken. It must have been

[35] Environmental Protection Act 1990 ss.128 (4) and 133.
[36] Some of the cases are in the name of the Nature Conservancy Council, now known as English Nature. For convenience the name "English Nature" is used in this paper.

obvious to English Nature that the full grounds of designation were not being addressed by the objector, he said, and so (one suspects looking at the totality of the position), there was a breach of the rules of natural justice. He quashed the decision to confirm the designation.

The next case was *R. v Nature Conservancy Council Ex p. London Brick* [1996] J.P.L. 227. In that case London Brick challenged the designation of a site as an SSSI. The site's interest was a species of water beetle which needed shallow saline pools to live in. The reason for the shallow pools (claimed London Brick), was that the site was artificially drained. The list proscribed operations included drainage. Salinity was due to pumping into the site from a nearby landfill. Pumping was also proscribed.

Under the legislation then in force English Nature could not compel the landowner to carry out operations, nor to desist from proscribed operations. A landowner who wishes to carry out a proscribed operation simply had to give notice and wait four months. The period was intended to give English Nature the opportunity to negotiate a management agreement. However, the legislation gave it no negotiating position. This had led Lord Mustill in *Southern Water v Nature Conservancy Council* [1993] P. & C.R. 55 to describe the regime as a toothless tiger.

London Brick claimed that it was irrational to designate when the very operations which created this interest were proscribed. They also argued that English Nature had failed to take a relevant consideration—cessation of drainage and pumping—into account. English Nature's evidence however was that despite cessation of drainage and pumping between notification and confirmation, the interest subsisted at that time.

The Court in *London Brick* made a number of key rulings. First, that there is a duty to notify if the relevant conditions exist at the date of notification. English Nature is not concerned at that stage with the management of the site nor, therefore, with the continuance of the interest. Their policy to confirm if the special interest existed at the date of confirmation, unless the continuance of the special interest was doomed, was reasonable and lawful. English Nature were aware that the pit could lose its scientific interest but it had not done so at that time. They considered, said the Court, that suitable management could ensure the continuance of the interest. Secondly, the Court did not consider that the fact there was no power to compel the landowner to manage the site in a particular way was relevant. English Nature's policy was to designate if the interest existed at the time of confirmation unless the interest was doomed. The Court held that it was not necessary for the continued existence of the nature conservation interest to be reasonably assured.

Thus the Court held that the designation was not irrational and nor had English Nature failed to take into account any relevant matter. *Obiter*, the Court thought that although there was no express power to denotify, one could be implied. If it did not then if the site ceased to have nature conservation interest then notification "would in practice by various means cease to have effect".

This is an interesting conclusion. The Court concentrated on the legal effect of designation as an SSSI but the more important and significant side of designation is the protection afforded by planning policy. In expecting the practical effect of designation (had it considered that aspect) planning authorities to address the actual state of the site. Acceptance of the status alone would not be the right way forward.

Do human rights affect the position? The impact of the Human Rights Act 1998 was considered in *R.. (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908. Aggregate Industries claimed that English Nature's process for confirming SSSIs does not comply with the requirement of Art.6(1) that when deciding on rights there must be a fair hearing before an independent and impartial tribunal. English Nature notified Bramshill Plantation[37] in Hampshire as an SSSI and also

[37] Interestingly, Bramshill was the site of the 1980s proposals known as Foxley Wood.

proposed to recommend to the Secretary of State that it be designated an SPA. The usual procedure for SSSIs was adopted allowing Aggregate Industries to object. There were meetings and discussions. Aggregate Industries asked for independent adjudication rather than confirmation by English Nature's Council. This was refused, but shortly before the Council meeting English Nature changed their procedure to allow a representative of an objector ten minutes to present the objector's case. Aggregate Industries nonetheless maintained this did not comply with Art.6.

Forbes J., in a very full judgment found that Art.6(1) was engaged as the rights of Aggregate Industries were affected and English Nature's decision was "directly decisive" of them. The restrictions on activities, potential for a management agreement and compulsory purchase were all changes to Aggregate Industries' rights.

He also held that English Nature's Council lacked the necessary appearance of impartiality and independence. Thus their procedure would only comply with Art.6(1) if saved by the so-called "composite approach". Was the decision subject to review by a Court having full jurisdiction so that the process complied?

In *Alconbury* some members of the House of Lords had said that the fact that the Secretary of State as decision-maker was accountable to Parliament was important. Forbes J. in *Aggregate Industries*, however, held that was not a necessary component, pointing out that the inspector in *Bryan v United Kingdom*[38] was not democratically accountable. Pausing there, one observes that the inspector was actually acting under powers delegated to him by the Secretary of State, so if there is a point it may still be open.

Secondly, he found that there was no requirement for any independent fact finder, failing which the Court must be able to review the full merits, including making its own findings of fact. He came to this conclusion despite the decision of the Court of Appeal in *Begum (Runa) v Tower Hamlets LBC*[39] which he quoted with approval where Laws L.J. said:

> "Where the scheme's subject matter generally or systematically involves the resolution of primary fact, the Court will incline to look for procedures akin to our conventional mechanisms for finding facts: rights of cross-examination, access to documents, a strictly independent decision-maker. To the extent that procedures of that kind are not given by the first instance process, the Court will look to see how far they are given by the appeal or review; and the judicial review jurisdiction (or its equivalent in the shape of a statutory appeal on law) may not suffice. Where however the subject-matter of the scheme generally or systematically requires the application of judgement or the exercise of discretion, especially if it involves the writing of policy issues and regard being had to the interests of others who are not before the decision-maker, then for the purposes of Art.6 the Court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expect than a judge (I use the terms loosely), and the second instance appeal is in the nature of a judicial review"[40].

