Environmental Judicial Review: Pitfalls to Avoid

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Introduction

Challenges to planning decisions on environmental grounds are now commonplace. Whereas environmental law was once an esoteric discipline practised by a handful of specialists, it is now essential that all planning lawyers, consultants and decision makers understand the myriad of environmental rules applicable to planning.

The consequences of getting it wrong can be catastrophic. The law reports regularly contain examples of planning permissions for significant schemes that have been quashed due to avoidable environmental law errors. Even where decisions ultimately survive challenge, often more could have been done to guard against a claim in the first place by more careful drafting of an environmental statement or an officer's report.

In this paper, after briefly outlining the main features of the principal environmental legislation regulating planning decisions, I will highlight some key pitfalls that might expose planning decisions to judicial review on environmental grounds. Throughout I will offer some practical tips for avoiding successful challenges.

The principal environmental legislation regulating planning decisions

Directive 2011/92/EC on the assessment of the effects of certain public and private projects on the environment ("EIA Directive") contains many traps for the unsuspecting developer and decision maker. The principal legislation transposing the EIA Directive in England is the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("EIA Regs 2011"). The EIA regime also applies to applications to the Infrastructure Planning Commission ("IPC") for nationally significant infrastructure projects. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) ("EIA Regs 2009") make provision for environmental information to be taken into account in the IPC process.

In outline the main features of the EIA Regs 2011 are:

(1) The regulations are engaged by an application for planning permission for "EIA development" or a "subsequent application in respect of EIA development" (reg.3(1)). EIA development is defined as being Sch.1 development, or Schedule 2 development which is likely to have significant effects on the environment.

(2) "Subsequent applications" include reserved matters applications under an outline planning permission.

(3) There is a general prohibition on granting planning permission or subsequent consent for EIA development without having first taken into account environmental information (reg.3(4)).

(4) The question of whether a development is EIA development is resolved by the developer submitted an environmental statement ("ES") (reg.4(2)(a)), the adoption by the relevant planning authority of a screening opinion (reg.4(2)(b)) or the making of a screening direction by the Secretary of State (reg.4(3)).

(5) The developer may request a scoping opinion from the relevant planning authority (reg.13). Such a request must at a minimum include a plan of the land concerned and a "brief description of the nature and purpose of the development and of its possible effects on the

environment" but may also include "such other information or representations as the person making the request may wish to provide or make". In practice, the request for a scoping opinion is likely to include a detailed scoping report including baseline environmental information. The relevant planning authority may in any event require further information to be provided before giving a scoping opinion (reg.13(3)).

(6) Once an ES has been submitted, it must be subject to consultation and publicity as set out in regs 16 and 17 (where the decision maker is the local planning authority) or in reg.19 (where the decision maker is the Secretary of State.

(7) Regulation 22 allows the decision maker to require the submission of further information and for developers to submit additional information to supplement an ES on a voluntary basis. The provision of further information triggers fresh publicity requirements.

Thirteen years ago, in *R. (on the application of Jones) v Mansfield DC*,[1] Carnwath LJ characterised the EIA process as something "intended to be an aid to efficient and inclusive decision making in special cases, not an obstacle race". That does not reflect the experience of many applicants and decision makers who have stumbled trying to negotiate the hurdles placed in their way by the EIA Directive.

EIA applies at the micro level i.e. to particular projects. At the macro level environmental assessment of "plans and programmes" takes place under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive). The SEA Directive is transposed in England by the Environmental Assessment of Plans and Programmes Regulations 2004 ("SEA Regs 2004"). The main features of the SEA process are that:

(1) Environmental assessment is to be carried out during the preparation of a plan or programme and before its adoption or submission.

(2) The responsible authority must prepare an environmental report in which the likely significant effects on the environment (whether positive or negative) of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated.

(3) The draft plan or programme and the environmental report must be made public for consultation.

(4) The environmental report and the opinions expressed during the consultation process should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

(5) When the plan or programme is adopted it must be explained how the environmental considerations have been integrated, how opinions expressed have been taken into account and the reasons for choosing the plan or programme adopted in the light of the other reasonable alternatives considered.

EIA and SEA share two related purposes: the first is to deliver better decision-making by ensuring that the environmental impacts of a project ("EIA"), plan or programme ("SEA") are fully considered before a decision is made; the second is to secure public participation in that process of systematically examining and evaluating those impacts. Neither piece of legislation dictates the outcome of the ultimate decision. Instead, the decision maker is free to grant planning permission, to refuse planning permission on the grounds of environmental impact, or (perhaps as more commonly occurs) to grant planning permission subject to conditions to mitigate environmental impacts.

In contrast to the purely procedural requirements of EIA and SEA, the protection afforded to species and habitats by EU law is substantive and can be a significant constraint on development. The Conservation

[1] [2003] Env. L.R. 26.

of Habitats and Species Regulations 2010 ("Habitats Regs 2010") transpose the requirements of the European Council Directives on the Conservation of Natural Habitats and of Wild Fauna and Flora (42/43/EEC) ("Habitats Directive") and the Conservation of Wild Birds (2009/147/EC) ("Birds Directive") into domestic legislation. The Habitats Regs 2010 afford a high level of protection to sites classified as Special Protection Areas ("SPAs") or designated as Special Areas for Conservation ("SACs") i.e. areas that hold significant populations of certain bird species ("SPAs"), or areas that support habitats or rare species (other than birds) considered to be scarce or vulnerable at a European community level ("SACs").

The Habitats Regs 2010 apply to the planning process because they are an "other material consideration" for the purposes of s.70(2)(c) of the TCPA 1990 and because reg.9(3) provides that "competent authorities" (which includes local planning authorities) "must have regard to the requirements of the [Habitats and Birds Directives] so far as they may be affected by the exercise of those functions".[2]

Protection is given to the "European protected species of animals" listed in Sch.2,[3] and also to habitats in the form of designated European Sites and European offshore marine sites. The mechanisms for protecting animals and habitats differs. European protected species of animals are protected through the creation of criminal offences, whereas habitats are protected through a system of appropriate assessment. In both instances the protection is only lifted if strict conditions are satisfied. In the case of protected species of animals this is done through a system of licensing. In respect of habitats it is done by allowing the relevant authority to grant consent for development despite a negative assessment.

In terms of habitat protection, reg.61 requires an appropriate assessment if a plan or project would be likely to have a significant effect and planning permission may only be granted if the authority is convinced that the development would not adversely affect the integrity of the SPA. In *Landelijke Vereniging tot Behoud van de Waddenzee and Another v Staatssecretaris van Landbouw* ("*Waddenzee*"),[4] the CJEU enunciated its precautionary interpretation of what made a plan or project "likely to have a significant effect" so as to require an appropriate assessment:[5]

> "… such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] E.C.R. 1-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised."

