European Nature Conservation Sites and the Appropriate Assessment of Plans and Projects

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Glossary of terms

ABP Associated British Ports

Appropriate assessment An assessment carried out under Art.6(3) of the Habitats Directive or under reg.48(1) of the Habitats Regulations

Birds Directive 1979 Council Directive on the conservation of wild birds[2]

cSAC A candidate Special Area of Conservation, *i.e.* a site proposed to the European Commission as a Site of Community Importance but not yet adopted as such by the Commission

CLG Department for Communities and Local Government

The Commission The European Commission

Defra Department for Food and Rural Affairs

DDP Natural England's Draft Delivery Plan for the Thames Basin Heaths SPA

DfT Department for Transport

ECJ European Court of Justice

EIA Environmental Impact Assessment

European Sites SACs, SPAs and cSACs

GPDO General Permitted Development Order

Habitats Directive 1992 Council Directive on the conservation of natural habitats and of wild fauna and flora[3]

Habitats Regulations The Conservation (Natural Habitats, &c.) Regulations 1994[4]

IROPI—imperative reasons of overriding public interest, as defined in article 6(4) of the Habitats Directive and reg.49 of the Habitats Regulations

LDD Local development document

LPA Local planning authority

Natura 2000 The Community-wide network of SACs and SPAs created under Art.3 of the Habitats Directive

[1] Bircham Dyson Bell LLP
[2] Directive 79/409/EEC.
[3] Directive 92/43/EEC.
[4] SI 1994/2716.

ODPM Office of the Deputy Prime Minister (predecessor of CLG)

Precautionary principle The principle that harmful effects will be assumed in the absence of evidence to the contrary

pSAC Site proposed as a SAC but not yet on a list submitted to the European Commission by a Member State

pSPA Site proposed as a SPA but not yet classified as a SPA

RPB Regional planning body

RSS Regional Spatial Strategy

SA Sustainability Appraisal

SAC Special Area of Conservation designated under the Habitats Directive

SANGS Suitable accessible natural green space

SEA Strategic Environmental Assessment

Sites of Community Importance Sites containing species of Community interest and/or natural habitat types of Community interest. The term is normally used to refer to sites adopted by the EC but not yet designated as SACs by the Member State

SPA Special Protection Area classified under the Birds Directive

Species of Community Interest Species which are endangered, vulnerable to becoming endangered, or that are rare, as listed in the Annexes to the Habitats Directive

Summary

This paper focuses on the requirement stemming from the Habitats Directive for the appropriate assessment of any plan or project not directly connected with or necessary to the management of a European Site but which is likely to have a significant effect on the site, in order to ensure that the plan or project does not adversely affect the integrity of the site.

With reference to case law, where relevant, I consider what is meant by appropriate assessment and how the requirement for an appropriate assessment (known as screening) is triggered. I then look at the different stages of the appropriate assessment process, including how plans or projects may be approved in the absence of a satisfactory appropriate assessment, again with reference to relevant case law.

I go on to comment on how the appropriate assessment process relates to other similar assessments, i.e. environmental impact assessments, strategic environmental assessments and sustainability appraisals.

I then turn to look at how the Directive and the UK's implementing regulations, the Habitats Regulations, have been applied in three broad areas: the recent decisions relating to four major ports projects, the Thames Basin Heaths SPA and the consideration of some draft regional spatial strategies.

I conclude by commenting on some ongoing legal and policy developments, including the relevance to appropriate assessment of the Government's proposed National Infrastructure Policy Statements set out in its May 2007 Planning White Paper.

Introduction to the European Directives

The Birds Directive and Special Protection Areas

The Council Directive on the conservation of wild birds[5] (the Birds Directive) requires Member States to maintain the population of wild bird species at "a level which corresponds. . . to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements" and to "preserve, maintain or re-establish a sufficient diversity and area of habitats" for all of the species.

In addition to the general requirements to conserve wild bird species the Directive lists (within Annex I) a number of species requiring special conservation measures. Article 4(1) requires that the Member States classify Special Protection Areas (SPAs) for the conservation of Annex I species. Article 4(2) creates a similar requirement to protect migratory species (not listed in Annex I) along with their wintering and breeding sites. Article 4(4) provides that in these protection areas Member States must take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, insofar as these would be significant having regard to the objectives of Art.4.

In *Commission v Austria*[6] the European Court of Justice (ECJ) confirmed that there was an ongoing obligation to classify sites as SPAs where their outstanding nature only came to light later. It would not be compatible with the objective of the effective protection of birds if outstanding areas for the conservation of the species to be protected were not brought under protection merely because the outstanding nature of a site came to light only after transposition of the Directive.

The Habitats Directive and Special Areas of Conservation

The Council Directive on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)[7] extends the approach taken in the Birds Directive to other animals, plant species and natural habitat types. Its aim is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna.

Sites hosting "natural habitat types of Community interest" (i.e. those which are in danger of disappearance, have a small natural range or present outstanding examples of certain habitat types) had to be identified and listed by each Member State within three years of the Directive's notification. A list of these habitat types is contained in Annex I to the Directive. Certain of these habitats (those which are in danger of disappearance and which the Community has particular responsibility for in view of the proportion of their range which falls within its territory) are designated "priority natural habitat types" and are highlighted in the Annex with an asterisk.

Sites hosting "species of Community interest" (i.e. those species which are endangered, vulnerable to becoming endangered or which are rare) and their habitats also had to be identified and listed by each Member State within three years of the Directive's notification. A list of these species is contained in Annex II to the Directive. Certain species of Community interest (those for which the Community has particular responsibility in view of the proportion of their range which falls within its territory) are designated "priority species" and are highlighted in the Annexes with an asterisk.

[5] Directive 79/409/EEC.
[6] [2006] Env. L.R. 39.
[7] Directive 92/43/EEC.

Under Art.4 each Member State was required to submit a list of its sites, known as candidate SACs, to the European Commission, showing which contained priority species or priority natural habitat types. The European Commission then established, in agreement with each Member State, and subsequently adopted, a list of Sites of Community Importance drawn from the Member States' lists, identifying those which host one or more priority natural habitat types or priority species. Sites of Community Importance are primarily those sites which, in the bio geographical region or regions to which they belong, contribute significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II. Once a Site of Community Importance has been formally adopted by the Commission the Member State must designate the site a Special Area of Conservation (SAC) and put in place measures to restore and/or maintain its conservation status. The precise stage of a site in the process to becoming a SAC determines how the site must be treated under the Directive; consequently a significant and growing body of case law exists in this respect and is discussed later in this paper.

The Special Areas of Conservation designated by Member States all form part of a European ecological network referred to by the Directive as Natura 2000. This network includes the Special Protection Areas classified by Member States under the Birds Directive.

Article 6 of the Habitats Directive

The main provision of the Habitats Directive relevant to this paper is Art.6, which aims to protect the conservation status of Special Areas of Conservation by ensuring that Member States have suitable conservation management plans in place for the maintenance or restoration of the site and exercise sufficient control of other plans and projects to avoid adversely affecting the conservation status of the sites. The Article contains four provisions:

Arts 6(1) and 6(2) contain general requirements in relation to putting in place conservation measures for Special Areas of Conservation and taking appropriate steps to prevent deterioration of habitats and disturbance of species.

Article 6(3)

Article 6(3) contains two important requirements: (a) that any plan or project which is likely to have a significant effect on a Special Area of Conservation must be the subject of an appropriate assessment by a competent national authority; and (b) that the authority may only approve the plan or project when it has ascertained that there will be no adverse effect on the SAC:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

The first requirement of Art.6(3) was considered by the ECJ in *Waddenzee* (2004)[8], a leading case concerning the issuing of licences by the Dutch Secretary of State for Agriculture, Nature Conservation and Fisheries for the mechanical fishing of cockles in the classified Waddenzee SPA, which were challenged by the National Association for Conservation of the Waddenzee and the Netherlands Association for the Protection of Birds.

As for what was meant by a plan or project, the Court was clear that mechanical cockle fishing which had been carried on for many years but for which a licence was granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may take place, did fall within the concept of a plan or project within the meaning of Art.6(3). Whilst the term ''plan or project'' was not defined, the Court looked at the EIA Directive 85/337/EC and commented:

> ''25. An activity such as mechanical cockle fishing is within the concept of a ''project'' as defined in the second indent of Article 1(2) of Directive 85/337.
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> 26. Such a definition of ''project'' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.
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> 27. Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive.
>
> 28. The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.''

The Court went on to consider the circumstances when an appropriate assessment was required by Art.6(3). It was clear that the triggering of the requirement for an appropriate assessment did not presume that the plan or project considered definitely had significant effects on the environment but it followed from the ''mere probability that such an effect attaches to that plan or project'' and ''a probability or a risk'' that the plan or project will have significant effects on the site concerned. In the light of the precautionary principle, by reference to which the Directive had to be interpreted, such a risk existed if it could not be excluded *on the basis of objective information* that the plan or project will have significant effects on the site concerned. The Court's justification for this was that such an interpretation of the condition for an appropriate assessment to be required, i.e. in any case of doubt as to the absence of significant effects, made it possible to ensure effectively that plans and projects which adversely affect the integrity of the site concerned are not authorised, and thereby this contributed to achieving the Directive's main aim of ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna. The Court's conclusion on this point was expressed in this way:

> ''The first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the

[8] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] EUECJ C-172/02.

> site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.''

The next question considered by the Court was on the basis of which criteria must it be determined whether or not the plan or project was likely to have a significant effect on the site concerned. It was clear to the Court that the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site was linked to its conservation objectives. Thus, where a plan or project had an effect on that site but was not likely to undermine its conservation objectives, it could not be considered likely to have a significant effect on the site concerned. Conversely, where a plan or project was likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site: in assessing the potential effects of a plan or project, their significance had to be established in the light, amongst other things, of the characteristics and specific environmental conditions of the site concerned.

Finally, the Court turned to the requirements for an appropriate assessment. Article 6(3) did not define any particular method for carrying out the assessment; the Court considered that all aspects of the plan or project which could, either individually or in combination with other plans or projects, affect the site's conservation objectives had to be identified in the light of the best scientific knowledge in the field. It was clear that the project or plan concerned could only be approved after having made sure that it would not adversely affect the integrity of the site, subject of course to the procedure outlined in Art.6(4) of the Directive (see below):

> ''It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.''

The second requirement of Art.6(3) is therefore also subject to the precautionary principle,[9] *i.e.* it is for the competent authority to determine that no adverse effect will result before granting approval. The absence of evidence of an adverse effect will therefore not be sufficient evidence to approve a plan or project. Article 174(2) of the EC Treaty states:

> ''Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken,

[9] The precautionary principle was introduced into the *Treaty establishing the European Community* by the *Treaty on European Union* (Maastricht Treaty) in 1992.

> that environmental damage should as a priority be rectified at source and that the polluter should pay.''

The Court in *Waddenzee* concluded that:

> ''Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities. . .. are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.''

It will be noted that whilst a high standard of proof is therefore required at both stages: first, as to whether appropriate assessment is required, and secondly, if it is, whether the project should be allowed to go ahead, the requirements are different and ascending: objective information at the first stage and the best scientific knowledge in the field at the second stage.

The Directive does not attempt to define the term ''plan'' and consequently the Commission's guidance[10] argues that it should be given a broad interpretation, and that it will include all types of land use plans. Similarly, the guidance suggests that ''project'' be given a broad definition, and, by analogy with Directive 85/337/EEC[11], means:

> ''—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 resource''.

Interestingly, in *R. (on the application of Edwards) v Environment Agency* (2006)[12], the case concerning a permit given for cement works outside Rugby to trial chipped tyres as fuel, the Court of Appeal held that under the EIA Directive, a ''project'' could include operation (as well as construction) of undertakings falling short of material changes of use, where this may have significant adverse effects on the environment.

Article 6(4)

Article 6(4) applies where a satisfactory appropriate assessment of plans and projects cannot be reached. It seeks to allow the approval of such plans and projects only in cases where three tests are met. There must be: (a) no alternative solution available; (b) imperative reasons of overriding public interest (IROPI) for the plan or project to proceed; and (c) adequate compensatory measures in place:

> ''If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
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> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to

[10] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.3, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[11] *Directive 85/337/EEC on the assessment of the effects of certain public and private plans and projects on the environment.*

[12] [2006] EWCA Civ 877.

beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.''

Articles 6(2), (3) and (4) apply to a site as soon as it has been placed on the list of Sites of Community Importance adopted by the European Commission.