Thirdly, the essential question is whether the High Court possesses full jurisdiction to deal with the case "as the nature of the decision requires". Looking at the process or procedures of the administrative decision-maker, can it be said to produce fair and reasonable decisions? This is in accord with the

[38] (1995) 21 E.H.R.R. 342.

[39] (2002) EWCA Civ 239; [2002] 1 W.L.R. 2491; [2002] 2 All E.R. 668.

[40] In the House of Lords however Lord Hoffman disapproved of Laws L.J.'s approach and went on to apply a generous approach to reconciling administrative procedures and human rights saying, at para.[59]: "In my opinion the question is whether, consistently with the rule of law and constitutional property, the relevant decision making powers may be entrusted to administrators. If so, its does not matter that there are many or few occasions on which they need to make findings of fact". And at para.[49] he said ". . . the intensity of the review must depend on what one considers to be most consistent with the statutory scheme."

Strasbourg jurisprudence, however it does appear to beg the question. The convention states that where there is to be a rights decision, there is an entitlement to an independent and impartial tribunal and a fair hearing. But the Courts say this does not apply if the decision maker's procedures are likely to give fair and reasonable decisions. What is the test? The claimant is obviously of the view that the procedure is not fair and reasonable and the Court has already decided the tribunal lacks the appearance of independence and impartiality.

To decide whether English Nature's process was likely to produce fair and reasonable decisions, Forbes J. did not propose a test but listed the procedural safeguards which he considered could be relied upon to produce fair and reasonable decisions. They were:

- The right to make representations following notification
- The notification must include a statement of why English Nature considers the site has special interest enabling informed objections to be made
- The fact that the notification falls away if it is not confirmed within nine months
- Ample opportunity for meetings and discussions
- A detailed and comprehensive report to Council
- The decision making meeting is held in public with oral representations by the objector of up to 10 minutes[41]
- The Council is bound by the laws of natural justice
- If consent for proscribed operations is sought or a management notice is served there is a right of appeal to the Secretary of State
- The site can be de-notified by English Nature

He held that the scheme was one which was more akin to an exercise of discretion and the application of judgement and policy. Expert judgments are made about scientific and technical matters as well as policy issues.

The JNCC guidelines state that the selection of sites is a matter of best judgement rather than rigid application of objective rules. Evaluation involves balancing the views of widely different interests in the phenomena of nature; there are different values, different needs and diverse view points; there is enormous variety. The JNCC concludes: "The second part of the determination process must remain a matter of best judgment".

Having decided that factual matters were not in dispute and having regard to the procedural aspects listed above Forbes J. held that the High Court did possess "full jurisdiction to deal with the case as the nature of the decision requires" by way of judicial review. Thus the process complied with Art.6(1).

This is a long and complex judgment with difficult human rights arguments. Forbes J. ultimately relies on English Nature's procedure as the guarantee of fair and reasonable decisions. He held that the rights of appeal in relation to consents for proscribed operations and management agreements were significant. However, appeals would be heard against the background of an existing designation. Perhaps, like listed building consent appeals there will be an opportunity to re-evaluate the merits of the designation at that stage. The fact remains, however, that the objector is faced with the difficult task persuading the officers of English Nature that their initial notification was wrong.

In July this year, judgment was issued in *Fisher v English Nature* [2003] EWHC 1599. This case, coincidentally, arose out of the same meeting of English Nature's Council as *Aggregate Industries*. The facts are different. A site of 13,000 hectares of farmland was designated as an SSSI. The site hosts the

[41] The time allotted to English Nature's officers, however, is unlimited and the procedure makes it clear that objectors are to take no other part in the proceedings at all.

stone curlew, and for that reason is a proposed SPA. Fisher did not oppose the SPA designation, but did oppose the SSSI, because the constraints imposed by the SPA were less onerous than those imposed by the SSSI.

Lightman J. concentrated on English Nature's duty under s.28(1) of the Wildlife and Countryside Act 1981 to notify if the area is of special interest by reason of fauna, flora, geology or physiography. This duty also applies at the confirmation stage. So the question is not what the guidelines say, or whether the Government's view is that SPAs automatically qualify as SSSIs, but English Nature's view of special interest. If in their view it has that interest, they must confirm.

One result of this is that English Nature's past position is irrelevant.

The claimants also challenged English Nature's conclusion that the whole 13,000 hectares should be designated. They said the locations used by the stone curlews for breeding depended on the rotation of the crops. The judge held that English Nature had to perform duty to designate if they considered the statutory criteria were met. As they had come to that conclusion, they had to confirm the designation. Furthermore, he was reluctant to interfere with English Nature's judgement as they are "far better placed and qualified than a Court to make the requisite assessments and value judgements", quoting Forbes J. in *Aggregate Industries* (para.[39] of Fisher).

3.3 The local site designation process was addressed in University of Leicester v Leicestershire County Council *(June 23, 2003).*

That concerned the designation of SINC. The University as landowner claimed that it has not been notified in advance as required by the SINC panel's procedure and it sought to quash the decision by judicial review. One difficulty was finding the right defendant. Was it the county as the body which published the procedure and provided the secretariat for the panel, was is the planning authority whose policies gave effect to the designation and who sent the designation letter, or was it the individual members of the SINC panel? Each denied responsibility.