In *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government*,[6] Sullivan J explained the decision in *Waddenzee* as follows:

> "78. To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a "standard of proof" is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof. Since the ECJ's decision in *Waddenzee*, it has been clear that, applying the precautionary principle, significant harm to an SPA is "likely" for the purposes of Art.6 and reg.48 if the risk of it occurring cannot be excluded on the basis of objective information. …"

[2] Regulation 9(1) also provides that the "appropriate authority" (the Secretary of State) must exercise his functions so as to secure compliance with the requirements of the Habitats and Birds Directives.

[3] The list includes many of the developers' particular favourites such as great crested newts, bats and doormice.

[4] [2004] ECR I-7405.

[5] At [44].

[6] [2008] 2 P. & C.R. 16.

An appropriate assessment will be required if there is "credible evidence" of a "real, rather than a hypothetical, risk" that the project may cause a significant effect on a European Site.[7] In *R. (on the application of Champion) v North Norfolk DC*,[8] the Supreme Court held that "appropriate assessment" under the Habitats Directive did not require a separate "screening" stage akin to EIA. All that was required was that, where a planning authority found a significant risk of adverse effects to a protected site, there should be an appropriate assessment. The word "appropriate" was not a technical term and connoted that the assessment should be appropriate for the particular task of satisfying the planning authority that the project would not adversely affect the integrity of the site. Accordingly no special procedure was required and, although a high standard of investigation was demanded, the issue ultimately rested on the judgment of the authority concerned.

In *Waddenzee* the CJEU explained that the competent authority may only grant consent for a project following an appropriate assessment if it is "convinced" that the project will not adversely affect the integrity of the site concerned.[9] If the project would adversely affect the integrity of the site then it may only be authorised if there are imperative reasons of overriding public importance in accordance with reg.62 and compensatory measures are provided in accordance with reg.66.

In terms of species protection, reg.41 makes it a criminal offence for any person to deliberately disturb, capture, injure or kill protected species, to take or destroy their eggs, or to damage or destroy the breeding sites or resting places of such animals. Regulation 41 does not apply to anything done under and in accordance with the terms of a licence granted under reg.53. The licensing body is Natural England.

Accordingly where development will involve committing one of the offences in reg.41, the development cannot proceed without a licence from Natural England. Natural England will only grant a licence for the purposes specified in reg.53. The most common purpose relied on in the development context is that of "preserving public health or public safety or other imperative reasons overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment". Additionally, Natural England must not grant a licence unless it is satisfied that "there is no satisfactory alternative" and the "action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

Setting the scene…

I will illustrate some key pitfalls that might expose planning decisions to judicial review on environmental grounds using the following hypothetical planning application.

Archers Land LLP has an option over part of Brookfield Farm, Ambridge. The land comprises three plots:

(1) Plot 1 is a contaminated brownfield site used for intensive pig rearing.
(2) Plot 2 contains trees, hedgerows and a number of dilapidated barns.
(3) Plot 3 is used as a cricket pitch by Ambridge Cricket Club.

Archers applies to Borsetshire Council for outline planning permission for a mixed use development comprising new housing, retail, offices; and a link road. But local resident Mr Grundy organises a meeting for objectors at the Bull public house and the villagers vow to use every possible environmental law argument to derail Archers' plans.

[7] *R. (on the application of Boggis) v Waveney DC* [2009] EWCA Civ 1061. Similarly in *R. (on the application of Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 Moore-Bick LJ commented obiter at [17] that what was required was more than a "bare possibility" though any "serious possibility" would suffice.

[8] [2015] 1 W.L.R. 3710.

[9] At [56]–[59].

Pitfall 1: Need to consider the full scope of the "project" and cumulative effects

Archers' mixed use scheme would be contrary to the Borsetshire Local Plan (2016) because it involves building on an existing sports pitch. In order to overcome that planning harm Archers agrees to execute a planning obligation requiring it to provide a new sports pavilion, all weather surface and floodlighting at a nearby football pitch before commencing the mixed use development. The planning obligation specifies certain minimum standards to which the new sports facilities must conform. The ES assesses all the environmental effects of the mixed use scheme, but does not consider the works to upgrade the nearby football pitch.

Defining the scope of the project and identifying the cumulative effects of the project are critical first steps in the EIA process. Article 5 of the EIA Directive requires that an EIA must describe and assess "the project", defined to mean "the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".[10] The EIA Regs 2011 also refer to the need to describe and assess "the whole development".[11] In addition, para.1 of Annex III of the EIA Directive requires consideration of the characteristics of the project, including "the cumulation with other existing and/or approved projects".[12]

This issue requires careful consideration because if the project and its cumulative effects are not properly identified the EIA is very likely to be incomplete and vulnerable to challenge.

There is no legislative definition of what a cumulative effect is and the Directive's definition of "the project" provides little assistance. This uncertainty, together with the purposive approach that the courts apply to interpreting environmental legislation,[13] strongly suggest that developers should err on the side of caution adopt a broad view of what constitutes the 'project' and its cumulative effects.

The CJEU has held that projects cannot be "salami sliced" for the purposes of deciding whether significant environmental effects will arise.[14] In practice this means:[15]

> "the purpose of the directive cannot be circumvented by the splitting of projects and the failure to take into account the cumulative effect of several projects must not mean in practice they all escaped the obligation to carry out an assessment when taken together, they are likely to have significant effects on the environment."

In *R. v Swale BC ex p, RSPB*,[16] Simon Brown J offered the following guidance:

> "The proposals should not be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter."

Applying that guidance, in some cases it will be possible confidently to conclude that two developments are separate and the EIA can lawfully treat them as such. For example in *R (on the application of Davies) v Secretary of State for Communities and Local Government*,[17] the Inspector had sufficient evidence to establish that the Heysham to M6 Link Road (for which there had been an ES) was justified in its own right and would be constructed whether or not a proposed park-and-ride scheme, which was the subject of a separate application, was permitted. There was no planning obligation preventing the construction and use of the link road until the park-and-ride scheme had been commenced. In those circumstances the

[10] Art.2(a).
[11] Sch.4 Pt 1
[12] This is transposed by Sch.4 Pt 1 para4 of the EIA Regs 2011.
[13] See e.g. Case C-567/10 *Inter-Environment Bruxelles ASBL and others v Région de Bruxelles-Capitale* at [37]: "The provisions which limit the Directive's scope, in particular those measures setting out the definitions of the measures envisaged by the Directive, must be interpreted broadly".
[14] Case C-142/07 *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2009] Env. L.R. D4.
[15] Case C-142/07 *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2009] Env. L.R. D4 at [44].
[16] [1991] 1 P.L.R. 6.
[17] [2008] EWHC 2223 (Admin).