Importantly, Art.7 of the Habitats Directive extends the application of Arts 6(2), 6(3) and 6(4) to those sites classified under Art.4 of the Birds Directive as Special Protection Areas in place of the more general restrictions in the first sentence of Art.4(4) of the Birds Directive.

The Conservation (Natural Habitats, &c.) Regulations 1994

The requirements of the Habitats and Birds Directives are transposed into UK law through the Conservation (Natural Habitats, &c.) Regulations 1994. The provisions of the Regulations most relevant to this paper are reproduced in consolidated form in Appendix 1.

Throughout the Regulations the term ''European site'' is used in relation to the sites protected by the legislation. The definition of ''European site'' is wider than is necessary to comply with the Directive, and is given in reg.10. Thus, for the purposes of appropriate assessment the term European site, in addition to SACs and SPAs, includes candidate SACs (those sites proposed by the UK as SACs but not yet adopted as such).

Appropriate Assessment: Regulation 48

The core requirements of Art.6(3) of the Habitats Directive appear in reg.48, comprising:

- the duty of a competent authority to make an appropriate assessment before deciding to undertake, or give any consent, permission or other authorisation for a plan or project which is likely to have a significant effect on a European site in Great Britain or a European offshore marine site (either alone or in combination with other plans or projects), this being an assessment of the implications for the site in view of that site's conservation objectives (reg.48(1));
- the duty of a party submitting the plan or project to provide information reasonably required by the competent authority to make its appropriate assessment or to help it to determine whether an appropriate assessment is required (reg.48(2));
- the duty of the competent authority for the purposes of the assessment to consult the appropriate nature conservation body and to have regard to any representations that it may make (reg.48(3)); and
- the duty to approve proposed plans and projects only after a satisfactory appropriate assessment has been concluded, i.e. (subject to reg.49, as to which see below) only after it has been ascertained that the plan or project will not adversely affect the integrity of the European site or the European offshore marine site (reg.48(5)).

Nothing in the Directive exempts existing plans and projects from its provisions, thus generally speaking any approval which has already been given but not implemented must be reviewed[13] and, where the plan or project approved involves the likelihood of significantly affecting a relevant site, an appropriate assessment must be carried out for this purpose in accordance with reg.48.

[13] But see *EC v Italy* (below) for the current position under the Habitats Directive.

The requirement to review existing decisions, consents, permissions and other authorisations and to affirm, modify or revoke them is set out in reg.50; this applies to cases where, before the date on which a site becomes a European site or, if later, the commencement date of the Regulations (October 30, 1994), a competent authority has decided to undertake, or has given any consent, permission or other authorisation for a plan or project to which reg.48(1) would apply if it were to be reconsidered as of that date. The steps required of a competent authority in carrying out a review of existing decisions, etc., under reg.50 are set out in reg.51. The authority's options include affirmation of the decision under review, if the authority considers that other action taken or to be taken by it, or by another authority, will secure that the plan or project does not adversely affect the integrity of the European site.

The scope of the application of regs 48 and 49 of the Habitats Regulations to the grant of planning permission is set out in regulation 54, this including planning permission granted on appeal and also granted directly by the Secretary of State under s.90 of the Town and Country Planning Act 1990 (development with government authorisation). Regulation 54(3) and (4) should be noted in particular:

> (3) The competent authority may grant planning permission subject to conditions or limitations if it considers that doing so would avoid any adverse effects of the plan or project on the integrity of a European site; and
> (4) Outline planning permission must not be granted unless the competent authority is satisfied (whether because of proposed conditions or limitations, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

The ECJ's decision in *Waddenzee*, which made it clear that the Habitats Directive has direct effect and therefore sits alongside reg.48, was to an extent presaged by the Court's decision in *ADT Auctions Ltd v The Secretary of State for the Environment, Transport and Regions*[14] (2000), when Jowitt J. remarked about reg.48(5):

> "There is thus a two stage process when Regulation 48 is engaged. Given a proposed development's likelihood to have a significant development on a European site there has to be an appropriate assessment of the implications for the site. Once, though, this assessment has been considered planning permission has to be refused *unless* the proposed development will *not* adversely affect the integrity of the site. . . . . .permission should not be granted unless the decision maker has ascertained that there will be no adverse effect on the integrity of the site. The approach required by paragraph (5) is relevant both when the decision maker is satisfied the proposed development will adversely affect the site's integrity and when he is undecided whether it will or not. In either case paragraph (5) requires permission to be withheld. This approach reflects the importance attached to safeguarding the integrity of an SPA. . . ..The approach to the conservation issue in these two appeals, that a case has not been made out that the development would adversely affect the conservation site, is not the approach required by Regulation 48(5) in the case of an SPA."

[14] 2000 WL 389632.

IROPI: Regulations 49 and 53

If a satisfactory appropriate assessment *cannot* be reached, then known as a negative assessment, a project or plan may only be approved where there are imperative reasons of overriding public interest (IROPI), as allowed for in Art.6(4) of the Habitats Directive. This IROPI test is transposed by reg.49, which provides that the plan or project may be agreed to if there are no alternative solutions and if there are imperative reasons of overriding public interest. Those reasons can be reasons of a social or economic nature but where the site concerned hosts a priority natural habitat type or priority species, the imperative reasons must be either reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, or any other reasons which the competent authority, having due regard to the opinion of the European Commission, considers to be imperative reasons of overriding public interest.

Regulation 49 also sets out the procedure by which a competent authority other than the Secretary of State may obtain the opinion of the Commission through the Secretary of State on whether a reason can be considered to be an imperative reason of overriding public interest.

In the event that a competent authority other than the Secretary of State wishes to agree a plan or project despite there being a negative assessment of the implications for the European site, reg.49(5) requires that the authority notifies the Secretary of State; the authority is then prevented from acting on the matter (without the Secretary of State's direction) for a period of 21 days. The Secretary of State may give directions in any case to the competent authority prohibiting it from agreeing to the plan or project, either indefinitely or during such period as the direction may specify.

In the event that a competent authority approves a proposal without a satisfactory appropriate assessment and on grounds of IROPI, Art.6(4) of the Habitats Directive requires that adequate compensatory measures are put in place, and that the Commission is informed of the measures adopted. The requirement to put in place the compensatory measures (but curiously not that of reporting to the Commission) is transposed by reg.53, which obliges the Secretary of State to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

Competent Authorities: Regulations 6 and 52

The definition of "competent authority" is set out in reg.6: this term includes any Minister, government department, statutory undertaker, public body of any description or person holding a public office. Statutory undertakers are not defined by the Regulations but the following definition is derived from the Regulations' adoption of the definition in the National Parks and Access to the Countryside Act 1949, which in turn defers to the Town and Country Planning Act[15]:

> "(1) . . ...persons authorised by any enactment, to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power and a relevant airport operator. . ...
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> (2). . ... any public gas transporter, water or sewerage undertaker, the Environment Agency, any universal postal service operator, ... the Civil Aviation Authority, ...
>
> (6). . ...any holder of a licence under section 6 of the Electricity Act 1989. . ..."

[15] Town and Country Planning Act 1990, s.262.

Thus in many cases, and especially for major infrastructure developments, there may well be two or more competent authorities. It is also possible that the promoter of a development may itself be a competent authority for the purposes of the Habitats Regulations[16].

Regulation 52 sets out principles for the co-ordination of action in cases where more than one competent authority is involved in relation to a plan or project. It allows the assessment of a plan or project to be performed by the most or more appropriate authority where one exists, and allows the Secretary of State to issue guidance on the adoption by a competent authority of another competent authority's reasoning or conclusions on a proposal. There is also a requirement that in determining whether a plan or project should be agreed for imperative reasons of overriding public interest, a competent authority other than the Secretary of State must seek and obtain the views of the other competent authority or authorities involved.

Effect on General Development Orders: Regulations 60–62

Regulation 60 provides that it is a condition of any planning permission granted by a general development order, whenever made, that development which is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects) and is not directly connected with or necessary to the management of the site shall not be begun until the local planning authority has approved the development.

Regulation 61 allows consultation of ''the appropriate nature conservation body'' on the matter of whether the development is likely to have a significant effect on a European site. The resulting opinion of the appropriate nature conservation body that the development is not likely to have a significant effect on a European site is provided to be conclusive of that question for the purpose of reliance on the planning permission granted by the development order.

The procedure to gain the approval of the local planning authority (LPA) for a development under a general development order is set out in reg.62. The Regulation creates a presumption that a significant effect will occur, and requires the LPA to consult the appropriate nature conservation body on the matter. If the nature conservation body does not then give an opinion that the development is not likely to have a significant effect, then an appropriate assessment of the development must be carried out by the LPA.

Effect on Special Planning Regimes: Regulations 64–66

Under regs 64–66 no Special Development Order, Local Development Order, Simplified Planning Zone scheme or Enterprise Zone scheme shall have effect to grant planning permission for a development likely to have a significant impact on a European site in Great Britain and European offshore marine sites (either alone or in combination with other plans or projects).

Application to Non-Planning Regimes: Regulations 69–85

The Regulations go on to provide in detail that the requirements of regs 48 and 49 apply to:

- the construction of improvement of highways;

[16] *E.g.* in the case of the proposed Dibden Bay container terminal one appropriate assessment was performed by the applicant: Associated British Ports.

- consents given under s.36 of the Electricity Act 1989 to construct, extend or operate a generating station, or consents given under s.37 to install electric lines;
- the granting of a pipe-line construction or diversion authorisation under the Pipe-lines Act 1962;
- the making of an order under ss.1 or 3 of the Transport and Works Act 1992;
- the granting of a waste management licence under Pt II of the Environmental Protection Act 1990;
- the granting of permits under the Pollution Prevention and Control (England and Wales) Regulations 2000;
- the granting of various authorisations under water legislation, including abstraction and impounding licences, ordinary and emergency drought orders, drought permits, discharge consents and compulsory works orders; and
- the giving of discharge consents under the Water Resources Act 1991.

EC v UK

In January 2004 the European Commission brought proceedings against the UK for failure correctly to transpose the Habitats Directive into UK law. A number of complaints was raised by the Commission including that Art.6(3) and (4) were not applied to water abstraction plans and projects and land use plans, and that the UK legislation was improperly restricted to territorial waters. The ECJ upheld these complaints in its judgment[17] of October 2005.

The Court's conclusion in relation to land use plans is worth quoting:

> "51 The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.
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> 52 According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.
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> 53 The United Kingdom accepts that land use plans can be considered to be plans and projects for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.
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> 54 As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).

[17] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland,* C-6/04, [2005] E.C.R. I-9017.

> 55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.
>
> 56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.''

The UK Government has sought to remedy the key deficiencies established by the case through the Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007,[18] which came into force with one exception on August 21, 2007.

The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007

Following consultation by Defra, the Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 made a number of changes to the 1994 Regulations with effect from August 21, 2007, notably:

- the inclusion of European Offshore Marine Sites designated under the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007[19];
- amending the requirement to provide information to the competent authority under reg.48. The change should mean that, in cases where it is clear that adverse impact is unlikely to occur, a full package of information for appropriate assessment will no longer be required from the applicant;
- correcting the transposition of Art.6(4) in reg.49 to clarify that the competent authority will make a decision on IROPI ''having due regard to the opinion of the European Commission'', rather than the Commission making the decision itself; and
- requiring the assessment of water abstraction plans and projects and land use plans in the same manner as other plans and projects.

Effect on Land Use Plans: Regulations 85A–E

The 2007 amendments to the Habitats Regulations correct the transposition of the Directive, and formally bring land use planning under the 1994 Regulations[20].

''Land use plans'' (as defined in reg.85A and principally, now, regional spatial strategies, London's spatial development strategy and local development documents—development plan documents and supplementary planning documents), where they are likely to have a significant effect on a European site in Great Britain or a European offshore marine site (either alone or in combination with other plans and projects) will, under the provisions in reg.85B, be subject to appropriate assessment before the plan is ''given effect'', similar to that under reg.48.

The plan-making authority or, in the case of a regional spatial strategy, the Secretary of State, may only adopt, approve or publish the land use plan concerned after having ascertained that it will not

[18] SI 2007/1843.
[19] SI 2007/1842.
[20] In March 2006 the ODPM said that its aim was to bring the amending regulations into force on September 1, 2006 after public consultation.

adversely affect the integrity of the European site or the European offshore marine site (as the case may be). Thus it is the responsibility of the regional planning body, the Greater London Authority or the local planning authority to assess whether an appropriate assessment is necessary and to carry it out in the course of preparation of the plan concerned when it is required.