Moses J. held that the panel should be joined under the name "SINC panel" (despite not having a conventional legal persona) and should be an interested party. The planning authority should be the defendant and the County, as author of the guidelines, an interested party. He was critical of the confusion.

The other issue in *University of Leicester* was the degree to which the University should have been consulted. To some extent the case turns on its own facts as the scheme required landowner notification during the process. However, Moses J. emphasised that the University "Should feel involved . . . and can make sensible representations as to good sense or otherwise of designating the whole of the area as opposed to merely part".

4 Other conservation codes

A comparison with other codes is helpful.

In listed building legislation there is a similar application of expert judgement. The Secretary of State has a duty to place on the list any building he considers to be of architectural or historic interest.[42] There is no right of appeal against this and no statutory entitlement for the landowner to be involved. In practice English Heritage inspectors identify themselves to landowners and thus inform them that the building is being considered for listing. Interestingly however, in a consultation paper issued this summer[43] the

[42] Planning (Listed Buildings and Conservation Areas) Act 1990 s.1.
[43] Protecting our historic environment: Making the system work better.

Department of Culture, Media and Sport is proposing to transfer the listing decision to English Heritage and to introduce a right of appeal.

The effect of listing is well known—it is a criminal offence to do works which affect the character of the building without listed building consent.

Listed building consent may be sought. There are very strong policies against demolition of listed buildings, especially Grade I buildings (see PPG15 para.3). There are also usually policies in Local Plans in relation to preservation of listed buildings. If listed building consent is refused or granted subject to conditions an appeal can be made to the Secretary of State.

At such appeal it is possible to bring evidence about the quality of the building in addition to the nature of the works or demolition proposed (indeed such evidence can be put forward in the application of listed building consent). The experience of many practitioners is that the reasons for listing can be revisited at the application or appeal stage and the special historic or architectural interest can be challenged. This is sometimes done head on or it is often said that there are other better examples of the interest elsewhere.

In practice, it is possible in suitable cases to have a building de-listed by using the Secretary of State's powers to amend the list. An appeal against refusal of listed building consent can include a request to de-list.

In the case of conservation areas there is no formal designation procedure. This does not seem to have created much, if any, controversy.

The restrictions in conservation areas are basically that buildings may not be demolished nor trees over a certain size felled without conservation area consent. The process for obtaining such consent is very similar to that for listed building consent.

National Parks are designated under the National Parks and Access to the Countryside Act 1949. Designation does not carry any express planning consequences but planning policies for development in national parks are often strict.

The process for designating a national park includes public notice and an objection period. If objections are made, the Minister must hold a local inquiry before confirming the designation order.[44]

5. Sound science and the use of scientific advice in decision making

Is the matter being left to scientists in the feeling that science is fully objective and will produce the right answer? This approach may be behind the judges' reluctance to interfere and the entrenchment of English Nature's position in the planning process.[45] It takes only a moment's reflection to realise that all decisions are to some extent influenced by the decision maker's own views.[46] That should lead to caution in denying a right of recourse to a third party adjudicator. It is also not right to conclude that science will give the right or only answer. There is often a wide variety of scientific opinions on an issue. To take a simple and obvious example, there is a huge body of scientists who agree that global warming is a serious and likely possibility. But there is also a body of scientists who disagree.

There is a body of literature about decision making in science which is highly instructive. Without pretending to have mastered the topic I have been struck by three papers in particular and the examples which they give.

[44] s.7(3) and Sch.1 to the 1949 Act.
[45] *e.g.* their right to ask for call in where planning permission is to be granted against their advice.
[46] The classic case is the Edinburgh phrenology studies of the nineteenth century.

First, the Government's Chief Scientific Advisor, Sir Robert May, has promulgated advice on the use of scientific advice in policy making.[47] He put forward three principles. First, the issues needing scientific advice must be identified early on. Secondly, having identified an issue the relevant government department should consider how best to access the best available scientific advice, drawing on a sufficiently wide range of best expert resources. Thirdly, the scientific evidence and analysis underlying policy decisions should be published and it should be shown how the policy analysis has been taken into account in formulating the policy.

Planning decisions are policy decisions. So this guidance has relevance although it is obviously aimed at higher-level policy decisions.

The first key issue is met in the planning system. The need for advice on nature conservation is recognised and there are provisions for consultation with English Nature when SSSIs are relevant. To some extent that begs the question of whether or not the only nature conservation interests needing scientific input are SSSIs. We also have local designations but that cannot be exhaustive. So presumably the SSSI system and local site system must operate in planning as markers and not as absolutes. They should alert the attention of the planning authority to the existence of nature conservation interest. They should not, however, proscribe development.

Key principle two is only met by consulting with English Nature. There is no duty to consult more widely. The applicant can, of course, proffer his own scientific advice.

Key principle three requires publication of the scientific advice. Consultees' views are, of course, public. But the reasoning behind the conservation designation does not usually form part of the consultation response. Analysis of how the response is taken into account is shown through the public committee report, but there are difficulties. Experience suggests that local planning authorities are very reluctant indeed to adjudicate between the views of scientists on each side. Research into what actually happens would be helpful. Secondly, some authorities have policies against development affecting SSSIs which amounts to the test for the effect on international sites, or other very restrictive policies. Thirdly, in the case of SSSIs the consultation is with English Nature, the body which made the designation.