Inspector was entitled to find that the park-and-ride scheme was not an integral part of an overall scheme comprising both the link road and the park-and-ride scheme.

In other cases the link between two developments will be obvious and it would be prudent for the EIA to consider them together. For example in *R. (on the application of Burridge) v Breckland DC*,[18] the local planning authority had before it application for a biomass renewable energy plant and an application for a combined heat and power plant about 1 km away. These were to be connected by an underground gas pipe to carry the fuel between the two sites. The planning committee considered both applications on the same day and the officer's report on each application cross referred to each other. Nevertheless the authority had unlawfully considered the applications separately when deciding whether EIA was necessary.[19]

Similarly, in the NSIP context the EIA should plainly include an assessment of the effects of "associated development" for which consent is also granted on the application under s.115 of the Planning Act 2008.

Other cases will be more marginal, but useful guidance is given in the Court of Appeal's decisions in *R. (on the application of Brown) v Carlisle CC*,[20] and *R. (on the application of Oldfield) v Secretary of State for Communities and Local Government*.[21]In *Brown*, the developer applied for planning permission for a freight distribution centre that was contrary to the development plan. In order to make the proposal acceptable in planning terms it entered into a planning obligation to carry out additional improvement works to the runway and terminal at Carlisle Airport. The ES did not address the additional works to the runway and terminal building. The Court of Appeal held that the s.106 agreement linking the airport works and the enabling development (freight distribution centre) provided a sufficient connection between the two developments to require assessment notwithstanding the absence of an operational or functional link between them. The Court rejected the developer's submission that the works to the runway and terminal building were "inchoate" because the works were not so lacking in detail as to prevent the council from assessing the economic, transport and tourism advantages of securing their implementation through the planning obligation.

By contrast, in *Oldfield* the Court of Appeal held that it was permissible for the Secretary of State to conclude that there were no cumulative significant environmental effects arising from the regeneration of a site in Margate which was adjacent to another site (the Dreamland site) earmarked for redevelopment. At the time of the decision the position in relation to Dreamland was too uncertain for the Secretary of State to be able to assess in cumulation with the application site. Maurice Kay LJ emphasised that "it is important that an assessment is made in the light of what is known and what is reasonably predictable or ascertainable at the time".[22]

In the light of these decisions, the improvements proposed by Archers to offset the loss of the cricket pitch will require a cumulative assessment of their effects together with those of the mixed-use scheme. The planning obligation provides sufficient detail of the improvement works that they are capable of assessment and the improvements are tied to and will proceed implementation of the mixed-use scheme.

It is also arguable that off-site mitigation, such as the improvements proposed by Archers, which is built into a planning application to make it acceptable in planning terms is part of the "project". This might also be the case where there are two separate planning applications that are intrinsically linked e.g. development of a donor site to provide off-site affordable housing. The divide between what is the project and what is a cumulative effect is a difficult one, but this point is largely academic because what matters is that an effect has been considered not what label has been attached to it.

[18] [2013] EWCA Civ 228.

[19] On the facts Davies LJ and Warren J declined to quash the decision because they accepted that the effect of the two facilities would not be likely to be any different from that screened earlier.

[20] [2010] EWCA Civ 523.

[21] [2015] Env. L.R. 9.

[22] At [24].

Finally, it is important to remember that cumulation is not simply adding together the effect of separate proposals. In *R. (on the application of Mortell) v Oldham MBC*,[23] Sir Michael Harrison quashed three outline planning permissions where negative screening opinions had been produced. The Council had granted three separate planning permissions for urban redevelopments at sites all governed by the same Masterplan. Each screening opinion simply referred (in identical terms in each case) to the fact that the proposal formed part of a wider redevelopment, then concluded that, in comparison to the existing uses of the sites, the proposal would have no greater impact on the environment. The judge accepted the claimant's argument that the point about cumulative effects is that they may have a magnitude and significance which the individual components do not have. Merely simultaneously assessing the effects of three developments does not mean that the cumulative effects of those developments have been properly assessed.

Practical tips:

- Err on the side of caution when defining the project and cumulative effects. If in doubt it is usually better to assess an effect than to exclude it.
- Look beyond the red line application boundary for other parts of the "project" and for cumulative effects.
- Consider whether there is a significant likelihood that only part of the development may go ahead and whether this should also be assessed as a separate scenario in the ES.
- Make sure the cumulative assessment actually considers the cumulative effects and does not just add together individual effects e.g. project A might affect birds by direct loss of habitat and project B might impact on local water quality and affect the birds' food. Simply added together the individual impacts does not reveal the synergistic cumulative effect on the birds.

Pitfall 2: Lack of information critical to the assessment of environmental effects

The construction of the housing element of Archers' proposal would involve the loss of habitat for lesser horseshoe bats (roost sites in the dilapidated barns and the habitat provided by the hedgerows and trees). This gives rise to the vexed issue of the timing, necessity for and adequacy of ecological surveys. Consider the following scenarios

(1) The ES states that the habitat is of limited conservation interest. Natural England and the Borsetshire Council wildlife officer both advise that bat surveys be carried out. The planning officer accepts the conservation advice, but suggests that a planning condition could be imposed to require the surveys to be carried out later;

(2) Archers carried out bat surveys 12 months before it submitted its planning application;

(3) Archers carried out bat surveys shortly before submitting its planning application but they were limited to looking at the bat roosts in the buildings and not surveyed the trees/hedgerow habitat; and

(4) Archers recent comprehensive bat surveys are acceptable to the consultees and to Borsetshire, but the planning officer is concerned that the situation on the ground may change if reserved matters applications are not made for another two years. Can Borsetshire impose a condition requiring updated surveys at the reserved matters stage?

The starting point is that the decision maker has to be able to reach a conclusion about whether there would be a significant likely effect on bats. It is impermissible to defer ecological surveys that the decision maker regards as necessary to enable it to reach that judgment. For example in *R v Cornwall CC, ex p Hardy*,[24] the local planning authority accepted the advice from ecological consultees that further surveys should be carried out to ensure that the protected bats would not be adversely affected. Having accepted that further surveys should be carried out the local planning authority was in no position rationally to conclude that there were no significant adverse effects. Consequently its decision to defer the surveys until after the grant of planning permission was quashed.

[23] [2007] J.P.L. 1679.
[24] [2001] Env. L.R. 473.

Importantly, *ex p. Hardy* does not require all uncertainty to be resolved. Depending on the facts, it may be possible to carry out an assessment on a "worst case" basis so that a significant effect can be ruled out without the need for further surveys/investigation.