Regulation 85C applies the IROPI test to land use plans in a manner analogous to Regulation 49. Regulation 85D sets out the principles for co-ordination in cases where more than one planning authority is involved, again it replicates the approach taken in reg.52. Finally reg.85E mandates the Secretary of State to secure the provision of compensatory measures when land use plans are given effect under reg.85C, analogous to the requirements of reg.53.

Effect on Water Abstraction Plans and Projects: Regulation 84B

Regulation 84B applies reg.48 to a list of licences, orders and consents made under the Water Resources Act 1991 and the Water Industry Act 1991. These include water abstraction licences, drought orders, certain discharge consents, and compulsory works orders. Regulation 50, the requirement to review existing authorisations, is also applied in certain situations including abstraction licences and compulsory works orders.

Principles of Appropriate Assessment

Terminology

The term ''appropriate assessment'' is used in a number of different contexts within the natural habitats arena. Commonly the term is applied both to the process of assessing the impact of a plan or project under Art.6(3)/reg.48, and to the statement of the outcome of the assessment. On occasion, however, the term ''appropriate assessment'' has been applied in other ways, *e.g.* to a wider process including the IROPI test and the provision of compensatory measures under Art.6(4)/regs 49 and 53[21].

For the remainder of this document the term ''appropriate assessment'' (AA) will be used to denote the process of an assessment under Art.6(3)/reg.48. Appropriate assessment in the wider sense will be referred to as ''statement of outcome of appropriate assessment''.

Definition of Appropriate Assessment

Appropriate assessment is the process of taking a proposed plan or project which is likely to have a significant effect on a European site through a series of steps to determine whether or not there will be an adverse effect on the site's integrity. The process can be reduced to the following simple steps:

- collection of information (on the European site concerned, its conservation objectives, and information on any other plans or projects which in combination with the proposal under consideration could affect the integrity of the site);
- prediction of the impacts of the proposal (either alone or in combination with other projects) on the European site;

[21] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* August 2006, http://www.communities.gov.uk/pub/353/Planning fortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceForRegionals_id1502353.pdf.

- assessment of the predicted impacts on the site's conservation objectives;
- design of measures to mitigate any adverse effects; and
- statement of the outcome of the appropriate assessment.

Plans and Projects

Article 6(3) of the Habitats Directive applies to ''any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon'' and the purpose of the Directive, ECJ jurisprudence and published guidance all indicate that the terms ''plan'' and ''project'' should be given a very wide interpretation in this context.

Whether a proposal is ''directly connected with the management of the site'' is determined using a two-stage test. Any proposal which (a) refers to management measures for conservation purposes, and (b) is *solely* for the conservation management of *that site* may be said to be directly connected to the management of the site and therefore exempt from the requirements of Art.6 including the requirement for an appropriate assessment.

Where a plan or project falls partly within this definition, e.g. a project is only partly for conservation purposes, the remaining parts of the scheme will need to be the subject of an appropriate assessment if likely to have a significant effect on a European site.

Integrity of the Site

The aim of the Habitats Directive is to ensure the *integrity* of Natura 2000 sites, a term which requires definition in this context. The integrity of a site involves its ecological functions; the site may be described as having a high degree of integrity where its capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.[22]

The Assessment Process

Published Guidance

Neither the Habitats Directive nor the Habitats Regulations set out how an appropriate assessment should be made, but there is plenty of guidance issued to those wishing to carry out an appropriate assessment, notably from the European Commission, CLG/ODPM, nature conservation bodies and consultancies. The various guidance documents adopt differing methodologies and, as the assessments carried out to date have used much of this guidance, the statements of outcomes of appropriate assessments have varied somewhat in style and approach.

European Commission There are two main Commission guidance documents: ''Managing Natura 2000 Sites: The Provisions of Article 6 of the ''Habitats'' Directive 92/43/EEC''[23] was provided in 2000 as an interpretation guide to the key concepts introduced in the Habitats Directive, and was intended to be supplemented by other (national) guidance. The document begins with a description of how Art.6 fits into the framework of the Habitats and Birds Directives, and then looks at how it

[22] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6.3, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[23] *Managing Natura 2000 Sites*, European Commission, 2000, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

is to be applied (including a discussion of some early case law). The four paragraphs of Art.6 are then addressed separately and in detail including, in the Art.6(3) chapter, an analysis of what is meant by appropriate assessment. The document provides a reasonable introduction to the subject and would not require the reader to have any significant prior knowledge.

The second document is ''Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC[24]'', which followed in November 2001 to provide detailed methodological guidance to the application of Arts 6(3) and 6(4). It is aimed at those carrying out stages of the assessment: developers, competent authorities, Member States, etc. The guidance begins with a stage by stage overview of the whole assessment process from screening to appropriate assessment, to assessment of alternative solutions and IROPI, and then breaks each stage down into detailed steps. Included in the guidance are checklists of tasks and suggested formats for recording key stages of the assessment. Finally the document provides a methodology and check list for reviewing appropriate assessments for satisfactory completeness under these headings:

1. Features of the project or plan
2. Cumulative effects
3. Description of the Natura 2000 site
4. Screening
5. Appropriate assessment
6. Mitigation
7. Alternative solutions
8. Imperative reasons of overriding public interest
9. Compensatory measures.

Although the methodology is presented in great detail, this guidance is well written and should be accessible to anyone with a basic understanding of the subject, such as might be gained from reading Managing Natura 2000 Sites.

In addition, there is the Commission's recent Guidance document on Art.6(4) of the ''Habitats Directive'' 92/43/EEC[25], a useful document which provides clarification of the concepts of alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence and Commission opinions. This document replaces s.5 of Managing Natura 2000 Sites: The Provisions of Art.6 of the ''Habitats'' Directive 92/43/EEC.

UK Guidance Despite the length of time since the commencement of the Habitats Regulations, there has been little in the way of guidance issued by the UK Government, which as this paper will go on to demonstrate has led to a myriad of different approaches to the process of screening and appropriate assessment. The only general[26] guidance documents to be found on the CLG or Department for Transport (DfT) web sites are the CLG's: Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents, published

[24] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf /natura_2000_assess_en.pdf. Written by the Impacts Assessment Unit, School of Planning, Oxford Brookes University.

[25] January 2007.

[26] But see Defra's Policy Guidance *Coastal Squeeze Implications for Flood Management The requirements of the European Birds and Habitats Directives*, September 2005.

in August 2006, and ODPM Circular 06/2005, Biodiversity and Geological Conservation—Statutory Obligations and their Impact within the Planning System, published in August 2005[27] alongside Planning Policy Statement (PPS) 9: Biodiversity and Geological Conservation[28].

The first document breaks the appropriate assessment process into three parts—likely significant effects, appropriate assessment and ascertaining the effects on site integrity, and mitigation and alternative solutions and IROPI—stating what must be achieved in each part of the process, but it lacks any great detail in describing the output of each part, and fails to provide any guidance at all on methodology. It does, however, seek to mandate its own approach to setting out an appropriate assessment and comments that for the purpose of appropriate assessment of land use plans, it would be inappropriate and impracticable to assess the effects in the degree of detail that would normally be required for the EIA of a project. More helpful is that the guidance covers the relationship of appropriate assessment with sustainability appraisals, public consultation requirements and the process for submission of the completed appropriate assessment to the Secretary of State.

In summary the CLG guidance sets out the CLG's expectations of the Regional Planning Body (RPB) or LPA in terms of layout of the appropriate assessment, consultation, and the submission process, but is silent on issues of methodology. While it is a document which an RPB or LPA should aim to comply with, it gives little in the way of practical guidance. It indicates that in the case of RSSs and LDDs best practice will be to scope out whether an appropriate assessment is required at the Sustainability Scoping Stage and to undertake the appropriate assessment alongside the development of options prior to the formal consultation stage. To date, at least in the case of those RSSs reviewed for the purpose of this paper, time has not allowed this.

The 2005 ODPM circular sets out and comments on the main requirements of the Habitats Regulations in relation to new plans and projects, before turning to the review of outstanding planning permissions and deemed planning permissions, and restrictions on permitted development. Its section on development plans has been superseded given the subsequent judgment of the ECJ. Usefully it provides clarity as to current Government policy on the application of the Habitats Regulations to emerging European sites:

The regulations apply as a matter of law to:

- designated Special Areas of Conservation;
- candidate Special Areas of Conservation (cSACs); and
- classified Special Protection Areas.

But the Circular explains that as a matter of policy the Government has chosen to apply the procedures relating to appropriate assessment to Ramsar sites[29] and to potential SPAs, even though they are not European sites as a matter of law.

In addition proposed SACs (pSACs), which are cSACs before they are submitted to the European Commission, are covered in this way:

[27] *Government Circular: Biodiversity and Geological Conservation—Statutory Obligations and their Impact within the Planning System*, ODPM Circular 06/2005 (also Defra Circular 01/2005), http://www.communities.gov.uk/pub/319/Circular0605BiodiversityandGeologicalConservationStatutoryObligationsandTheirImm_id1144319.pdf.

[28] ODPM, August 2005, replacing *PPG9 on Nature Conservation* published in October 1994.

[29] Wetlands designated for inclusion in a List of Wetlands of International Importance under the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat.

> ''Prior to its submission to the European Commission as a cSAC, a proposed SAC (pSAC) is subject to wide consultation. At that stage it is not a European site and the Habitats Regulations do not apply as a matter of law or as a matter of policy. Nevertheless, local planning authorities should take note of this potential designation in their consideration of any planning applications that may affect the site.''.

Although this may have little practical effect given that, as the Circular explains, there remain very few cSACs awaiting decisions regarding their designation as SACs, the Circular appears to conflict with para.6 of PPS9 so far as the treatment of cSACs is concerned, which includes this statement:

> ''The Habitats Regulations do not provide statutory protection for potential Special Protection Areas (pSPAs) or to candidate Special Areas of Conservation (cSACs) before they have been agreed with the European Commission. For the purpose of considering development proposals affecting them, as a matter of policy, the government wishes pSPAs and cSACs included in a list sent to the European Commission, to be considered in the same way as if they had already been classified or designated.''

Guidance has also been issued by the Northern Ireland Environment and Heritage Service in the form of its September 2002 document: The Habitats Regulations: A Guide for Competent Authorities. This document does not seek to provide methodological guidance, but provides a general introduction to the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995, along with explanation of the key concepts. The document is well written and, despite being produced for use in a separate jurisdiction, provides one of the best general introductions to the subject.

Natural England (formerly English Nature) and other Public Body Guidance The current Natural England guidance is contained in a series of Guidance Notes (Nos 1–4 and 6) published between 1997 and 2001. The notes are largely confined to a factual treatment of the Regulations, and are out of date insofar as they make repeated references to detailed guidance contained in the now withdrawn PPG 9.

Natural England guidance for its own staff, The Assessment of Regional Spatial Strategies and Sub-Regional Strategies Under the Provisions of the Habitats Regulations[30], exists in draft form and has already been used by some authorities, notably the authors of the Habitats Directive Assessment for the East of England Plan (see below). The document is not generally available, and Natural England declined to make a copy available for consideration in the course of writing this paper, possibly because of the criticisms that have been levelled at that document by those reviewing the Habitats Directive Assessment for the East of England Plan on behalf of the Regional Assembly.

Other detailed guidance is available from Natural England in the form of A Practical Toolkit for Assessing Cumulative Effects of Spatial Plans and Development Projects on Biodiversity in England[31]. This guidance is clearly of a technical nature and is not further discussed here.

The Environment Agency has produced Habitats Directive: Work Instruction Taking a New Agency Permission/Activity through the Regulations (January 2003) along with case studies illustrating application of the Habitats Directive and Habitats Regulations.

[30] David Tyldesley and Associates (August 2006), Draft Guidance, report for English Nature.
[31] English Nature, 2006. ISSN 0967-876-X. Written by Land Use Consultants.

There is also a useful guidance document by Scottish Natural Heritage, Cumulative Effect of Windfarms[32], which provides guidance on the issue of cumulative effects of windfarms but which is also of some help in the context of other development.

Independent Guidance One of the most comprehensive guidance documents available is Appropriate Assessment of Plans, published by Scott Wilson et al in September 2006. This guidance note was produced jointly by four consultancies in the (then) absence of any official guidance on the appropriate assessment of land use plans, but is also of use in the appropriate assessment of projects.

The guidance covers the background to the Regulations and the transposition issues involving land use plans before discussing the appropriate assessment process. The appropriate assessment process is first dealt with in outline and issues such as who performs the assessment and its links with SEA and SA are introduced. Finally the assessment process is taken stepwise and analysed in a significant level of detail with the use of diagrams, examples and case law as appropriate. The document ends with a comprehensive bibliography.