The second paper is published by the Economic and Social Research Council as part of its global environmental change programme (1999). It is entitled "The Politics of GM Food: Risk, Science and Public Trust, Special Briefing No. 5 University of Sussex".

Again, this document looks at the science in the context of highly difficult national political issues. But it makes a number of important points about the use of science in decision making which are relevant to planning decisions. It is probably simplest to let the paper speak for itself with some quotations.

1. Senior politicians frequently stress the need for decisions on GM food to be made in the light of "sound science". Their approach to public unease about the technology has often been to characterise the public as ignorant, irrational or even hysterical.
2. . . . our research calls into question the validity of the notion of "sound science", on which politicians are inclined to rely.
3. Building the legitimacy and accountability of political decisions on GM food requires a much more participatory style of decision-making, in which a far wider range of options are considered.
4. Science seeks to provide explanations for natural processes based on theory and evidence.

[47] Published by the Office of Science and Technology 1997.

But the way that scientific advice is used is heavily influenced by the way the official advisory system is put together.

5. Scientific judgements on risks and uncertainties are underpinned and framed by unavoidably subjective assumptions about the nature, magnitude and relative importance of these uncertainties.
6. A report for the Royal Society, jointly authored by the Chief Executive of the Natural Environment Research Council Sir John Krebs, states that :
"Disagreeing with a scientific estimate of risk is not necessarily irrational", the evidence on the analysis may be incomplete, the scientist may have a vested interest in selecting particular bits of evidence, or there may be more than one particular interpretation of the facts.
7. Government needs to be a more "intelligent customer" for a wider range of advice.
8. But even with thorough monitoring [of effect of new technologies] science is a necessary but not sufficient basis for government decisions. The issue is the use of science and scientific advice.

These two papers are relevant to decisions made by a local planning authority. The third paper relates more to the decisions made by the designating body. In "The Third Wave of Science Studies: Studies of Expertise and Experience"[48] Collins and Evans, from Cardiff University, discuss the need for political and technical legitimacy in scientific decision making. They describe how we have moved from the days when experts were seen as sources of truth. A good scientific training was, they say, in the 1950s and 1960s seen as putting the person in a position of authority and decisiveness in their field and often in other fields too. Decision-making involving science could only be "top down". In the 1970s this developed into a position where to give greater legitimacy to scientific decisions the laity became more involved and were able to question the knowledge and expertise of scientists. This is still the position today. In my view it is not a bad position. However, it is said to lead to some lack of confidence on the part of scientists in the ability to assert their position as experts, and, importantly it has led to extremes such as the Brent Spar affair.

Collins and Evans argue that we still need to recognise expertise but not confine expertise to certificated experts. Drawing, *inter alia*, on a study of the approach of nuclear scientists and Cumbrian sheep farmers to radiation effects on sheep and fells near Sellafield, they characterised the input of the sheep farmers as that of "uncertificated experts".[49]

This has obvious applications to the processes of designating SSSIs and local sites. English Nature can be seen to be quite a long way down the line on this in that having notified they then invite representations and objections from a range of people. Landowners are commonly represented by other experts, both certificated and non-certificated. The difficulty with their process remains that their Council is the body which has to resolve the differences without a hearing and on the basis of its own officers' report and 10 minute address from the objector. In the opinion of this writer it would be better to have a hearing before an independent adjudicator at which the views of the experts could be tested. This would also assist the legitimacy and acceptance of English Nature's decisions.

On the other hand the local site systems which do not consult with the landowner are a long way from this. In fact they are much closer to the 1950s and 1960s model.

In addition the local site systems raise the difficulty of ascertaining who is actually taking the decision. This is a vital problem where the only method of challenge is judicial review.

[48] Collins and Evans March 2002 ISBN 1872330665.
[49] And like much academic literature they call for more research.

Is the position any better with other systems? Here it is instructive to look at the systems for listed buildings, for conservation areas and for national parks.

In the listing of buildings there is no review whatsoever of the listing. Inspectors from English Heritage survey and re-survey the country and on the basis of their reports alone the Secretary of State adds buildings to the list. There is no formal procedure for involving the landowner although the practice is for inspectors to identify themselves and inform landowners what is going on.

Nor is there a formal de-listing process. There are strong policies protecting listed buildings both at national and local level. If one wishes to demolish or carry out work to a listed building it is necessary to obtain listed building consent. This works within the planning system and it is the local planning authority which gives or refuses consent. The actual historic or architectural value of the building can be challenged in the listed building consent process. It is common for there to be evidence from architects or historians of their worth, or lack of worth, and availability of comparable or better examples elsewhere. Whilst the issues in listed buildings are ones upon which there is expert opinion the subject matter is not science but art and history.

In relation to conservation areas there is no formal designation process whatsoever. Thus, there is even less involvement on the part of landowners. The consent process, however, is the same as for listed buildings. In both cases the opinions of English Heritage are often sought. There is perceived to be the same reluctance on the part of the planning authority to adjudicate between the views of English Heritage and the applicant.

The listing process, however, has not produced the litigation which has been seen in the SSSI field. The reasons for this might be that it is recognised that there is a high degree of subjectivity in issues of architectural and historic importance. It may be that there is greater confidence that the planning authority will weigh the conflicting arguments of English Heritage and the applicant. And it may be that as the issues are about art and history the lay person feels they are more approachable than the issues of science.