Additionally, *ex p. Hardy* does not prohibit a planning condition requiring further surveys to be carried out after the grant of planning permission. In *National Trust's Application*,[25] the claimant challenged the grant of planning permission for a hotel and golf complex close to the Giant's Causeway (a World Heritage Site). The claimant argued that a number of lizard surveys had been deferred until after the grant of planning permission contrary to the principle in *ex p. Hardy*. Weatherup J held that if surveys were required to assess likely effects, then they could not be deferred. However, it was for the decision-maker to decide if they were required. Thus, if there were sufficient remaining suitable terrain to which lizards could be translocated, then it was rational to conclude that there would not be likely significant effects. Accordingly it is important to distinguish between surveys required to assess effects, and those to be undertaken to enable mitigation to be implemented, or to monitor whether the mitigation is operating as it should.[26]

Consequently in the first scenario set out above the planning condition proposed by Borsetshire Council would not be acceptable if the Council required the survey information in order to assess the likely effects of the mixed-use scheme. If, however, the Council is able to make an assessment without the surveys e.g. on a worst-case basis then it may require further surveys to enable mitigation to be implemented/monitored.

The second and third scenarios raises the question of how long ecological surveys are valid for and whether the decision maker is required to check that they are carried out in accordance with recognised standards. Natural England has issued standing advice in relation to European Protected Species and its survey calendar indicates best practice for the times of year species surveys should be undertaken. These are material considerations and decision makers ought to consider the extent to which an ES diverges from best practice. It is not necessarily fatal if older surveys are used or if there are differences in methodology because the overriding question is whether the authority could rationally rely on the survey.[27] For example, in *Crichton v Wellingborough BC*,[28] Gibb J held that the local planning authority was entitled to rely on surveys with acknowledged limitations in circumstances where there was an extremely limited potential for there to be any adverse effects.

The fourth scenario illustrates the difference between impermissibly deferring consideration of a development's effects (*ex p. Hardy*) and conditioning surveys for further update if reserved matters applications are not made for several years. As was recognised in *R. (on the application of PPG 11 Ltd) v Dorset CC*,[29] it can be prudent "to establish whether any changes had taken place on the ground between the last survey and the starting of work, events which could be well up to five years or more apart in time".

Practical tips:

- Undertake ecological surveying at an early stage to inform the scheme design.
- Identify all possible mitigation options so as to minimise impacts on European Protected Species. These should ensure the developer will avoid criminal offences and the need to apply for a Natural England licence;.
- If a planning condition requires further surveys make sure the reason for the condition clearly explains the lawful reason for imposing the condition. Do not leave the permission open to an *ex p. Hardy* challenge.
- Check that surveys conform to best practice and Natural England's standing advice. If there are differences/deficiencies explain why they are not material.

[25] [2013] NIQB 60.

[26] See also *R. (on the application of PPG 11 Ltd) v Dorset CC* [2004] Env. L.R. 5 in which it was held that there is a difference between unlawfully reaching a contingent conclusion on the significance of effects and prudently making provision for further surveys to minimise non-significant effects.

[27] *R. (on the application of Jones) v Mansfield DC* [2003] Env. L.R. 26.

[28] [2002] EWHC 2988 (Admin).

[29] [2004] Env. L.R. 5.

- Consider whether it is necessary to condition surveys for update at reserved matters stage or prior to commencement.

Pitfall 3: Outline application must be tied to the environmental information provided in the ES

Archers outline planning application (with all matters reserved) is supported by a Design and Access Statement and parameter plans identifying the following:

(1) Land use: the buildings and uses proposed for the development;
(2) Areas of potential built development: identifying broad areas within the site within which proposed buildings would be located;
(3) Building Heights: identifying the upper and lower limits for height within the areas of built development;
(4) Landscape & open space structure: identifying strategic areas of open space indicating the role and purpose of different spaces, landscape and other facility (i.e. LEAP, NEAP) content;
(5) Access & movement: identifying proposed access point/s, movement across the site including strategic highway, pedestrian and cycle routes.

The ES assesses the likely environmental effects in great detail but only in accordance with the scheme shown on an illustrative Masterplan for the site.

This scenario raises the problem of undertaking a full assessment of the likely environmental effects in the context of an outline planning application. In *R. v Rochdale MBC, ex p. Tew*,[30] Sullivan J held that the EIA Directive did not outlaw the use of outline planning permissions, but he recognised that a bare outline application could not begin to comply with the assessment requirements. In that case there was no requirement for the scheme to be developed in accordance with the illustrative masterplan and consequently a very different scheme could have been built compared to the one assessed in the ES. The description of the scheme and the decision notice was insufficient to enable the main effects of the scheme to be properly assessed.

Sullivan J held that one way to overcome the difficulty was for the ES to describe the environmental effects of the development assuming it were carried out in accordance with an illustrative masterplan and an indicative schedule of land uses which were tied to the description of development by condition. Thus in *R. v Rochdale MBC, ex p. Milne*,[31] the grant of outline planning permission was upheld in circumstances where conditions were attached to the outline planning permission to "tie the outline permission for the business park to the documents which comprised the application" such that the permission prevented the development from proceeding outside the parameters of what the ES had assessed.

These cases predate the requirement for a Design and Access Statement and the use of parameter plans. Outline planning application should now have an EIA carried out on the parameter plans rather than any illustrative master plan. The assessment should look not only at the maximum parameters but also assess the minimum parameters. It will usually not be necessary to carry out a full assessment of the minimum parameters. Rather, a short qualitative assessment may be carried out acknowledging whether there would be any change to the environmental effects of the development if the minimum parameters were implemented.

Practical tips:

- Carry out ES on the DAS and parameter plans.
- Consider assessing the minimum parameters as well as the maximum.

Pitfall 4: Requirement to publicise 'any other information' provided under Regulation 22

The Environment Agency ("EA") objected to Archer's application on the basis that it would exacerbate flooding in the area and that there was insufficient information provided to assess the effectiveness of the proposed mitigation. The EA and Archers then

[30] [1999] 3 P.L.R. 74.
[31] [2001] 81 P. & C.R. 27.

had a series of constructive meetings and shortly before the Planning Committee meeting they agreed a ditch design that would enable the EA to remove its objection. Borsetshire Council reported this in its addendum officer's report which was the first time that the new ditch design had been mentioned in a report.

It is important to be aware of the publicity requirements that apply during consideration of an EIA application. Regulation 22(2) of the EIA Regs 2011 provides that the publicity requirements in reg.22(3)–(9) apply in relation to "further information and any other information". The term "any other information" is defined in reg.2(1) as "any other substantive information relating to the environmental statement and provided by the applicant or the appellant as the case may be". Does this, for example, require every written response from the developer to objectors' consultation comments to be publicised in the local newspaper?

The three High Court decisions on this point leave some doubt as to the correct interpretation of reg.22. After considering those decisions, I will offer some practical suggestions for mitigating any risk.