Overall the guidance is the most thorough available but can appear to be over-complex. In particular, splitting the assessment process into more stages than any other guidance and the overuse of complex graphics detract from the user-friendliness of the document. Nevertheless this remains the most comprehensive document available and, with a little prior knowledge of the subject, provides the reader with detailed and accessible methodological guidance.

Methodology

One of the first issues likely to be encountered by a developer or competent authority is how to carry out an appropriate assessment at all. In attempting to answer this question the enquirer will discover that the guidance published by the European Commission, UK Government departments and agencies, nature conservation bodies and environmental consultancies varies greatly in a number of respects.

As discussed in the context of the definition of appropriate assessment, the methodologies recommended by the various bodies issuing guidance in this area vary significantly at a superficial level. For example the main guidance to date from CLG[33] adopts a three stage methodology (and this includes the screening stage), the Commission Guidance[34] proposes a four stage process (five if decision-making is included), and the leading independent guidance[35] espouses a six stage process.

Despite these superficial differences the guidance notes all lead the assessor through a broadly similar set of steps:

- screening for likely significant effect;
- gathering data on the project;
- gathering data on other projects;

[32] Version 2, 13.04.05.

[33] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* DCLG, August 2006, http://www.communities.gov.uk/pub/353/ PlanningfortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceForRegionals_id1502353.pdf.

[34] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/ pdf/ natura_2000_assess_en.pdf.

[35] *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006, http://www.levett-therivel.Fsworld. co.uk/AA.pdf.

- gathering data on the site and its conservation objectives;
- identification of potential impacts on the site;
- identification of mitigating measures; and
- assessment of the potential impacts,
  and, where necessary,
- identification of alternative solutions; and
- IROPI.

What is the best practice is far from clear, but the best thought out guidance appears to be that issued by Scott Wilson *et al*[36] which recommends a ''bottom up approach'' to gathering data for the appropriate assessment, starting with the site data and progressing to the details of the plan. In following such a process the authors argue that the investigation is more likely to focus on the site and its conservation objectives, rather than the plan or project and its aims. The approach is therefore more in keeping with the spirit and purpose of the Habitats Directive. An analysis would begin with the reasons for the site's classification/designation (species or habitats), identify the features of the site which support its integrity, then identify the factors that affect the supporting features. The output from this analysis would be a simple table showing the site, its qualifying features and key conditions to support its integrity. The subsequent collection of data on the plan or project and its relevant features will then be performed with prior knowledge of the site's key conditions, allowing a further level of screening of alternative solutions to take place.

The recent CLG guidance to RPBs and LPAs, although not binding, attempts to mandate its approach to the appropriate assessment of land use plans. In time it therefore seems likely that future land use plans will achieve a greater degree of standardisation.

In the projects field there is probably less need for standardisation due to the greater inherent variation in the subject matter of the assessment.

Appendix 2 reproduces Fig.1 of ODPM Circular 06/2005 and Defra Circular 01/2005, August 16, 2005, an often referred to flow diagram of the main procedural steps.

Screening: Likelihood of Significant Effects

As only those proposals which are likely to have a significant effect on a European site require appropriate assessment, any proposal must first be screened for the likelihood of such an effect. This screening process may be a trivial exercise for small or simple projects, where it can be seen from the outset that the likelihood of a significant effect is remote. Conversely, for some major projects it may be possible to conclude that the likelihood of significant effects is so high that significant effect should simply be assumed. In many cases, however, the application of the precautionary principle requires a careful analysis.

To determine which European sites a plan or project could affect, the following approach has been suggested[37]. The outcome is a 'long list' of sites that could possibly be affected:

- If the site is within the planning authority's boundary: include it.
- If the site is within the boundary of a neighbouring authority: consult the authority, the Environment Agency or Natural England, as appropriate.

[36] *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006, at page 20, http://www.levett-therivel.Fsworld.co.uk/AA.pdf.
[37] See above fn.36, at p.18.

- If in doubt, request a formal screening opinion from English Nature.

Once the list of possible affected sites has been generated, European Commission guidance[38] suggests a four-stage methodology for carrying out the screening exercise under the following headings:

- Management of the site.
- Description of the project or plan.
- Characteristics of the site.
- Assessment of the significance of the effects.

The first step is a test of whether the proposal is ''directly connected with the management of the site'' (see above).

The second step involves the identification of those elements of the proposal which (alone or in combination with other plans or projects) have the potential significantly to affect a European site, and the pathways (water abstraction, noise, emissions, etc.) by which the effects may take place. For many projects these may be significantly different during the construction and operation phases. Care will be required to identify the possibility of indirect or cumulative impacts at this point.

The third step requires assessment of the potential impacts on the site, *i.e.* the type and magnitude of the potential effect, and may require access to a variety of source data on the site (site surveys, data on species, etc.).

The final stage, assessment of the significance of the impacts, might be carried out by consultation with the relevant nature conservation body in simple cases. More commonly it involves quantification using one or more key indicators (*e.g.* percentage of habitat lost, or population density). It should be stressed that the criterion to be used in the test is ''significant effect'' and not ''adverse effect'' for which it has often been substituted erroneously[39].

What amounts to a ''significant effect'' must be tested objectively, within the context of the individual SAC and its conservation objectives[40], and in accordance with the precautionary principle established by *Waddenzee*.

The outcome of the screening assessment will be one of the following statements:

- It is not likely that the proposal will have a significant effect on the site;
- It is likely that the proposal will have a significant effect on the site; or
- It has not been determined whether or not the proposal will have a significant effect on the site.

In either of the last two cases an appropriate assessment will then be required.

The screening assessment should be documented by the competent authority; this is especially important where it concludes that there is no likelihood of a significant effect as the document will be required to demonstrate that the precautionary principle has been satisfactorily applied.

[38] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/ pdf/ natura_2000_assess_en.pdf.

[39] For examples see: *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006 at page 8, http://www.levett-therivel.Fsworld.co.uk/AA.pdf.

[40] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.4.1, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

Although mitigation measures may be conceived before the screening stage of the plan or project, it is of paramount importance that they are *not* factored into the screening assessment[41]. To do so would prevent proper assessment of the proposal's impact by screening out the scheme before an appropriate assessment was started. In addition to an inadequate assessment, such a process would fail to identify and safeguard the mitigating measures required to ensure that the proposal did not have an adverse effect. I return to this subject later, in the context of the Thames Basin Heaths SPA.

Appropriate Assessment: General

Undertaking the appropriate assessment is the responsibility of the relevant competent authority, but the assessment draws on a wealth of data provided by a variety of parties. Much of the data must be provided by the promoter of a proposal but the opinions of the relevant nature conservation bodies, other statutory consultees and any discretionary consultees approached by the parties will need to be taken into account.

The competent authority may be a central, regional or local decision-making body, or a court[42], and the definition in the Habitats Regulations (Regulation 6) includes statutory undertakers such as port and harbour authorities.

As noted above, European Commission guidance[43] identifies a four stage methodology (detailed below) for carrying out the appropriate assessment; others have described different processes[44], but all cover broadly the same steps.

The appropriate assessment process is invariably described as iterative in that, after completing the assessment of the first proposal, alternative solutions may be sought and assessed. In practice, however, it is likely that a range of feasible solutions will be taken through the appropriate assessment together and, as it becomes clear which give the best outcome, most of the solutions will be discontinued. To this effect the CLG guidance[45] on the appropriate assessment of land use plans states that the appropriate assessment stages ''should be applied to each plan option which is considered suitable to take forward to the submission stage''.

Other Commission guidance[46] emphasises that assessments must be carried out at the correct stage of the process, *i.e.* before the decision is made, and must not be added to after the decision is made. Whilst this is obvious for those proposals that are approved after an appropriate assessment it is far from clear that this happens when a proposal is rejected, *e.g.* in the case of the Dibden Bay container terminal in 2004, where no appropriate assessment was performed as the Secretary of State for Transport had no intention of approving the project even though the rejection was substantially on environmental and nature conservation grounds.

[41] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, at section 2.6, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_ articles/art6/pdf/natura_2000_assess_en.pdf.

[42] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[43] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/ pdf/natura_2000_assess_en.pdf.

[44] For example a six-stage process is described in *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006, http://www.levett-therivel.Fsworld.co.uk/AA.pdf.

[45] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents*, DCLG, August 2006, at p9, http://www.communities.gov.uk/pub/ 353/PlanningfortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceForRegionals_id1502353.pdf.

[46] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.5.1, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

Where an appropriate assessment is satisfactorily completed no detailed record of the assessment of the discontinued options is required. Clearly where a proposal is progressed under an IROPI justification it will have to be shown that no other suitable alternative solutions existed, and in these circumstances each alternative solution considered and the reasons for ruling it out should be clearly documented.

Appropriate Assessment—Step One: Information Gathering

A comprehensive portfolio of information will be required for the assessment, and any information not already available may need to be commissioned; for the site data this is likely to involve field studies.

Where a Strategic Environmental Assessment (SEA) or Sustainability Appraisal (SA) is required for a plan or project the basic information required for an appropriate assessment will already have been collected.

As for the screening assessment the information required falls into two categories (proposal and site)[47], but for the appropriate assessment more detail is required. The Commission guidance suggests the following base set is obtained before commencing the assessment[48]:

Information about the project or plan:

- Full characteristics of the project or plan which may affect the site.
- The total range or area the plan will cover.
- Size and other specifications of the project.
- The characteristics of existing, proposed or other approved projects or plans which may cause interactive or cumulative impacts with the project being assessed and which may affect the site.
- Planned or contemplated nature conservation initiatives likely to affect the status of the site in the future.
- The relationship (*e.g.* key distances, etc.) between the project or plan and the Natura 2000 site.
- The information requirements (*e.g.* Environmental Impact Assessment / SEA) of the authorisation body or agency.

Information about the site:

- The reasons for the designation of the Natura 2000 site (all Annex I habitats and Annex II species at the Site mist be identified in the assessment data).[49]
- The conservation objectives of the site and the factors that contribute to the conservation value of the site.
- The conservation status of the site (favourable or otherwise).
- The existing baseline condition of the site.
- The key attributes of any Annex I habitats or Annex II species on the site.

[47] The Scott Wilson guidance would include a third category: other plans / projects that could have in-combination effects. *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006, http://www.levett-therivel. Fsworld.co.uk/AA.pdf.

[48] *Assessment of plans and projects significantly affecting Natura 2000 sites,* European Commission, November 2001, at s.3.2.2, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/ specific_articles/art6/pdf/natura_2000_assess_en.pdf.

[49] See above fn.48, at s.4.5.3.

- The physical and chemical composition of the site.
- The dynamics of the habitats, species and their ecology.
- Those aspects of the site that are sensitive to change.
- The key structural and functional relationships that create and maintain the site's integrity.
- The seasonal influences on the key Annex I habitats or Annex II species on the site.
- Other conservation issues relevant to the site, including likely future natural changes taking place.

As noted above, Scott Wilson recommends a ''bottom-up approach'' to gathering data for the appropriate assessment[50], starting with the site data and progressing to the details of the plan or project concerned.

Although data on other plans and projects likely to have an in-combination effect is required at this stage there is little in the way of guidance on how this may be achieved other than the guidance document by Scottish Natural Heritage, Cumulative Effect of Windfarms. Clearly the competent authority will have information on other proposals under its jurisdiction, but this task could be significantly more difficult for a developer. However the data is gathered, the requirement on the competent authority will normally be to take account of not only ongoing activities and plans, but also those which are only partly implemented and those which are the subject of a current application.[51] Logically the requirement should extend to any plan or project of which the competent authority is aware, even if an application has not already been made, though in such circumstances the amount of data available to support the assessment of any in-combination effect may be severely limited. Where other plans are in development it may also be necessary to consider the various open options.[52]

It is clear that the consideration of in-combination effects could quickly become complicated. One example of the difficulty presented to developers is at the Thames Basin Heaths SPA (see below) where Natural England guidance suggests that plans to build 40,000 dwellings should all be considered in combination.

Appropriate Assessment—Step Two: Impact Prediction

The analysis of whether a proposal could affect a site's integrity should be carried out in a systematic manner. The search is effectively one for pathways by which the proposed development's attributes can be transmitted to the key features supporting the integrity of the site. The integrity of the site involves its ecological functions; and that the site is described as having a high degree of integrity where its capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required[53].

Where effects are found Commission guidance[54] suggests grouping them into categories, *e.g.:*

[50] *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006 at p.20, http://www.levett-therivel. Fsworld.co.uk/AA.pdf.