In the case of national parks of course there is an inquiry process. This enables objectors to question the views of experts on landscape and national beauty, and to put forward their own views or those of their own experts.

6. Conclusion

There is little doubt that nature conservation is politically an important issue and of course we must be careful with our planet. The question is who takes the decisions about whether development proposals which have an impact on nature conservation should go ahead or not, and are there adequate checks and balances on their decisions?

In the case of European Sites, nature is very powerful. Once an adverse impact is detected there is no choice but to reject the development unless there are imperative overriding reasons of public importance. Even in such a case, there must be adequate compensatory measures to recreate the lost interest.

Furthermore, existing planning permissions must be reviewed and modified as necessary to avoid adverse impacts. In the case of European Sites planning authorities have no discretion. Landowners' development rights can be removed. The case against granting permission is strengthened

immeasurably. This suggests that the designation process should be particularly careful and that landowners, whose rights are being removed, should be able to challenge the designation and have their challenge heard by a suitably independent body.

It appears that the Government recognises this. In the draft regulations to extend the SAC and SPA regime offshore,[50] the Government gives a right of appeal to a public hearing, with rights to call evidence and to cross-examine. It is difficult to see why such an approach should not apply onshore.

In the case of SSSI designations, planning authorities are obviously not bound by the same strict rules which apply to European Sites. They have discretion whether or not to allow development. Some have adopted restrictive planning policies which make SSSI designation a very important issue for the landowner. The policy in PPG9 is not for blanket protection of SSSIs but for nature conservation interests to be weighed with other material considerations in the planning balance. There is actually no blanket ban on development which affects SSSIs. Given that there is no effective way of testing the designation decisions of nature conservation bodies and the Secretary of State, the conclusion must be that planning authorities are to be the arbiters of disputes between the nature conservation bodies and applicants for planning permission.

However, PPG9 also says that if it is proposed to grant permission against the advice of English Nature, they should be notified and given the opportunity to ask for the application to be called in. This shows that even after the balancing exercise has been done, nature has added weight. As argued above in s.2.1.2 the implication of this procedural step is that English Nature can give advice on the desirability of the development as a whole, not just on nature conservation. This is not consistent with their functions. They are not charged with weighing all material considerations.

The local designations also have problems. Firstly they do not have the two stage process (notification and confirmation) which English Nature are required to use. Their designation procedures are not statutory and are not uniform. Thus while it is open to them to involve landowners, this is not always done. The same criticisms which can be made of SSSI procedures also apply to local sites. In addition it is difficult to tell who does the designating, and thus who to challenge. Is it the authority proposing the designation, the panel of experts which considers the proposal (not usually a body which has a separate legal persona) or the authority which implements the view of the body of experts?

It should also be remembered that "sound science" cannot provide all of the answers. It is no criticism of scientists and experts to say that they bring their own views and preconceptions with them, but it is a fact. Thus in policy decisions such as planning the decision maker must make up his own mind. This means being prepared to consider challenges and views which are contrary to those of the experts who designate nature conservation sites.

The Courts recognise both that rights are being interfered with and that English Nature's Council does not have the appearance of independence and impartiality—see *Aggregate Industries*. The SSSI designation process does look and feel like an adversarial one. English Nature notifies, invites representations and objections and then itself decides in the light of those. English Nature's Council looks as though it is hearing an appeal. But it feels like an uphill struggle trying to dissuade somebody from a view which they have already taken. Is there not a case here for an independent adjudication following an objection to a notification? The legislation has given the right to object, but it is effectively to the body which notified in the first place. National Park designations which have less restrictive effects require a public inquiry. Why not SSSIs? Would it not give greater confidence in designation? It would simply be fairer, simpler and more transparent. However, the Courts do not require

[50] Consultation on the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2003.

independent adjudication and prefer to rely on the "composite approach". This involves looking at the actual procedures and coming to a view of whether they are adequate "as the nature of the decision requires" (*Alconbury*, *Aggregate Industries*, *Begum (Runa), Albert & Le Compte v Belgium*[51]). This last aspect is a very difficult test to apply. The very complaint which is made by the claimant is that the procedures are inadequate for such a decision. Yet the Court without an expressed yardstick decides the point.

Ex p. Bolton shows that natural justice rules do apply to the procedure for designating SSSIs and *Ex p. London Brick* shows that the usual requirements to avoid taking into account irrelevant considerations and irrationality also apply albeit that the applicant could not convince the Court of the facts to show these matters in that case. The Court did however in that case say that if the nature conservation interest ceases then one way or another the designation would cease to have effect. This was before power to revoke an SSSI was given and the clear but unspoken implication is that planning authorities should look behind the label of designation to examine the actual interest.

So is nature taking over? The Courts have stood back, reluctant to interfere on both human rights grounds and out of a feeling that these are matters for experts for which the Court is ill-equipped. European Sites are heavily protected by law and there, one can fairly say that nature is taking over. The development decision is really taken from the moment the site becomes a SPA or SAC. There is no appeal or review. As a result the designation process should involve landowners better. The Government has really already made the point by suggesting rights of appeal in offshore cases.

In relation to SSSIs and local designations planning authorities still have a discretion.

Some planning authorities have very restrictive policies. Great weight is undoubtedly given to nature and nature conservation. However it is still, both in policy and in law, for planning authorities and ultimately the Secretary of State to weigh all the material considerations before coming to the conclusion to permit or refuse permission. This is expressly stated in PPG9, para.27 where planning authorities are directed to consider whether there are material considerations which outweigh nature conservation considerations.