In *Jenkins v Gloucester CC*,[32] the local planning authority's decision to grant planning permission was quashed because it had breached the predecessor of reg.22[33] by failing to publicise environmental information falling within the concept of 'any other information'. The information was a document entitled Advisory Note concerning mitigation measures produced in order to deal with the problems of flooding identified in the Addendum to the Planning Officer's report. Bean J found that the document contained substantive information relating to the environmental statement and provided by the applicants for planning permission. He held that:[34]

> "It sought to address objectors' concerns on a significant issue, namely flood risk, by giving 'a description of the measures envisaged in order to avoid, reduce, and if possible remedy significant adverse effects'. (Schedule 4, part II, paragraph 2). It was therefore 'any other information' within the reg. 2(1) definition and caught by the publicity provisions of reg.19(3)(d) to (g). The fact that it satisfied the EA is immaterial on this point."

Bean J also held that the timetable for the publicity of the new ditch design in *Jenkins* "fell well short of the statutory requirements" i.e. 21 days and therefore he quashed the grant of planning permission.

In *R. (on the application of Corbett) v Cornwall Council*,[35] (a case in which *Jenkins* was not cited) Lewis J held that the definition of "any other information" did not include comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or council officers:

> "71. In my judgment, information is 'any other information' within the meaning of Regulations 2(1) and 19 of the EIA Regulations if it is substantive information provided by the applicant to ensure that the Council is provided with the information required for inclusion in an environmental statement as required by Schedule 4 to the EIA Regulations. Thus, if the original document comprising the environmental statement was considered not to include all the information required by Schedule 4, then additional information provided at the direction of the Council to make it an environmental statement would be 'further information'. If such information were provided voluntarily by the applicant, it would be 'any other information'. *Conversely, the phrase 'any other information' in Regulations 2 and 19 does not include comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or Council officers. Still less does it include documents*

[32] [2012] EWHC 292.
[33] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 reg.19.
[34] At [77].
[35] [2013] EWHC 3958 (Admin).

submitted by third parties or generated by the Council. I reach that conclusion for the following reasons.

…

75. Fourthly, the Claimant's interpretation could lead to such odd or absurd consequences that it is unlikely that those drafting the relevant regulations intended them to be interpreted as the Claimant submits should be done. On the Claimant's analysis, the provision of substantive information in response to a concern raised by a third party must be the subject of a notice in a local newspaper. Each time that occurs, the Council must suspend determination of an application for 21 days to allow time for further comment on the information provided. There are likely to be many occasions when additional information is provided in response to points raised. On the Claimant's case, there must be a publication in a local newspaper of the fact that that information has been provided and a suspension of the determination of the application each time. *Furthermore, if a person were opposed to a planning application, there would be ample opportunity to raise a point, receive a response from the application for planning permission and then claim that that was substantive information provided by the applicant which required publication and a suspension of determination. In my judgment, the regulations were not intended to produce such results. That is neither required by, nor in my judgment, consistent with effective public participation, in environmental decision making*."(Emphasis added)

At first sight the decision in *Corbett* appears inconsistent with Bean J's conclusion in *Jenkins* that the term "any other information" was wide enough to encompass a document submitted by the applicant in response to points raised by objectors and officers. But in the recent case of *R. (on the application of Surringer) v Vale of Glamorgan Council*,[36] although both counsel agreed that there was "a radical difference of approach in these two cases", Coulson J was "not necessarily sure that there was" because "on one view, each judge was simply deciding a question of fact as to whether the particular document under consideration was or was not substantive information, against the background of the particular case before him".[37] Coulson J added that if he was wrong about that and there is a conflict, he preferred Lewis J's analysis because it came at the end of a lengthy consideration of the relevant Regulations.[38]

In *Surringer*, the claimant challenged the grant of planning permission for a facility to recycle incinerator bottom ash. One of the grounds of challenge was that information provided by the developer in response to objections was 'any other information' which ought to have been publicised. Coulson J held that the information provided by the developer was not substantive information which related to the ES. Neither was the information new or not otherwise available. It was simply the reordering and reemphasising of the material in the documents which accompanied the planning application. Accordingly he concluded that it was not "any other information" and it did not have to be publicised. He also concluded that even if he were wrong it would not be appropriate to quash the planning permission because the claimant had been aware of the information and had responded to it. Consequently her rights under the EIA Directive had not been substantially prejudiced.

Coulson J was right to regard *Corbett* and *Jenkins* as consistent with one another. Each case will turn on the precise substance of the information in issue. The information in *Jenkins* was not just a response to objections, it was an entirely new solution for mitigating a significant environmental impact of the project. It is easy to see why the details of a new element of a project require publicity under reg.22: the public ought to be fully appraised of what it is that consent is sought for, including the nature and extent of the proposed mitigation. By contrast publicity ought not to be required where (as in *Corbett* and

[36] [2016] Env. L.R. 25.
[37] At [74].
[38] At [74].

Surringer) the information does not change the project or the ES, but instead simply explains why an objection is unfounded.

I suggest the following guidelines to mitigate risks relating to publicity:

- Regularly check to ensure that the local planning authority is complying with the publicity requirements in relation to information that it requests and in relation to information that the developer provides voluntarily.
- Coordinate the submission of information after the planning application has been validated with somebody specifically tasked with assessing whether the publicity requirements are likely to be triggered.
- Err on the side of caution and ensure publicity of any changes to the development, the mitigation, the construction methodology or the construction materials.
- When responding to objections try not to reinvent the wheel. If a point is answered by the existing application material it is usually sufficient and desirable simply to say so with cross-references. The danger of making the same point in a different way, or at greater length, is that it will be characterised by objectors as substantive information relating to the ES thereby providing an opportunity to challenge the grant of planning permission.

Pitfall 5: Air quality: The new village green?

Based on the transport assessment traffic modelling, Archers' ES predicts that the development (including the link road) will cause an exceedance of the limit values in the Air Quality Directive. No mitigation is proposed. How should Borsetshire Council deal with that? Is it required to refuse planning permission?

Recently there has been a growing trend for the air quality impacts of development to form the basis of objection and legal challenge. This is the case not just for large infrastructure schemes e.g. the potential third runway at Heathrow, but also for much smaller developments that might increase air pollution e.g. by generating road traffic. There are relatively few judgments dealing with air quality issues and it is a technically complex subject, which create a potential minefield for developers.

So far the challenges have focused on three main areas:

(1) the argument that planning permission must be refused where development would cause or prolong a breach of the relevant air quality limit values;

(2) arguments that policy in relation to air quality has not been properly understood or applied; and

(3) arguments that air quality considerations have not been properly reported in the ES and/or to planning committee members.

I will outline the relevant legislation before looking at these three types of challenge.