[51] *Government Circular: Biodiversity and Geological Conservation—Statutory Obligations and their Impact within the Planning System*, ODPM Circular 06/2005, (also Defra Circular 01/2005), http://www.communities.gov.uk/ pub/319/Circular0605BiodiversityandGeologicalConservationStatutory ObligationsandTheirImm_id1144319.pdf.

[52] *Appropriate Assessment of Plans*, Scott Wilson *et al*, September 2006 at p.26, http://www.levett-therivel.Fsworld.co.uk/AA.pdf.

[53] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6, http://ec.europa.eu/environment/ nature/nature_conservation/ eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[54] *Assessment of plans and projects significantly affecting Natura 2000 sites,* European Commission, November 2001, at s.3.2.3, http://ec.europa.eu/ environment/nature/nature_conservation/eu_nature_legislation/ specific_articles/art6/pdf/natura_2000_assess_en.pdf.

- Short or Long Term.
- Direct or Indirect.
- Construction, Operational or Decommissioning.
- Isolated, Interactive or Cumulative.

The guidance also suggests a range of impact prediction tools and methods:

- Direct measurements, *e.g.* of areas of habitat lost or affected.
- Flow charts and systems diagrams—used to identify chains of impacts resulting from direct and indirect impacts. Systems diagrams are more flexible than networks in illustrating interrelationships and process pathways.
- Quantitative predictive models—predictions based on data and assumptions about the force and direction of impacts. Models can extrapolate predictions that are consistent with past and present data.
- Geographical information systems—to produce models of spatial relationships, such as constraint overlays, or to map sensitive areas and locations of habitat loss.
- Expert opinion and judgment.

Appropriate Assessment—Step Three: Conservation Objectives

Once the likely impacts have been determined, their effect on the conservation status of the site can be predicted. This may be as simple as comparing the predicted effects against the listed conservation objectives. Again the precautionary principle must be applied, and the absence of an adverse effect on each of the site's conservation objectives must be positively concluded.

The decision as to whether the site is adversely affected should focus on, and be limited to, the site's conservation objectives. So if an impact is only visual, or only non-listed species or habitats are involved, there can be no impact for the purposes of Art.6(3). On the other hand the site must be assessed in isolation; the conservation status of other sites is irrelevant.[55]

By analogy with Directive 85/337/EC, the assessment must also take account of the sensitivity of the site.[56]

It is possible that different species present may have conflicting interests, and therefore in some cases prioritisation may be required.[57]

The Commission guidance[58] recommends that the outcome of this stage be recorded in a conservation objectives checklist, *e.g.* does the proposal have the potential adversely to affect the site's conservation objectives by:

- causing delays in progress towards achieving the conservation objectives of the site?
- interrupting progress towards achieving the conservation objectives of the site?
- disrupting those factors that help to maintain the favourable conditions of the site?

[55] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[56] *Commission of the European Communities v. Ireland*, C-392/96, [1999] ECR I-05901.

[57] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, at s.4.5.3, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/ specific_articles/art6/pdf/natura_2000_assess_en.pdf.

[58] See above fn.57, at s.3.2.4.

- interfering with the balance, distribution and density of key species that are the indicators of the favourable condition of the site?

And does the project or plan have the potential adversely to affect other indicators by:

- causing changes to the vital defining aspects (*e.g.* nutrient balance) that determine how the site functions as a habitat or ecosystem?
- changing the dynamics of the relationships (between, for example, soil and water or plants and animals) that define the structure and/or function of the site?
- interfering with predicted or expected natural changes to the site (such as water dynamics or chemical composition)?
- reducing the area of key habitats?
- reducing the population of key species?
- changing the balance between key species?
- reducing diversity of the site?
- resulting in disturbance that could affect population size or density or the balance between key species?
- resulting in fragmentation?
- resulting in loss or reduction of key features (*e.g.* tree cover, tidal exposure, annual flooding, etc.)?

Where adverse effects are evident, or it cannot be demonstrated that the site's conservation objectives will not be adversely affected, mitigation measures will be required.

Appropriate Assessment—Step Four: Mitigation Measures

The final stage of the process is to apply any necessary mitigation measures. ''Mitigation'' in this context refers to a hierarchy of measures[59] including:

- avoidance of the impact at source;
- reduction of the impact at source;
- abatement of the impact at the site; and
- abatement of the impact at the receptor.

Care is required that the meaning of mitigation is understood by those involved. Only measures which work to avoid possible damage to the European site can be classed as mitigating. Other measures to avoid the loss of species and habitats, *e.g.* by creating new habitats, may be compensatory measures and, if so, can only be taken into account under Regulation 53 following an IROPI justification. Although this distinction seems obvious there are cases where compensatory measures have been proposed as mitigation[60].

Once the mitigation measures for the proposal are fully developed it will be necessary to ensure that they themselves have not brought about an adverse effect on the integrity of the Site (either alone

[59] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, at s.2.3, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_ articles/art6/pdf/natura_2000_assess_en.pdf.

[60] The Dibden Bay Container Terminal appropriate assessment was fundamentally flawed in this respect; see Inspector's Report ss.36.176–36.184.

or in combination with other proposals). To this effect it will be necessary to repeat some of the appropriate assessment steps[61].

Appropriate Assessment—Outcome

The outcome of the appropriate assessment needs to be documented, and must be sent to the appropriate nature conservation body for consultation. In England the appropriate nature conservation body will always be Natural England (formerly English Nature). The corresponding body in Wales is the Countryside Council for Wales. Following consultation, if the appropriate assessment concludes that a proposal will not have an adverse effect on the integrity of the European site, the proposal may be approved by the competent authority.

Although the outcome of successful appropriate assessments must be documented, earlier drafts of appropriate assessments examining discontinued options need not be documented in the same detail as the final option[62].

Where the appropriate assessment concludes that there are (or may be) residual adverse effects on the integrity of the European site the proposal can only be approved after: (a) investigation of other solutions which will not have an adverse impact, as required by Art.6(4) and reg.49; (b) completing the test of imperative reasons of overriding public interest (IROPI) in Art.6(4) and reg.49; and (c) the provision of adequate compensatory measures under Art.6(4) and reg.53.

Although there is no requirement to consult the public on an assessment under the Habitats Regulations, projects requiring an Environmental Impact Assessment must be subjected to public consultation[63]. CLG guidance[64] on appropriate assessment of Regional Spatial Strategies requires the RPB to "make the appropriate assessment findings available to the public. These should be consulted upon as the RBP see appropriate." It seems likely, therefore, that most proposals requiring an appropriate assessment will be the subject of some form of public consultation, although it might be noted that there is no requirement for the completed appropriate assessment of a land use plan to be published[65].

Alternative Solutions

If an appropriate assessment concludes that an adverse effect on the European site is possible, a search must be made for alternatives solutions to achieve the same aim as the original proposal. The alternative solutions must, in turn, be subjected to appropriate assessment until either an acceptable solution is found or all alternatives are exhausted. At this stage only alternative solutions to meet the proposal's immediate aim need be examined, i.e. a project to increase container capacity at Southampton need not consider alternatives elsewhere[66].

[61] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* DCLG, August 2006, at p.12, http://www.communities.gov.uk/pub /353/PlanningfortheProtectionofEuropeanSitesAppropriateAssessment GuidanceForRegionals_id1502353.pdf.

[62] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, at s.2.6, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_ articles/art6/pdf/natura_2000_assess_en.pdf.

[63] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[64] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* DCLG, August 2006, at p.14, http://www.communities.gov.uk/pub /353/PlanningfortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceFor Regionals_id1502353.pdf.

[65] *Towards Appropriate Assessment of Plans*, Therival R., Town & Country Planning, October 2006, pp.273–5.

[66] Dibden Bay Container Terminal Inspector's Report, at para.36.655.

Clearly, where a suitable alternative is found it should be substituted for the original proposal and approval may be given by the relevant competent authority. It is only in the absence of alternative solutions that a proposal having an adverse effect on a European site may then be taken through the process defined in Art.6(4) and reg.49. This is illustrated by the recent decision of the ECJ in *EC v Portugal*[67].

EC v Portugal (2006) In this case the Member State built the A2 motorway linking Lisbon with the Algarve region through the Castro Verde SPA, following an assessment showing that the motorway would have a very significant negative impact on 17 species of wild birds listed in Annex I to the Birds Directive. The Commission brought the case on the ground that the Portuguese authorities should have considered approving the scheme under Ar.6(4) of the Habitats Directive but that they had failed to consider all of the feasible alternative routes before authorising the construction.

The Portuguese government sought to argue that the Commission needed to show that the alternative routes it argued had not been assessed were not only theoretically viable but that they would cause less harm to the environment and fewer adverse effects than the adopted scheme.

In delivering a simple judgement the Court, applying the precautionary principle and thus a rigorous and strict approach, held that the State's failure to assess alternative proposals in the area proposed by the Commission was a breach of the Habitats Directive as it was not immediately clear that these alternatives were not capable of amounting to alternative solutions for the purposes of Art.6(4) of the directive.

As a general comment the Court also remarked that Art.6(4) ''must, as a derogation from the criterion for authorisation laid down in the second sentence of article 6(3), be interpreted strictly''.

EC v Austria (2006) The question of alternatives was also a feature of the recent case *Commission v Austria* (2006). There, the Advocate General J. Kokott remarked in her Opinion of October 2005:[68]

> ''The Austrian Government concedes that the road line had already been set definitively, thus precluding an examination of alternatives, when, in 2000 and 2002, the assessment of the implications for the site pursuant to Art. 6(3) of the Habitats Directive was submitted and was the subject of a decision by the competent authorities. However, the Austrian Government maintains that all the alternatives to be considered had already been examined, and rightly discarded, in 1994 as part of a general examination of the *environmental impact* in accordance with the EIA Directive.
>
> However, the Austrian Government overlooks the fact that the first sentence of Art. 6(4) of the Habitats Directive permits approval of a project only in the *absence* of alternative solutions, whereas the examination of alternatives under the EIA Directive entails no restrictions on the choice of alternatives but requires only an *account* of the choice made and the reasons for it.
>
> Under Art.5(1) of, and point 2 of Annex III to, the EIA Directive, the developer must, where necessary, supply in an appropriate form an outline of the main alternatives studied by him and

[67] *Commission of the European Communities v Portuguese Republic*, C-239/04, [2006] E.C.R. I-10183.

[68] Although it should be noted that the Court eventually held that for temporal reasons relating to Austria's accession to the European Union, the obligations of the Habitats Directive did not bind Austria and that the project concerned was not subject to the requirements laid down in the Directive.

> an indication of the main reasons for his choice, taking into account the environmental effects. However, there is no obligation concerning weighing the environmental effects against other considerations.
>
> By contrast, Art.6(4) of the Habitats Directive permits projects to be approved only if no alternative is available. Although the Austrian Government is right that not every theoretically imaginable alternative stands in the way of project approval, the examination of alternatives cannot be confined—as in the case of an EIA—to "the main alternatives studied by the developer" (point 2 of Annex III to the EIA Directive). That would not guarantee the absence of alternatives as required by Art.6(4) of the Habitats Directive. Consequently, the approving authority must ensure that at least those alternatives are examined that are not obviously—beyond reasonable doubt—out of the question. In selecting the alternative, the decisive factor is whether imperative reasons of overriding public interest demand the implementation of *this* alternative or whether they can also be met by *another* alternative.
>
> It is apparent from the documents submitted by the Austrian Government, however, that an allegedly less damaging alternative was not even considered in the procedure."

Decisions on recent proposals have led to the possibility that there are in fact two different tests in operation for alternative solutions to a proposed plan or project, one applying at the appropriate assessment stage and a second, stricter test in operation at the IROPI stage.

Differences between Proposal and IROPI Stages In the first instance a promoter must, where his plan or project is assessed as having a negative effect on a site, provide the competent authority with alternative solutions. This requirement relates only to the particular proposal under assessment, and requires only a limited search for alternative solutions to the immediate proposal. The requirement is best illustrated by reference to the Dibden Bay proposal, where the developer had fulfilled his obligation by searching for other alternative solutions to provide the port of Southampton with increased container capacity.[69] (In the Dibden Bay case the assessment of alternative solutions in the Southampton area only was also sufficient to meet the developer's EIA obligations under Sch.3 to the Harbours Act 1964.)