This means that planning authorities are to look at the reasons and reasoning for designation. The fact of designation is not the end of the story. It is important for planning authorities to approach nature conservation in this way. In the first place that is consistent with the way in which all material considerations are to be approached. It is usual for financial reasoning for example to be scrutinised and investigated carefully. The same should apply to site designations. Secondly, it is important to do so to give legitimacy to the planning decision. This is largely a political aspect. Without such an approach, there will be a loss of confidence in the system and its fairness. It is also a practical one. Science alone does not give answers nor take value decisions and it is for decision makers to weigh the views of experts. This approach is consistent with the entire scheme of the planning system and if applied vigorously should ensure that no single interest, whether nature or any other, takes over.

Appendix 1: SPA Selection Guidelines

The JNCC Guidelines establish a two-stage process for the identification of SPAs. The first stage is intended to identify areas which are likely to qualify for SPA status. These areas are then considered further using one or more of the judgements in Stage 2 to select the most suitable areas in number and size for SPA classification. The diagram in appendix 4 "*SPA Network Assessment Process*" devised by the JNCC[52] illustrates how the Stage I and II guidelines are to be applied.

[51] (1985) 5 E.H.R.R. 533.
[52] *www.jncc.gov.uk/UKSPA/docs/UKSPAS4.pdf.*

Stage 1[53]

An area is used regularly by 1 per cent or more of the Great Britain (or in Northern Ireland, the all-Ireland) population of a species listed in Annex I of the Birds Directive (79/409/EEC as amended) in any season.

- An area is used regularly by 1 per cent or more of the biogeographical population of a regularly occurring migratory species (other than those listed in Annex I) in any season.
- An area is used regularly by over 20,000 waterfowl (waterfowl as defined by the Ramsar Convention) or 20,000 seabirds in any season.
- An area which meets the requirements of one or more of the Stage 2 guidelines in any season, where the application of Stage 1 guidelines 1, 2 or 3 for a species does not identify an adequate suite of most suitable sites for the conservation of that species.

Stage 2

- Population size and density: Areas holding or supporting more birds than others and/or holding or supporting birds at higher concentrations are favoured for selection.
- Species range: Areas selected for a given species provide as wide a geographic coverage across the species' range as possible.
- Breeding success: Areas of higher breeding success than others are favoured for selection.
- History of occupancy: Areas known to have a longer history of occupation or use by the relevant species are favoured for selection.
- Multi-species areas: Areas holding or supporting the larger number of qualifying species under Art.4 of the Directive are favoured for selection.
- Naturalness: Areas comprising natural or semi-natural habitats are favoured for selection over those which do not.
- Severe weather refuges: Areas used at least once a decade by significant proportions of the biogeographical population of a species in periods of severe weather in any season, and which are vital to the survival of a viable population, are favoured for selection.

Appendix 2: Local Site Systems—A Random Sample

A Sites of importance for nature conservation in the West Midlands

1. Panel function

   Formerly, SINC schedules were held by English Nature who also identified the sites. The document requires the participation of local authorities and wildlife trusts. There is no panel as such.

2. Membership

   The bodies which are able to put forward amendments to the existing SINC schedule are to be the local authority, English Nature, the Wildlife Trust and the geological conservation body in the West Midlands.

3. Procedure

Any one of the partners can put forward a proposal gathering its own data.
Their assessment is discussed at the annual liaison meetings between individual local authorities and

[53] para.3.2 JNCC UK SPA Review—Selection Guidelines *www.jncc.gov.uk/UKSPA/v1s3.htm.*

English Nature. English Nature arbitrate. A local authority maintains the records. English Nature formally notify the local authority of amendments to SINC schedules. They will also notify landowners.

Comment: There is no landowner involvement until after designation. It is not clear whether the designation is made by the partner putting forward the site, the members of the annual liaison meeting collectively or English Nature.

B Buckinghamshire and Milton Keynes Wildlife Site Selection Panel

1. Panel Function

   The function of the panel is to evaluate and select County wildlife sites and advise on site selection criteria.

2. Membership

   Members are all technical experts from wildlife and environmental organisations, local authorities, English Nature and the Environment Agency.

3. Procedure

   The panel decides whether or not the site meets the criteria. It reports to the Buckinghamshire Nature Conservation Forum, from whom the terms of reference document state the panel derives its authority, for BNCF's endorsement.

The process is as follows:

(1) Survey with owner's permission
(2) Survey sent to owner for comment
(3) Site report and panel decision
(4) Report to BNCF and Local Authority
(5) Local Authority endorses site selection
(6) Owner is informed
(7) Site entered on records

Comment: Under this procedure the landowner is involved from the outset and has the opportunity to comment.

It is not clear who is the decision-maker. The panel makes a "decision". The Local Authority "endorses" it. There is also reference to the endorsement if BNCF.

There is no mention of a recommendation to the local authority.

C Criteria for the designation city wildlife sites in Cambridge

1. Panel function

   To co-ordinate the assessment of new sites and review existing ones, monitor the effectiveness of the site selection process and update the list of city notable species. The group also deals with de-designation.

2. Membership

   Members are drawn from the City Council, English Nature and the Wildlife Trust.