Action to manage and improve air quality is largely driven by EU legislation. Directive 2008/50/EC on ambient air quality and cleaner air for Europe ('the Air Quality Directive') sets legally binding limit values for the concentrations in outdoor air of major air pollutants that impact public health such as particulate matter (PM10 and PM2.5) and nitrogen dioxide NO2.[39]

In accordance with the Air Quality Directive the UK is divided into 43 zones and agglomerations. In 2010 40 zones/agglomerations where in breach of one or more of the limit values for NO2. NO2 is a gas formed by combustion at high temperatures. The main sources in UK urban areas road traffic and domestic heating. NO2 is a component of particulate matter (PM10 and PM2.5) which is estimated to have an effect equivalent to 29,000 premature deaths each year in the UK.

[39] The Air Quality Standards Regulations 2010 transpose the Air Quality Directive into English law.

Article 12 of the Air Quality Directive states that in zones where the levels of NO2 are below the relevant Limit Value: "Member States shall maintain the levels of these pollutants below the Limit Values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development."

Article 13 of the Air Quality Directive obliges Member States to ensure that throughout zones, levels of NO2 in ambient air do not exceed the Limit Values specified in Annex XI from 1 January 2010.

Article 23(1) of the Air Quality Directive provides that where pollutants exceed any Limit Value, Member States must ensure that air quality plans are established for the relevant zone or zones. If the relevant attainment deadline has already expired, the plan must set out appropriate measures so that the exceedance period can be kept as short as possible.

In *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs*,[40] the UK was found to be in breach of the Air Quality Directive by failing to ensure that the NO2 limit values were met by the required compliance date (1 January 2010). Additionally the Supreme Court quashed the UK's Air Quality Plan, which failed adequately to identify measures that will ensure compliance with the limit values "as soon as possible".

The UK published a new Air Quality Plan on 17 December 2015 which is currently the subject of a further judicial review challenge by ClientEarth.[41] The claim argues that the Air Quality Plan is defective because it has not considered a range of other potential measures (many of which were identified by consultees) which could and should have been adopted in order to end any breach of the limit values "as soon as possible" e.g. fiscal incentives for the purchase of low emitting vehicles, congestion charging within a delimited zone according to vehicle categories in urban areas, or measures specifically targeted to protect vulnerable/sensitive groups such as traffic bans at peak times on roads surrounding schools to protect children. On 25 April Irwin J granted permission for judicial review.

The *ClientEarth* litigation is already having important consequences for planners. One view is that local planning authorities are required to refuse planning permission where development would cause or prolong a breach of the Air Quality Directive's limit values. Opponents of development are arguing that:

(1) Planning authorities have a duty in their decision making to seek to achieve compliance with the Air Quality Directive's limit values;

(2) Where development would cause a breach in the locality of the development, planning authorities must refuse planning permission;

(3) Where development would in the locality either worsen an existing breach, or significantly delay the achievement of compliance with limit values, planning permission must be refused;

(4) The Air Quality Directive does not merely require national government to produce plans; it also requires other organs of the state to use their powers to secure compliance with the limit values.

This line of argument draws an analogy with the CJEU's approach to water quality under the Water Framework Directive. In *Bund für Umwelt und Naturschutz Deutschland v Germany*,[42] the CJEU held that art.4(1)(a)(i) to (iii) of the Water Framework Directive must be interpreted as meaning that the Member States are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.

It is unlikely, however, that this line of reasoning will be supported by the UK courts or the CJEU. Other decisions of the CJEU suggest that the need to ensure compliance with the limit values in the Air

[40] [2015] P.T.S.R. 909.
[41] *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* CO/1508/2016.
[42] Case 461/13, 1 July 2015.

Quality Directive does not mean that individual projects must be refused consent. For example, in *Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen*,[43] the claimant challenged the grant of a permit for the construction and operation of a power station fuelled by pulverised coal and biomass at an industrial site in the Netherlands. The total annual emissions from that installation were estimated at 2.9 per cent of the national emission ceiling for SO. The claimants submitted that, given the fact that the emission ceilings laid down for the Netherlands by Directive 2001/81 ("the NEC Directive") would not be complied with at the end of 2010, the competent authorities should not have granted the permits or should, at least, have granted them subject to stricter conditions.

AG Kokott agreed:[44]

> "in deciding on an application for an environmental permit account is to be taken of the national emission ceilings established by Directive 2001/81 on national emission ceilings for certain atmospheric substances where the Member State has not drawn up and implemented adequate programmes for the reduction of emissions, it must refuse an application for an environmental permit for the purposes of art.4 of Directive 2008/1 if the installation contributes to the national emission ceiling for polluting substances laid down in Directive 2001/81 being exceeded or the risk of its being exceeded. That prohibition does not apply if, in an individual case, it is proven that the emissions of the polluting substances in question are not material for the environmental impact of the installation."

But the CJEU held that:

> "[75] … [the NEC Directive] is based on a purely programmatic approach under which the Member States enjoy wide flexibility as regards the choice of the policies and measures to be adopted or envisaged, within the framework of national programmes concerning all sources of pollution, in order progressively to achieve a structural reduction of emissions of inter alia So and Nox to amounts not exceeding, at the end of 2010 at the latest, the emission ceilings laid down in Annex I to the directive. It follows that attainment of the objectives set by the directive cannot interfere directly in the procedure for grant of an environmental permit."

The early indication is that the English courts are unreceptive to the argument that planning permission must be refused where the Air Quality Directive limit values are likely to be exceeded or an existing breach is likely to be prolonged. The issue arose in relation to a proposed cruise liner terminal in Greenwich. Planning permission had previously been granted in 2012 for a new jetty providing docking for cruise liners, a cruise liner terminal, a hotel, residential units and commercial and retail uses. In December 2015 Greenwich granted planning permission to allow a number of changes to the proposed development, including the substitution of the hotel by an enhanced terminal building and additional residential development. The claimant's particular concern was that the cruise liners would emit NO2 while berthed at the terminal because they would be powered by the engines rather than an onshore electricity supply.

At a renewed oral permission hearing,[45] Dove J refused permission for judicial review in relation to the claimant's attempts to rely directly on arts 12 and 13 of the Air Quality Directive. He held that:

> "… I am unpersuaded that direct reliance in this instance is, in fact, appropriate in a development control decision. That is not to say that in, for instance, the approval of an air quality management plan the reliance on the Directive might not play some important role in providing an individual citizen with rights. That is rather different from suggesting that in a development control decision the Air Quality Directive has direct application. In reality, its application is through the terms of the

[43] (C-165/09) [2011] 3 C.M.L.R. 21.
[44] At [152].
[45] [2016] EWHC 1903 (Admin).

policy of the [NPPF] which I have set out above and thus this point, if it is a point at all, collapses into ground one."