The second test is part of the need test under IROPI (see below) and appears to require a much wider range of alternatives to be explored. In fact all options able to satisfy the national need must be examined. To continue with the Dibden Bay example, the Secretary of State stated in his decision letter that, in making a decision on IROPI, he must have regard to all other options to satisfy the national demand for container capacity.[70] Commission guidance states:[71]

> "Competent authorities will at that stage consider a range of solutions. These may include those alternative solutions already considered by the proponent of a project or plan, but will also include other alternative solutions that may be suggested by other stakeholders. It must be recognised, therefore, that authorities may determine that further alternative solutions exist even where the proponent of a project or plan has demonstrated that a range of alternative

[69] Dibden Bay Inquiry Inspector's Report at para.36.192.

[70] Dibden Bay Decision Letter, Secretary of State for Transport, 20 April 2004, at para.67—see Appendix 3.

[71] *Assessment of plans and projects significantly affecting Natura 2000 sites*, European Commission, November 2001, at s.2.6, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_ articles/art6/pdf/natura_2000_assess_en.pdf.

> solutions had been examined at the design stage. In reporting the assessment of alternative solutions, it will be important to record all alternative solutions considered as well as their relative impacts on a Natura 2000 site.''

The difference in the tests clearly arises because any IROPI justification must be founded on the national need, decided by the Secretary of State, and justifiable to the European Commission, whereas a promoter's duty is only to find an acceptable solution to his self-defined need.

Dibden Bay demonstrates that in practice only one of the two tests has any meaningful application. The first test only operates to allow a proposal into the IROPI procedure where the same facts will be subject to the second test. In practice therefore it is the second test that a promoter must satisfy in order to progress his project. This raises the question of how a developer can ascertain the national need for his scheme, a question which to date has been at best difficult to address but, with the proposal for the creation of National Infrastructure Policy Statements for a range of key infrastructure sectors, should be easier for future developments in those sectors.

The requirement to consider the full range of alternatives at the earlier stage was underlined by the publication of guidance[72] by the European Commission in January 2007 which states that:

> ''competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. . . ... Such solutions should normally already have been identified within the framework of the initial assessment carried our under Article 6(3). They could involve alternative locations or routes, different scales of designs of development, or alternative processes.''

Alternative Solutions: the Iteration Paradox Most if not all of the available guidance describes the appropriate assessment process as iterative: i.e. if, after assessing the preferred solution, a negative impact remains, a second solution is assessed. Such a methodology has a number of disadvantages:

- It fails to identify the best practicable environmental option.
- It is inherently wasteful, as steps must be repeated.
- The outcome is uncertain—will there be an acceptable solution?
- The length of the assessment process is uncertain.

In practice of course it is highly unlikely that a developer will follow such an iterative process. Developers (and competent authorities) are likely to take all of the feasible options into an appropriate assessment screening exercise, discarding the less favourable options as the study develops. The final product of such a process would be an appropriate assessment which reflects only the final solution which, through a process of attrition, has become the preferred option. To follow such a comprehensive assessment has a number of advantages:

- It identifies the best outcome for the environment.
- The length of the process is easily estimated.
- Its parallel nature avoids repetition.

The braver of the guidance notes do suggest that alternatives be considered from the start, but then go on regardless to describe an iterative process. It would be preferable to have methodology written as it is intended to be implemented.

[72] *Guidance document on Article 6(4) of the ''Habitats Directive'' 92/43/EEC*, European Commission, Jan 2007.

IROPI

As is only right for a procedure that allows departure from an important environmental protection measure, the IROPI test is to be interpreted strictly. The grounds on which derogation may be sought are, however, surprisingly flexible, and include social and economic factors in most cases.

But the grounds allowed do depend on the type of species and habitats involved; where priority species or habitats are concerned the only interests allowed to constitute IROPI are those of human health, public safety, beneficial consequences of primary importance for the environment, or other grounds further to an opinion from the Commission. It is the *existence* of the priority species (or habitat) at the site, and not any anticipated impact on it, that invokes the restriction on IROPI.

Clearly any ''imperative reason'' for proceeding with such a proposal must be associated with a justifiable need for the scheme that has been proposed. In this case, need must be considered in the wider, national context, and is inherently linked with both the demand for the scheme and the availability of alternative solutions. So, in the case of a container terminal in Southampton, justifying IROPI involves establishing that there is a national need for the additional capacity and, in the national context, showing that there are no alternative solutions available.

In the UK an IROPI justification must be referred to the Secretary of State for determination before a competent authority may approve the proposed scheme.

In January 2007 the European Commission published guidance[73] on Art.6(4) in an effort to clarify some of the concepts involved in IROPI. The document describes a two-stage process under which the competent authority must first establish that the reasons of public interest qualify as overriding, then go on to strike a balance between the overriding interest and the conservation objectives of the site. The approach seems reasonable and it remains to see what, if any, effect it will have on IROPI decisions.

One complication in the application of IROPI is the complicated and growing body of case law that determines how sites at varying stages in the adoption/designation/classification process are treated.

Different Treatment of SPAs, pSPAs, SACs, cSACs and undesignated sites How a site of Community importance is regulated depends on its status. So-called ''potential SPAs'' (pSPAs) and ''candidate SACs'' (cSACs) are not referred to in the Directive, but the status of sites of Community interest prior to their adoption by the Commission is addressed in the Habitats Regulations, where they are included in the definition of European sites. Such sites are therefore afforded the same level of protection as other European sites in the UK.

There are a number of interesting cases involving the classification of SPAs, SACs and the protection of sites which should have been classified but were not.

Turning first to the cases on SPAs:

Santona Marshes (1993) In *Santona Marshes*[74] the Spanish government had failed to classify the Santona Marshes area as a SPA, and was further accused of failing to protect the marshes as required

[73] *Guidance document on Article 6(4) of the ''Habitats Directive'' 92/43/EEC*, European Commission, Jan 2007.
[74] *Commission of the European Communities v Kingdom of Spain*, C-355/90, [1993] E.C.R. I-04221.

by the Birds Directive. The Government sought to argue that if, in breach of the Birds Directive, it had failed to classify the area, it could not also be held to have breached an obligation in the Directive to protect a classified area. The Court found, however, that where such classification is not made the provisions of Art.4(4) shall apply nevertheless:

> ''The objectives of protection set out in the directive, as expressed in the ninth recital in its preamble, could not be achieved if Member States had to comply with the obligations arising under Article 4(4) only in cases where a special protection area had previously been established.''

Therefore where, in breach of the Birds Directive, a site is not classified as a SPA, it is nevertheless afforded the same protection under Art.4(4) as a classified site.

Basses Corbieres (2000) Article 7 of the Habitats Directive applies the provisions of Art.6(2)–(4) to SPAs in place of the stricter first sentence of Art.4(4) of the Birds Directive, as from the date of implementation of the Habitats Directive or the date of classification by a Member State under the Birds Directive, where the latter date is later. In *Basses Corbieres,*[75] which concerned France's failure to classify the Basses Corbieres site as a Special Protection Area, the ECJ was asked to decide whether or not the same applied to sites protected as a result of the *Santona Marshes* decision.

The Court decided that the wording of Art.7 (of the Habitats Directive) was clear: on a literal interpretation it only applied to classified SPAs. Furthermore, to allow the provisions of Arts 6(3) and 6(4) to apply to sites that had not been classified as SPAs but which should have been would afford an advantage to Member States who were in breach of their obligations under the Directive, and that a State cannot be allowed to derive an advantage from its failure to comply with its Community obligations.

So *Basses Corbieres* established that sites which, in breach of the Birds Directive, are not classified as SPAs are (under *Santona Marshes*) still protected by the general duty in the first sentence of Art.4(4) of the Birds Directive but that it did not then follow that Art.7 of the Habitats Directive made these sites subject to Art.6(2)–(4) of the Habitats Directive and thus the IROPI exception was not available for plans and projects proposed for these sites.

Humber Sea Terminals (2005) In *Humber Sea Terminals*[76] the High Court was asked to determine whether a proposal affecting a site proposed but not yet classified as an SPA could be the subject of an IROPI justification under Art.6(4), or whether following *Basses Corbieres* it remained subject only to the more rigorous duty contained in Art.4(4) of the Birds Directive.

The case concerned Associated British Port's (ABP) proposed development of five new roll-on roll-off berths known as Immingham Outer Harbour. These works required the removal of 22ha of existing mud flats, which the Secretary of State agreed would be likely to have a significant effect on the combined Phase 1 of the Humber Flats Marshes and Coast SPA, already classified as an SPA under the Birds Directive, and Phase 2 of that area, which was being considered for such classification, as well as on a proposed Ramsar site and a possible SAC. The reason why the Secretary of State had

[75] *Commission of the European Communities v French Republic*, C-374/98, [2000] E.C.R. I-10799.
[76] *Humber Sea Terminals v Secretary of State for Transport*, [2006] Env. L.R. 4.

applied regs 48 and 49 of the Habitats Regulations without differentiation between Phases 1 and 2 of the SPA was because of his policy contained in PPG9 dealing with conservation and planning:

> ''For the purpose of considering development proposals affecting them, potential SPAs and candidate SACs included in the list sent to the European Commission should be treated in the same way as classified SPAs and designated SACs. . . ..Regulations 48, 49 and 54. . . . .apply to classified SPAs, and to SACs from the point where the Commission and the Government agree the site as a Site of Community Importance to be designated as an SAC. They do not apply to potential SPAs or to candidate SACs before they have been agreed with the Commission, but as a matter of policy the Government wishes development proposals affecting them to be considered in the same way as if they had already been classified or designated''[77].

The Court held that *Basses Corbieres* was only to be applied where the failure to classify a site as a SPA was caused by a breach of the State's obligation under the Birds Directive. To treat a State which was diligently protecting sites before their classification as SPAs in the same manner as one which was failing to fulfil its obligations would provide an incentive not to comply. Furthermore, referring back to *Basses Corbieres,* the Court added:

> ''None of the incentives to breach the Directive, which the ECJ wished to prevent, are present in this case, nor are any of the unattractive consequences of allowing the state to take advantage of its breach of the law. . . . . I consider that there is a clear distinction between the way a site is treated for the purposes of PPG9 and of the application of the Habitats Regulations as a matter of policy, and whether a site should have been classified to avoid a breach of Directive obligations. The former involves no allegation of breach, whereas the latter must necessarily do so if *Basses Corbieres* is to be relied on. Unless the claim is made that the Secretary of State is in breach of the Directive, *Basses Corbieres* is of no assistance to the claimant.''.

Sites proposed but not yet classified as SPAs are therefore protected under Art.s 6(2)–6(4) of the Habitats Directive, while sites not classified as SPAs *in breach of the State's obligation under the Birds Directive* are (following *Basses Corbieres*) protected under the stricter provisions of Art.4(4) of the Birds Directive. In the latter case the Member State does not therefore have the benefit of the flexibility contained within Arts 6(3) and particularly 6(4), the most important of which is the IROPI exception.

The case is also of interest because of three other grounds of challenge considered by the Court:

1. It was alleged that the Secretary of State was in breach of his obligations on issuing consent to ensure that the necessary compensation measures were taken, pursuant to reg.53 of the Habitats Regulations. The Court decided that the Regulation did not mean that the measures had to be in place before consent was granted, just the obligation to secure them, which could be done in a number of ways, including his conclusion at the moment of issuing consent that he would acquire land himself or use land under his control to secure the compensation measures at that time. In this case an agreement between ABP and others had been chosen as the way to secure the Secretary of State's duty and it was plain that the agreement would not be bound or even likely to fail to achieve its objectives, i.e. the coherence of Natura 2000. It would, for example, be enforceable by a positive

[77] Para.13 and Annex C7.

injunction by any one of ''plenty of parties who have an interest opposite to that of ABP'', leaving aside the exercise of any relevant statutory powers by the Secretary of State.