3. Procedure

There is a rolling programme of surveys and re-surveys. Information is stored by the Wildlife Trust. The group applies the criteria and recommends designation or de-designation to the council. The Environment Committee of the City Council endorse the designation.

Comment: There is no landowner involvement at any stage and the landowner appears not to be notified. Use of the word "endorse" suggests that the City Council takes the decision but has no power to do anything other than to say yes or no. Discussion and review by the council is not contemplated.

D Biological Heritage Site ("BHS") designation in Lancashire

1. Panel Function

The BHS Review Panel annually reviews the current list of BHS sites and produces a definitive and more stable list of non-statutory wildlife sites for the County, in accordance with the published guidelines.

2. Membership

Members are all technical experts comprising of ecologists from Lancashire County Council, Wildlife Trust for Lancashire, Manchester and N. Merseyside and English Nature (NW Team). A working group of officers from Lancashire County Council Planning Department, Lancashire Wildlife Trust and English Nature (North West Region) was accordingly set up to progress the work.

3. Procedure

The document 'Guidelines for the Selection of Biological Heritage Sites' devised by ecologists from Lancashire County Council, English Nature and Lancashire Wildlife Trust, assisted by local and national specialists in particular habitat-types and species-groups sets out the procedure for BHS site selection and is based on the guidelines adopted by English Nature for the selection of Sites of Special Scientific Interest (Nature Conservancy Council 1989).
Potential sites—both on existing lists, and newly identified from the Phase 1 Habitat Survey, have been evaluated against the guidelines as follows:

(1) Preliminary site selection and site boundary evaluation by contract officers to produce Initial List (desk study).
(2) Sites on initial list examined and evaluated by the Biological Heritage Sites Working Group (desk study) and categorised as confirmed, rejected or subject to further survey/information.
(3) Category (c) sites above subject to:
    (a) brief site survey to determine whether site satisfies selection guideline(s), or to confirm/determine site boundary; and/or
    (b) obtain additional data from local naturalists, documentary sources, etc.
    Data for sites in this stage evaluated by the Biological Heritage Sites Working Group and all qualifying sites from Stages 2 and 3 included in the Provisional Summary Listings.
(4) Biological Heritage Sites Working Group agree revisions and listings after wider consultation with interested bodies, and issue Summary Listings and Composite Site Boundary Plans, subject to future updating.
(5) Site record, including Site Information Form and Site Boundary Plan, produced for each site on the Summary Listings.

(6) Annual review of the Summary Listings, Site Information Forms and Site Boundary Plans. Proposals for changes are contained in an annual schedule of site amendments.

Comment: Landowner involvement may take place once the site has been included on the initial list and reviewed by the Working Group. The Working Group consults 'interested bodies' (which one would expect to include the landowner) and amendments are made pursuant to this review. However, the extent of and procedure for such landowner involvement is not clear.

It is not clear whether the designation is made by the Working Group collectively or whether the Local Authority endorses the list put forward by the Working Group.

Appendix 3: Cambridgeshire structure plan 1996

Policy SP12/3

> "development will not be permitted within or which is likely to adversely effect Ramsar sites SPAs, SACs, national nature reserves, SSSIs and sites proposed by English Nature for the above designations other than in exceptional cases of overriding national or international need".

Policy SP12/5

> "The local planning authorities will not normally grant permission for development which has significant adverse effect on the interest of nature conservation, particularly in zones which are especially valuable for wildlife."

In the South Cambridgeshire local plan policy EN10 sets out that in exercising its planning powers, the Council will have regard to the following hierarchy of identified sites:

1. Sites of International Importance
2. Sites of Special Scientific Interest
3. County Wildlife Sites

Sites of international importance (or proposed as such)

There are no such sites or proposed sites in the District at present. However, if any such sites are proposed during the period of the plan any development proposals affecting them will be subject to the most rigorous examination in accordance with the relevant EC Directives and PPG9[54].

Sites of Special Scientific Interest (SSSI) and County Wildlife Sites (CWS)

Sites of national importance (Sites of Special Scientific Interest) are designated by English Nature under the Wildlife and Countryside Act. In South Cambridgeshire Structure Plan Policy P12/3 states that development will not be permitted within an SSSI, nor will development be permitted if it is likely to affect adversely an SSSI other than in exceptional cases of an overriding national or international need. English Nature will therefore be consulted on any planning application in or adjacent to an SSSI. For any wetland SSSI such consultation may extend up to 2km from its boundary because development at some distance could have an adverse effect by a lowering of the water table.

In addition to sites which have statutory designation, there are numerous other sites in South

[54] Method set out in the blue boxes on pp.17 and 19 of PPG9 Annex C and illustrated in the flow diagram on p.18.

Cambridgeshire which have natural history value. These "Country Wildlife Sites" have been identified by the Wildlife Trust and will be treated as material to the consideration of development proposals.

In all its planning decisions affecting SSSIs and CWSs the Council will safeguard (and wherever possible enhance) the intrinsic features of natural and/or geological interest having particular regard to:

— the nature and quality of the features on the site, including their rarity value; and
— the extent of any adverse impacts of proposals on the above features; and
— the likely effectiveness of any proposed mitigation or compensation measures aimed at enhancing or recreating habitat features on or off the site.

In negotiating development proposals the Council will, where appropriate, seek to secure the effective management of designated sites through the imposition of conditions or through planning obligations, as appropriate.

Warrington Borough Council

Policy GRN20: Sites of National Importance for Nature Conservation

Proposals for development in or likely to affect these sites will be subject to special scrutiny.