Thus, for the moment the English courts have (at the permission stage) resisted the growing calls for a prohibition on new development that would cause or prolong breaches of the Air Quality Directive. It is likely that this point will continue to be pressed by opponents of development and we can expect a substantive judicial review decision, and perhaps an appellate decision, in the near future to resolve the matter once and for all.

The second main focus for air quality challenges has been the interpretation and application of planning policy. In *R. (on the application of Caryle) v Hastings BC*,[46] the claimant challenged the grant of planning permission for a new link road (less than 1km long) to serve a development plan allocation for employment uses. The local planning authority consented to judgment shortly before the substantive hearing on the basis that "in deciding to grant permission the Council failed to have regard, properly or at all, to policy DM6 of the Council's emerging Development Management Plan and the Government's Planning Policy Guidance dealing with Air Quality".

The only ground to be granted permission for judicial review in the Greenwich liner terminal case also concerned the interpretation/application of air quality policy in paras 120 and 124 of the NPPF. Collins J dismissed the claim that this policy required a cumulative assessment of the air quality impacts of the liners in their berths together with the impact on air quality of emissions from transport other than shipping (which had been assessed in the ES).[47] He held that the planning permission did not affect the birthing of the liners nor the pollution to be expected from them (that being permitted under the extant 2012 planning permission). In those circumstances the impacts were not impacts of the development which was the subject of the impugned planning permission and thus the NPPF did not require them to be assessed.

The third type of air quality challenge to be brought relates to the way in which air quality impacts are explained to the public and to the planning committee. In *R. (on the application of Carlyle) v Hastings BC*,[48] Dove J refused permission for judicial review at an oral renewal hearing in relation to a challenge to the authority's redetermination of the planning decision quashed by consent. The focus of the challenge to the redetermination was the way in which air quality impacts were reported in the ES and to the planning committee. The ES had been updated prior to redetermination and new "Emission Factors" had been used with the result that the consultants no longer predicted any exceedances of the Air Quality Directive emission values. The local planning authority had reviewed the ES using independent external consultants and Dove J held that there was sufficient information for members to be properly informed and reach a decision.

Practical tips:

- Make sure that all relevant national and local policy and guidance on air quality is considered.
- Where limit values are likely to be exceeded this is a material planning consideration and it should be made clear.
- If possible include mitigation to ensure that there will be no breaches of limit values.[49]
- The payment of money for air quality monitoring can be a planning benefit to help justify development that worsens air quality.
- Check whether the site is within an Air Quality Management Area.

[46] CO/1313/2015.
[47] *PS (by his litigation friend TS) v Greenwich RLBC* [2016] EWHC 1967 (Admin).
[48] [2016] EWHC 1482 (Admin).
[49] The PPG gives the following examples of mitigation: the design and layout of development to increase separation distances from sources of air pollution; using green infrastructure, in particular trees, to absorb dust and other pollutants; means of ventilation; promoting infrastructure to promote modes of transport with low impact on air quality; controlling dust and emissions from construction, operation and demolition; and contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.

Pitfall 6: Appropriate assessment

Brookfield Farm is close to a special protection area designated under the Birds Directive. The protected birds are ground nesting and particularly vulnerable to disturbance from recreational use of their heathland habitat. Archers argues strongly that its development could not conceivably affect the birds. Natural England however advises that it cannot rule out a likely significant effect on the protected birds where new housing is built within 5km of the SPA. How should Archers proceed?

Under the Habitats Regs 2010 it is the competent authority which carries out the Habitats Regulations Assessment ("HRA") to identify whether a project has the potential to have an adverse effect on a protected European Site. Nevertheless the developer is required to submit sufficient scientific evidence to enable the authority to complete the HRA. This evidence is submitted in the form of a "report to inform" or "shadow" HRA. Accordingly Archers ought to prepare a shadow HRA seeking to convince Borsetshire that its scheme would not be likely to have an adverse effect on the SPA.

The presence of bats at Brookfield Farm also illustrates two issues that arise in applying the species protection provisions in the Habitats Regs 2010: first, what is meant by "disturbance" (and thus when is a licence from Natural England required) and secondly, what is the role of the local planning authority in deciding whether a licence would be granted by Natural England.

Regulation 41(2) provides a non-exhaustive definition of what disturbance can include, but there is uncertainty about what precisely amounts to disturbance even following the decision of the Supreme Court in *R. (on the application of Morge) v Hampshire CC*.[50] At first instance HHJ Bidder QC held that there would be disturbance in the event of "certain negative impact likely to be detrimental".[51] The Court of Appeal held that this was too low a threshold and held that "for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at the population level … ie the long-term distribution and abundance of the population".[52] The Supreme Court rejected the Court of Appeal's approach which it held imposed too high a threshold. It held that disturbance did not need to be "significant", nor affect the long-term conservation status of the species, but declined further to define what disturbance actually meant and what level of disturbance would be sufficient to constitute an offence. Lord Brown held that what was needed was an assessment of the nature and extent of the negative impact of the activity in question upon the species (rather than the specimens of the species). Ultimately this will be a question of judgment having regard to the species in question and the situation.

In terms of Borsetshire's responsibilities when confronted with an application involving disturbance to a European Protected Species the Supreme Court in *Morge* held that planning permission should be granted unless the planning committee is satisfied both that there is likely to be a breach of the Habitats Regs 2010 and that Natural England would be unlikely to grant a licence. Thus planning permission can be granted even if there is uncertainty as to whether there would be a breach of the Habitats Regs 2010. Planning permission should only be refused if the planning authority concludes that there would be a breach and that Natural England would be unlikely to grant a licence.[53]

Pitfall 7: Don't get lost at SEA

Borsetshire learns its lesson about the importance of the Habitats Directive and its new Local Plan contains a policy that all new development within 7km of the SPA should provide measures to mitigate the impact of increased visitors to the heath, including the provision of on-site or off-site Suitable Alternative Natural Green Space (SANGS) and contributions for the better management of the publically accessible heathland. In the absence of such mitigation planning permission will be refused. Borsetshire did not consider any alternatives to this policy when it prepared its Local Plan (2016).

[50] [2011] 1 W.L.R. 268.
[51] [2010] Env. L.R. 26.
[52] [2010] P.T.S.R. 1882.
[53] See also *R. (on the application of Prideaux) v Buckinghamshire CC* [2013] EWHC 1054.

In *Ashdown Forest Economic Development LLP v Wealden DC*,[54] the Court of Appeal quashed Policy WCS12 of the Wealden District (incorporating part of the South Downs National Park) Core Strategy Local Plan, which required all new development within 7km of the Ashdown Forest to provide SANGS to mitigate the impact of increased visitors to the Forest. In the absence of any deliverable SANGS scheme identified by the Council, developments as small as a single dwelling had been refused planning permission by reference to Policy WCS12.