2. It was also alleged that contrary to reg.48, the Secretary of State had failed to consider the in-combination effect of the Immingham Outer Harbour project proposed by ABP and the development of Humber Sea Terminal by the claimant. The Secretary of State told the Court that he did not consider the full effects of the claimant's project in the decision on ABP's proposal because it had already been decided that an appropriate assessment was necessary because of the significant effects which the ABP proposal had by itself. He also argued that the purpose of the reference in reg.48 to in-combination effects was to ensure than an appropriate assessment was carried out on those projects which would not by themselves have warranted an appropriate assessment but in combination with others would. There was no evidence of any in-combination effects which were not simply additive and which could not be dealt with by separate compensation measures in the context of the claimant's own project. The Court held:

> ''If an appropriate assessment is being carried out on a site which warrants one because of its standalone effects, it would, in my judgment, be very curious if combination effects had to be ignored and only taken into account for those developments which did not warrant an appropriate assessment by themselves. That would be to introduce a lacuna for which there is no purpose. The trigger for the appropriate assessment does not confine the content of the appropriate assessment which has to be carried out.
>
> There was a certain amount of uncertainty about the use of the words ''in-combination''. It means more than the baseline effect of a permitted but unimplemented previous development. The ABP ES uses ''in-combination'' to cover both additive and interactive losses: the former being simply additional losses; the latter involves a worsening of a loss because it is exacerbated by another effect.
>
> It is for the claimant to show that the Secretary of State did not carry out an appropriate assessment. The Secretary of State is necessarily restricted by the information available and there is no evidence about what the Secretary of State had either from the ABP final appropriate assessment or from the claimant themselves. Certainly there was no evidence that there was any interactive loss which might be increased by the possible effects of ABP and the HST proposal in combination. If there had been it might have been necessary to apportion how any extra compensation was to be dealt with. But in the absence of any such evidence, there is no material upon which it could be concluded that the absence of a full assessment of the HST proposal could affect the compensation due as a result of the Immigration Outer Harbour proposal. Mr Drabble was right to say that if the in-combination effect was simply additive in terms of habitat losses, it would be for the claimant to make appropriate compensation as a result of its own appropriate assessment. Again that would have no material effect upon the decision of the Secretary of State in relation to this application.''.

3. Whether a ''zero option'' had been considered by the Secretary of State as an alternative, as required by reg.49. The Court referred to the European Commission's guidance of 2000 as to the application of Article 6 of the Directive, in which it was said that in examining alternatives which better respected the site's integrity, a zero option should be considered as well as different designs or locations. Whilst the Court acknowledged that the claimants had resiled from their original submission that a zero option had not been considered as an alternative, the Court's subsequent comment on the zero option is interesting:

> ''It is in any event far from clear how it can be an alternative in the sense of that phrase in regulation 49, although the question of whether there are imperative reasons of overriding public interest clearly raises the question of whether it is better to do nothing.''.

Writing about this case Neil King commented[78]:

> ''This decision illustrates how reluctant the courts are, except in the clearest of cases, to accede to what are in essence highly technical arguments about alleged breaches of the requirements of the EIA, Habitats and Birds Directives and their associated regulations. What the Court will examine is the substance of the process that has been undertaken in relation to the assessment of the likely significant effects of the project. If there has been substantial compliance with those requirements, then the court is unlikely to intervene.''

In other words, this and other cases underline the importance of taking a rigorous and precautionary approach to each of the applicable requirements.

There are also two cases of importance on the classification of cSACs:

Draggagi (2005) The ECJ in *Draggagi*[79] was asked to rule on the applicability of Art.6(2)-(4) to sites proposed as sites of community importance by a Member State, but not yet adopted as sites of Community Importance by the European Commission, following the cancellation of a dredging contract in the port of Monfalcone in view of Italy's proposal to the European Commission that the mouth of the Timavo should be included on the list of Sites of Community Importance. The ECJ decided that:

> ''. . ...on a proper construction of Art.4(5) of the Directive, the protective measures prescribed in Art.6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Art.21 of the Directive. . ...
>
> In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.''

This ruling applies the provisions in question to cSACs as soon as they are placed on a list of sites selected as sites of community importance *adopted by the Commission*. In doing so the Court recognised that the Commission exercises some discretion over which of the proposed sites it adopts. The Court went on to emphasise that the Member State was under a general duty to ensure the favourable conservation status of such nationally important sites although, in the absence of any explicit provision in the Directive, the duty must be read from the general purpose of the Directive (in particular Art.3(1) and the Directive's sixth recital).

[78] J.P.L. 2007, Apr, pp.522–535.
[79] *Società Italiana Draggagi SpA v Ministero Delle Infrastrutture e dei Trasporti*, C-117/03, [2005] 2 C.M.L.R. 56.

Comparison with other Member States' Decisions As well as standing out from the later ports decisions (see below) the Dibden case appears to be at odds with some decisions of competent authorities in other Member States. A review of the European Commission web site[80] reveals a number of cases referred to the Commission for an opinion under Art.6(4) of the Habitats Directive. In some of the cases the IROPI test was applied less strictly than in Dibden Bay.

For example, one of the cases[81] involved the extension of underground coal mining facilities in Germany; Germany claimed that IROPI existed because closure of the Prosper Haniel mine would have unacceptable direct and indirect economic and social consequences at the regional level, with a direct loss of up to 4,400 jobs in coal mining and another 6,000 jobs in up-stream industries and downstream services, and because the mine contributed to achieving the general objectives of the German long term energy policy at the federal and regional level, and in particular the interest of supply security and to maintain the leading position of European mining and coal energy technologies.

Despite finding that the closure of the mine was eventually inevitable given that coal mining in Germany required large public subsidy and that therefore the financial resources freed up by closure could be used to retrain or relocate workers, or attract new employers to the region, so helping to offset the localised short term negative economic and social effects of accelerated closure of the mine; that the extension of the mine was itself too small to have an impact on the security of energy supply, the mine accounting for about 10 per cent of German coal production, or about 1 per cent of overall German energy needs; and maintaining the leading position of European mining and coal energy technologies was unlikely to require the extension of a single specific mine, the Commission agreed that the extension of the mine to avoid regional economic and social impacts could, in the circumstances, constitute IROPI. This clearly contrasts with the decision in Dibden Bay that a temporary adverse effect on the UK's national economy caused by a shortfall in container handling capacity was not sufficient to constitute IROPI.

A second case[82] involved plans to expand Karlsruhe/Baden-Baden Airport. Six alternatives to the proposal were considered and dismissed as more harmful to the local Natura 2000 sites. What is surprising in this case is that all seven options considered were for extension of the same facility; no mention was made of other transport schemes to fulfil the same need. Again the Commission allowed the project to proceed on grounds of IROPI.

From the above decisions it seems possible, if not probable, that the referral of the Dibden Bay application to the Commission would have resulted in an opinion that would have allowed the Secretary of State to approve the proposal.

Compensation and the Overall Integrity of Natura 2000

A project approved under an IROPI justification must include adequate compensatory measures to ensure the overall coherence of Natura 2000. In practice this is likely to be the provision of a suitable alternative location in which the lost habitat can be re-created. For example, the promoters of the

[80] http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_ en.htm.

[81] Commission opinion of April 24, 2003, http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_ legislation/specific_articles /art6/pdf/prosper_haniel_colliery_en.pdf.

[82] Commission opinion: C (2005) 1641, 06.06.2005, http://ec.europa.eu/environment/nature/nature_conservation/ eu_nature_legislation/specific_articles/art6/pdf/baden_baden_en.pdf.

London Gateway Port scheme will create two new areas (totalling 72ha) of new mudflats on the Thames Estuary adjacent to the site of the new port facility.

The responsibility for ensuring that adequate compensatory measures are in place falls to the Member State. The compensatory measures adopted must then be reported to the European Commission.

Consultation requirements and practice

Requirement to Consult Appropriate Nature Conservation Bodies Surprisingly the only requirement to consult the ''appropriate nature conservation body'' during an appropriate assessment arises once the assessment is complete and the competent authority wishes to make its decision. Of course to wait until that stage of a project is likely to be highly detrimental to the project's chances of approval and is hardly conducive to good stakeholder relations.

For an effective assessment to take place the developer or promoter of the project or plan should approach the relevant nature conservation body at the earliest opportunity, normally to obtain sufficient data on likely affected sites before the initial screening assessment is carried out. Further contact with the nature conservation body is likely to be required at the appropriate assessment stage when more detailed site data will be required.

Two examples are useful to illustrate the differences in approach that have been employed by developers. At Dibden Bay the developer, Associated British Ports (ABP), itself a competent authority by virtue of being a statutory undertaker, produced its own appropriate assessment and, in doing so, sought the opinion of (what was then) English Nature. Despite English Nature having a number of outstanding concerns with the proposal, the appropriate assessment was submitted to the Secretary of State for Transport along with English Nature's response as an appendix. The Inspector dealt with ABP's appropriate assessment summarily:[83]

> ''Appropriate Assessment
>
> The Secretary of State asked about the degree to which reliance could be placed on the appropriate assessment undertaken by ABP, in which they conclude that their proposals would not adversely affect the integrity of the European sites that they considered. In my view, no reliance should be placed on that assessment.''

In contrast, the ''Information for Appropriate Assessment'' documents submitted to the London Gateway Port inquiry were comprehensive, but more importantly were supported by English Nature through statements of common ground. The inspector's conclusion being:[84]

> ''Accordingly, I consider that there are no reasons to object in principle on nature conservation grounds to the proposals for the OPA,[85] the TWAO[86] or the HEO[87] either in isolation or in combination.''

Requirement to Consult the Public Although there is no requirement to consult the public on an assessment under the Habitats Regulations, to do so is clearly good practice. As well as good practice, there are a number of other additional drivers for the public consultation of some plans and projects.

[83] Dibden Bay Container Terminal Inspector's Report, at para.36.166.
[84] London Gateway Port Inspector's Report, at para.11.88.
[85] Outline Planning Application under the Town and Country Planning Act 1990.
[86] Transport and Works Act Order under the Transport and Works Act 1992.
[87] Harbour Empowerment Order under the Harbours Act 1964.

First, all projects requiring an Environmental Impact Assessment will be subject to public consultation. In practice it is therefore likely that all significant projects will be open to public consultation, which may in some cases be hastened by tactical use of the Environmental Information Regulations.

Secondly, the CLG guidance on appropriate assessment of Regional Spatial Strategies[88] requires the RPB to "make the appropriate assessment findings available to the public. These should be consulted upon as the RBP see appropriate", so all RSSs should be consulted on. There is, however, no requirement for the final appropriate assessment of a land use plan to be published.

Finally, the UK's ratification of the *Aarhus Convention*[89] should eventually lead to general public consultation on environmental matters. Article 3(3) of the convention stating:

> "the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters."

Appropriate Response to Consultation Where consultation is undertaken there is a duty on the consulter to take proper account of the responses received:[90]

> "... whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

As the conference for which this paper has been prepared will be told, this is now a fast developing area of law. What is required to establish that the product of the consultation has been taken into account is therefore open to debate to an extent but it is submitted that, where possible, the rationale of a decision made after consultation should reference at least the key themes from the consultees' responses in a recognisable form.

Reserved matters, etc., approvals: Screening and appropriate assessment?

The decisions in *Barker* and *Commission v UK*[91] and *R. v Bromley LBC Ex p. Baker*[92] clearly beg the question as to whether Art.6(3) of the Habitats Directive and reg.48 of the Habitats Regulations also apply to applications for the approval of reserved matters and similar such applications, e.g. applications for approvals required under planning conditions. After all, Regulation 48 of the Habitats Regulations is broadly drafted (emphasis added):

> "48 (1) A competent authority, before deciding to undertake, or give *any consent, permission or other authorisation for, a plan or project* which–

[88] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* DCLG, August 2006, http://www.communities.gov.uk/pub/353/ PlanningfortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceForRegionals_id1502353.pdf.

[89] The UK ratified the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* on February 24, 2005.

[90] *R. v Brent LBC Ex p. Gunning,* (1985) 84 L.G.R. 168.

[91] Case C-290/03 [2006] Q.B. 764

[92] [2006] 3 W.L.R. 1209.

(a) is likely to have a significant effect on a European site in Great Britain [or a European offshore marine site] (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.''.

Natural England is clearly of this view, as in May 2007 in relation to the Thames Basin Heaths SPA it asked all affected local authorities to consult Natural England:

> ''on reserved matters applications, variations and renewals relating to residential development, within the defined zone around the SPA, wherever the original application was not subject to assessment under the Habitats Regulations. . ...we should advise on these cases from the same starting point as with entirely new proposals. That is, that they are likely to have a significant effect on the SPA. The Habitats Regulations should be applied to them as they would be for other plans and projects likely to have a significant effect alone or in combination with other plans or projects.''

This argument is also consistent with the strong policy underlying the Habitats Directive, vigorously protected by the ECJ and in accordance with the precautionary principle, particularly through *Waddenzee*. Article 6(3) of the Directive goes wider than reg.48, in referring to (emphasis added):

> ''*Any plan or project* not directly connected with or necessary to the management of the site but likely to have a significant effect thereon.''