Where such development may have an adverse effect, direct or indirectly, on the SSSI it will not be permitted unless the reasons for the development clearly outweigh the nature conservation value of the site itself and the national policy to safeguard the national network of such sites.

Where development is permitted, the Council will consider the use of onditions or planning obligations to ensure the protection and enhancement of the site's nature conservation interest.

Policy GRN21: Sites of Local Importance for Nature Conservation

Development likely to have an adverse effect on these sites will not be permitted unless it can be clearly demonstrated that there are reasons for the development which outweigh the need to safeguard the substantive nature conservation value of the site or feature.

Where development is permitted which would damage the nature conservation value of the site or feature, such damage will be kept to a minimum.

Where appropriate, the Council will consider the use of conditions or planning obligations to provide appropriate compensatory measures.

Surrey Heath Local Plan 2000

Policy RE11: National Nature Reserves and Sites of Special Scientific Interest

Proposals for development in, around or likely to affect Sites of Special Scientific Interest, as identified on the Proposals Map or as subsequently identified will be subject to special scrutiny. Where such development may have a significant adverse effect, directly or indirectly on the SSSI, it will not be permitted unless the reasons for the development clearly outweigh the value of the site itself and the national policy to safeguard the intrinsic nature conservation value of the national network of such sites.

Where the site concerned is a National Nature Reserve (NNR) particular regard will be paid to the individual site's national importance.

Policy RE12:Sites of Nature Conservation Importance

Development will not be permitted within or affecting Sites of Nature Conservation Importance or potential Sites of Nature Conservation Importance, as identified on the Proposals Map or as subsequently identified, unless it can be shown that it will not materially harm the nature conservation or wildlife interest on the site. The Borough Council will seek to negate or minimise any possible adverse effect on the nature conservation interest of the area concerned.

Cornwall Structure Plan 1997

POLICY ENV 5

Natural and semi-natural habitats or associated wildlife should not be significantly disturbed or damaged by development. In particular, development should not adversely affect to a significant degree:

1. any site of European importance (either Special Protection Area or Special Area of Conservation) including proposed sites;
2. Sites of Special Scientific Interest or National Nature Reserves;
3. the substantive value of sites shown to be of at least county-wide importance for wildlife;
4. any protected species or its habitat; and
5. the landscape features within the Areas of Great Scientific Value (listed in Proposal ENV D) of importance to wildlife by reason of their linear or continuous nature or function as stepping stones between habitats.

In considering development proposals account should be taken of the European, national or local importance of the interest to be protected.

The greatest protection must be given to sites of European importance. Development, having either direct or indirect impact on these sites, will be unacceptable unless no alternative site is available and there is an overriding public need. Where the site concerned hosts a priority natural habitat or species, development will not be permitted, unless it is necessary for reasons of human health or public safety or for beneficial consequences of primary importance for nature conservation.

Essex and Southend-on-Sea Replacement Structure Plan April 2001

POLICY NR6: Nature Conservation Sites

Wildlife and other natural features will be protected from inappropriate development, conserved and enhanced as follows:

1. Development or land use change, not directly connected with or necessary to the management of the site, which would adversely affect either designated or candidate sites of international or European significance, will not be permitted unless there is no alternative solution and the development is necessary for imperative reasons of overriding public interest. These sites include Ramsar Sites, Special Protection Areas, Special Areas of Conservation and Marine Special Areas of Conservation;
2. Development which would have an adverse effect, either directly or indirectly on a Site of Special Scientific Interest or National Nature Reserve, will not be permitted unless the need for the development clearly outweighs the national nature conservation importance of the site. If there is a risk of damage to a designated site from development, local authorities may seek to enter into a planning obligation with developers to secure future site management or

to make compensatory provision elsewhere for any losses expected when development occurs in accordance with Policy EB5:

3. Local Nature Reserves, Wildlife Sites, Regionally Important Geological/Geomorphologic Sites, other habitats and natural features of local value will be protected from material adverse effects of development, unless it can be clearly demonstrated that the reasons for the proposals outweigh the need to safeguard the nature conservation value of the site and appropriate compensatory measures can be provided;
4. Development will not be permitted which may harm or adversely affect animals and plants protected by law, together with their habitats.

Appropriate management of all sites and features of the landscape that are of defined importance for nature conservation will be encouraged.

Carmarthenshire Unitary Development Plan Deposit Draft

EN2—Site Protection—National Sites

It is the policy of Carmarthenshire County Council that planning permission for development proposals which have an adverse effect on sites of special scientific interest and national nature reserves will only be permitted where there are imperative reasons of overriding public interest for the development or land use change. Where planning permission is granted the council will consider the use of conditions or planning obligations to ensure positive enhancement, protection and management of the sites nature conservation interest.

EN3—Site Protection—Regional/Local Designations

It is the policy of Carmarthenshire County Council that development likely to have an adverse effect on a local nature reserve (LNR), sites of importance for nature conservation (SINC) or regionally important geological/geomorphological sites (RIGGs) will not be permitted unless it can be clearly demonstrated that there are reasons of a national or local need for the proposal which outweigh the need to safeguard the substantive nature conservation value of the site or feature.
Where development is permitted which would damage the nature conservation value of the site or feature, such damage will be kept to a minimum. Where appropriate the authority will consider the use of conditions and/or planning obligations to provide appropriate compensatory measures.