Richards LJ, with whom McFarlane and Christopher Clarke LJJ agreed, held that in adopting Policy WCS12 the Council had failed to comply with the requirements of the SEA Directive. This was because no regard had been given to whether there were reasonable alternatives to the 7km SANGS zone which ought to be subject to environmental assessment alongside the Council's preferred approach. Contrary to the judgment of Sales J., it could not be said that the Habitats Screening Assessment prepared in conjunction with the draft Core Strategy had considered the reasonable alternatives since its sole focus had been whether the 7km SANGS zone would avoid the risk of harm to the Ashdown Forest SAC/SPA and thus avoid the need for appropriate assessment pursuant to the Habitats Regs 2010. It was not the function of the Habitats Screening Assessment to consider alternatives and therefore it did not follow its conclusions that there were no alternative means of ensuring the necessary protection of the Forest.

The judgment in *Ashdown Forest* serves as an important warning to local planning authorities of the distinct roles of Habitats Assessment and SEA and highlights the dangers of confusing the two processes. Borsetshire's policy was adopted in breach of the SEA Directive, but that does not mean that the SPA ceases to be a constraint for Archers.

In response to the Court of Appeal's judgment Wealden DC has made changes to Policy WCS12 by removing the reference to the 7km zone and the specific reference requiring SANGS and on-site visitor management measures. In practice this does not lessen the environmental protection of the European Site. Any new planning application will be screened under s.61 of the Habitat Regulations and if it is determined that the application either alone, or in combination with other factors, is likely to result in a significant effect on the Special Protection Area, then an appropriate assessment will be required to determine the implications for that site in view of the site's conservation objectives. Where the implications for the site are not known or it is uncertain, then the precautionary approach must by law be applied. It will be the duty of Wealden DC to determine if the application will have a likely significant effect on the integrity of the SPA and whether suitable mitigation measures can be applied to mitigate the impact. Where an appropriate assessment is required, applicants will be required to provide the relevant information in order for the Council to undertake an appropriate assessment including any required proposals for mitigation measures.

Pitfall 8: Enforcement and EIA

Plot 2 of the development site is in use as a pig farm,an intensive agricultural use. That use does not have planning permission, but it is long-established and will gain immunity from enforcement very shortly. Archers wants to argue that the pig farm use is a fallback and that its mixed use development is preferable in planning terms. Can Borsetshire take the claimed fallback into account? Alternatively must it take enforcement action in response to complaints from local resident Mr Grundy?

In *Ardagh Glass v Chester CC*,[55] a local planning authority was ordered to take enforcement action to prevent immunity arising for EIA development. The Deputy Judge found that if immunity were to arise through a failure to take action it would "be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country".[56] In considering expediency, the Deputy Judge held:

[54] [2015] EWCA Civ 681.
[55] [2009] Env. L.R. 34.
[56] At [46].

> "[47] Expedience as a test suggests the balancing of the advantages and disadvantages of a course of action. The advantage of taking enforcement action by issuing an enforcement notice is that it will at once prevent immunity arising at least for another four years and it will avoid the need for certainty about the date of substantial completion of the plant.
> …
> [110] In my judgement, a purposive interpretation of art.2(1) strongly suggests that for the defendant councils to permit the Quinn Glass development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would … amount to a breach of the UK's obligations under the Directive."

In *R. (on the application of Evans) v Basingstoke and Deane BC*,[57] the Court of Appeal considered whether the time limits for taking enforcement action in s.171B of the TCPA 1990 applied to EIA development and held that they did. Sullivan LJ recognised that it may well be a breach of the obligations on a local planning authority under the EIA Directive to allow EIA development to become immune from enforcement action.

Local authorities ought not to be resistant to enforcing against unauthorised EIA development. The service of an enforcement notice may well lead to a ground (a) appeal (i.e. a deemed application for planning permission) which will trigger the need for EIA. This can be a valuable way of securing mitigation for a use that the authority does not wish to cease e.g. in cases where an activity has been taking place for years, but then intensifies to such an extent that there is a material change of use requiring planning permission.

Where a local planning authority is required to take enforcement action against unauthorised EIA development the question remains what form of enforcement action must it take? The Court of Appeal in *Ardagh Glass v Chester CC*,[58] held that the local planning authority was not required to serve a stop notice in addition to a planning enforcement notice:[59]

> "However, once it is accepted that retrospective planning permission for unauthorised development is permissible in principle (subject to certain conditions), there is no substance in the claimant's further submission before the judge that the local authority was bound to issue a stop notice and not merely to issue an enforcement notice. The latter was sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted either by the local authority under section 73A, or by the Secretary of State under section 177 in response to any appeal against the enforcement notice by the interested party."

Borsetshire might therefore be compelled to issue an enforcement notice, but it is unlikely to be required to issue a stop notice.

All very interesting, but what about Brexit …?

Until we know exactly what form of Brexit the UK is seeking (let alone what form of Brexit it will be able to negotiate in Brussels) it is unclear what the precise impact of Brexit on environmental protection will be. Nevertheless it seems to me that:

- The decision to leave the EU does not of itself mark a withdrawal from the Aarhus Convention or the European Convention of Human Rights as international treaties.
- In the short term there may be a wholesale grandfathering of EU-derived rights, which will preserve planning/environmental legislation arising from EU Directives (e.g. EIA, SEA,

[57] [2014] 1 W.L.R. 2034.
[58] [2011] P.T.S.R. 1498.
[59] At [22].

Habitats, Wild Birds, pollution control) followed by a more leisurely repeal and amendment programme.

- It is unlikely that there will be any change in the short term, while the UK negotiates with the EU, but beyond that the future is unclear.
- There is nothing necessarily incompatible with the UK planning system in EIA, SEA, Habitats etc given their integration over many decades into the current system but the drive to make the system more sensitive to economic needs and to speedier process may create pressure to relax the controls and procedures.
- If we were to end up with something like the Norway/EEA model, while many EU environmental laws are required to be complied with by EEA states, the Habitats Directive is not one of those laws that EEA states must currently comply with.
- All SPAs and SACs in England and Wales are also SSSIs (see *R. (on the application of Aggregate Industries UK Ltd) v English Nature*[60]) and this domestic protection would remain in place even if all EU Habitats law was repealed overnight. It would continue to provide a level of protection but not provide for appropriate assessments, IROPI etc. Thus in terms of planning under the NPPF it is provided in para 118 that "proposed development on land within or outside a Site of Special Scientific Interest likely to have an adverse effect on a Site of Special Scientific Interest (either individually or in combination with other developments) should not normally be permitted. Where an adverse effect on the site's notified special interest features is likely, an exception should only be made where the benefits of the development, at this site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of Sites of Special Scientific Interest". Whilst this is itself a strong policy test it does not match that provided for in regulations 61 and 62 of the Habitats Regs 2010.

[60] [2003] Env. L.R. 3.