The argument also recognises that the case for holding this position in the context of appropriate assessment is perhaps even stronger than in relation to EIA, given that EIA is a procedural ''hoop'' whereas the Habitats Directive and the Habitats Regulations impose substantive requirements. We know from *Waddenzee* that the Directive has direct effect, and so the prospect emerges of a competent authority refusing the approval of reserved matters because of there being an adverse effect on the integrity of a European site, in accordance with the duty in Art.6(3) to refuse consent. That is only likely to happen, however, in cases where an adverse effect had not been identified at the outline stage or has not been identified to the extent it should have been, and in cases where a new assessment is required because circumstances have changed materially.

Relationship and comparison with other procedures

Environmental Impact Assessment

It is likely that most projects falling within the scope of reg.48 of the Habitats Regulations will also require an environmental impact assessment. There are really two key points to be made in relation to the relationship between the two concepts:

Procedurally, the two activities of EIA and screening/appropriate assessment can often be run together, with the material necessary ''to inform the appropriate assessment'' being included in the environmental statement. The Commission's document Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Art.6(3) and (4) of the Habitats Directive 92/43/EEC makes it clear that as a matter of practicality the appropriate assessment can be part of the assessment required by the SEA and EIA Directives:

> ''Where projects or plans are subject to the EIA or SEA directives, the Article 6 assessments may form part of these assessments. However, *the assessments required by Article 6 should be clearly distinguishable and identified within an environmental statement or reported separately*. Similarly, MN2000 makes clear that where a project is likely to have significant effects on a Natura 2000 site it is also likely that both an Article 6 assessment and an EIA, in accordance with Directives 85/337/EEC and 97/11/EC, will be necessary.''

The CLG's: Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents takes this further in the context of land use planning:

> ''3.1 AA and SA are two separate processes each with their own legal requirements:
>
> - SA aims to ensure that the land-use plan contributes to sustainable development by integrating social, environmental and economic considerations into plan preparation and incorporating the requirements of the European Directive 2001/42/EC ''on the assessment of the effects of certain plans and programmes on the environment'' (the Strategic Environmental Assessment Directive or SEA Directive).
> - AA aims to ensure that the plan will not have an adverse effect on the integrity of European sites as described above.
>
> 3.2 We recommend that AA should be undertaken in conjunction with the SA. It would be best practice to maximise the relevant evidence gathered in the SA and to use it to inform the AA and vice versa. SA and AA outputs must be clearly distinguishable and reported on separately.
>
> Note: In terms of assessing options, AA is a standard which must be passed, and SA is a means of comparing options.''

But *substantively* the two processes are entirely different. In *Commission v Austria* (2006) the Advocate General's opinion contained this pertinent passage, referring to what were described as ''the essential differences between the Habitats Directive and the EIA Directive'':

> ''The EIA Directive contains procedural provisions designed to ensure that the consideration given to environmental issues is improved. It sets no binding environmental standards, so that it does not oblige the competent authorities to draw particular conclusions from the findings of the environmental impact assessment. The influence of the environmental impact assessment stems above all from the fact that the authorities, developers and the public are informed at an early stage about environmental issues and the project can as a result subsequently be adapted inter alia to meet those concerns.
>
> . . .
>
> The Habitats Directive, by contrast, lays down *substantive* requirements regarding approval of a project, which are intended to be served by the procedure envisaged in Art. 6(3) and (4) of the Habitats Directive following an impact assessment followed, if necessary, by the examination and consideration of alternatives. As a rule, this procedure prevents the integrity of a protection area from being adversely affected. Only in exceptional cases is an adverse effect permissible under Art. 6(4) for imperative reasons of overriding public interest, including those of a social or economic nature, if no alternative solution is available. In these circumstances all necessary

> compensatory measures must be taken to ensure that the overall coherence of Natura 2000 is safeguarded. Thus the protection provisions have a practical effect even when applied to procedures that are already under way.''

This was emphasised by the European Commission in March 2007:[93]

> ''There is not any a priori prohibition of new activities or developments within Natura 2000 sites. This needs to be judged on a case by case basis. Articles 6(3) and 6(4) of the Habitats Directive, which apply to all Natura 2000 sites, provide for the appropriate assessment of development proposals which are likely to have an impact on designated sites. These provisions are based on existing good practice with respect to environmental impact assessment. However, it should be stressed that the EIA Directive contains procedural provisions designed to ensure that the consideration given to environmental issues is improved, while the Habitats Directive lays down substantive requirements regarding approval of a plan or project, which is intended to be served by the procedure envisaged in Article 6(3) and (4) of the Habitats Directive.''

Strategic Environmental Assessment

The SEA Directive[94] came into force in July 2004. The UK implemented this by the Environmental Assessment of Plans and Programmes Regulations 2004[95] (SEA Regulations), which came into force on July 20, 2004. They apply to England only. Much needed guidance on the SEA Directive was published in September 2005[96] (SEA Guidance).

Article 1 of the SEA Directive sets out its objectives, which are:

> ''to provide for the high level of protection of the environment and to contribute to the integrity of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.''

(It should be noted at the outset that the SEA Directive does not actually refer to the expression ''strategic environmental assessment'' but simply to ''an environmental assessment''. The expression appears to have arisen to differentiate it from the EIA of certain projects.)

The SEA Directive, and in turn the SEA Regulations, define ''plans and programmes'' widely as plans and programmes (as well as modifications to them) which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.[97]

Article 3(2), like Art.4(1) of the EIA Directive, states that an environmental assessment is mandatory for certain plans and programme. These are all plans and programmes:

[93] Commission staff working document, March, 26, 2007, an accompanying document to the Communication from the Commission *Trans-European Networks:Towards an integrated approach*.

[94] *EC Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment*.

[95] SI 2004/1633.

[96] *A Practical Guide to the Strategic Environmental Assessment Directive,* ODPM, September 2005, http://www. communities.gov.uk/pub/290/APracticalGuidetotheStrategicEnvironmentalAssessmentDirective_id1143290.pdf

[97] EC Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, at Art.2(a).

> '(a) which are prepared for agriculture, forestry, fisheries, energy, industry, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC [the EIA directive], or
>
> *(b) which in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC [the Habitats Directive].*'' (emphasis added).

Exempt plans and programmes include those whose sole purpose is to serve national defence or civil emergency, financial or budget plans and programmes[98].

The SEA Guidance contains an ''indicative'' list of plans and programmes subject to SEA which includes a wide range of plans including Local Development Documents (Local Development Plans in Wales), Regional Spatial Strategies as well as the London Plan, Minerals Local Plans, Waste Local Plans, Local Transport Plans, Local Housing Strategies and National Park Management Plans.

Article 5 requires the environmental assessment to be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure. Article 6 deals with consultations and requires Member States to designate the authorities to be consulted and identify the public, including the public affected or likely to be affected by, or having an interest in, the decision making subject to the SEA Directive, including relevant non-governmental organisations. The SEA Directive states that detailed arrangements for consultation are a matter to be determined by the relevant Member States.[99]

The SEA Regulations closely follow the SEA Directive, setting out the ''responsible authorities'' for the preparation of the environmental assessments of plans and projects as:

> ''(a) the authority by which or on whose behalf it is prepared; and
>
> (b) where, at any particular time, that authority ceases to be responsible, or solely responsible, for taking steps in relation to the plan or programme, the person who, at that time, is responsible (solely or jointly with the authority) for taking those steps.''

The SEA Guidance states that the ''responsible authority'' will be the body which repairs and/or adopts the plan or programme.[100]

Regulation 12 of the SEA Regulations deals with the preparation of the environmental report which will need to identify, describe and evaluate the likely significant effects on the environment of:

> ''(a) implementing the plan or programme; and
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of -
>
> (a) current knowledge and methods of assessment;

[98] EC Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, at Art.3(8).

[99] See above fn.99, Art.6(5).

[100] *A Practical Guide to the Strategic Environmental Assessment Directive,* ODPM, September 2005, at page 14. http://www.communities.gov.uk/pub/290/APracticalGuidetotheStrategicEnvironmentalAssessmentDirective_id1143290.pdf

(b) the contents and level of detail in the plan or programme;
(c) the stage of the plan or programme in the decision-making process; and
(d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.''

Consultation is required with the ''consultation bodies'', defined in reg.4 (Countryside Agency, English Heritage, English Nature, Environment Agency) when deciding on the scope and level of detail of the information that must be included in the report.

So while the EIA Directive deals with the environmental effects of ''projects'', the SEA Directive sits at a higher level.

As can be readily seen there is clearly a very close relationship and similarities with the appropriate assessment of land use and other plans which, as noted below, is still very much in its infancy with no substantive Government guidance at the moment. The two regimes work separately and in parallel and whilst in due course it is expected that the appropriate assessment of plans will be undertaken at the same time as SEA, that has not been possible to date given the relatively recent requirement to undertake the appropriate assessment of land use plans.

Furthermore, like appropriate assessment the responsibility for carrying out a SEA rests firmly with the ''responsible authority'' rather than with the developer.

Sustainability Appraisal

The Planning and Compulsory Purchase Act 2004 has brought sustainability to the heart of the planning system by making the undertaking of a sustainability appraisal (SA) mandatory for Regional Spatial Strategies (RSSs) and Development Plan Documents (DPDs) as well as supplementary planning documents (SPDs). (Although it should be noted that the Planning White Paper[101] now suggests that a SA for every SPD is not necessary and the Government will seek to legislate to remove this requirement except for SPDs which have a significant social, environmental or economic effects which have not been covered in the parent DPD or where a SEA is required.)

The Government guidance on SA (SA Guidance) issued for regional planning bodies and local planning authorities states that:

> ''The purpose of sustainability appraisal (SA) is to promote sustainable development through the integration of social, environmental and economic considerations into the preparation of revisions of Regional Spatial Strategies (RSS) and for new or revised Development Plan Documents (DPDs) and Supplementary Planning Documents (SPDs).''[102]

The SA Guidance envisages a SA incorporating the SEA, and by virtue of Art.3(2)(b) of the SEA Directive (see above) any plan or programme which requires appropriate assessment also requires a SEA.

Following the ECJ ruling in *EC v United Kingdom*[103] that the UK had not transposed the Habitats Directive properly in relation to land use plans, in a letter to chief planning officers the Government

[101] *Planning for a Sustainable Future*, HMSO, May 2007, http://www.communities.gov.uk/pub/669/ PlanningforaSustainableFutureWhitePaper_id1510669.pdf
[102] *Sustainability Appraisal of Regional Spatial Strategies and Local Development Documents*, ODPM, November 2005, http://www.communities.gov.uk/pub/346/SustainabilityAppraisalofRegionalSpatialStrategiesandLocal DevelopmentDocuments_id1161346.pdf
[103] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland,* C-6/04, [2005] E.C.R. I-9017

made it clear that appropriate assessment applies to RSSs, transitional plans, Development Plan Documents (DPDs) and Supplementary Planning Documents (SPDs). The scope of the appropriate assessment will depend on the location, size and significance of the proposed plan or project.[104] The letter states that:

> ''To satisfy the requirements of Article 6 (3), the application of appropriate assessment should be undertaken before the publication of revisions to an RSS, the adoption of an LDD by an LPA, or the approval of an LDD under the Secretary of State's default or intervention powers.
>
> It will be best practice for the appropriate assessment be undertaken during the preparation of the land-use plan.
>
> In the case of RSSs, best practice will be to scope out whether an appropriate assessment is required at the Sustainability Appraisal (SA) Scoping Stage and to undertake the appropriate assessment alongside the development of options prior to the formal consultation at the regulation 125 stage of its preparation. However, in exceptional circumstances, an appropriate assessment can be applied at the Examination in Public if the Panel consider it necessary.
>
> For LDDs similarly, best practice will be to scope out whether an appropriate assessment is required at the Sustainability Appraisal (SA) Scoping Stage and to undertake the appropriate assessment alongside the development of options prior to the formal consultation which occurs at the Regulation 26 stage for DPD and Regulation 17 for SPDs. However, in exceptional circumstances, appropriate assessment can also be applied at the Examination of DPDs if the Inspector considers it necessary.''

In broad terms the SEA, SA and appropriate assessment all have the same aim, which is to ensure that there is adequate protection for the environment. However, the appropriate assessment is very specific; its aim is to protect and maintain the integrity of the Natura 2000 network and to avoid development which would threaten it. The SEA and SA have rather more ''woolly'' aims: in the case of SEA it is to ''to provide for the high level of protection of the environment''; whereas the aim of SA is to promote sustainable development.

It will be a challenge for local planning authorities to juggle all three processes at the same time. There are obvious time saving and resource advantages in integrating all three processes if possible, but it has been suggested and one can see that such a move also has certain disadvantages including diluting the environmental focus of SEA and the strong protection part of appropriate assessment and that the SA could lead to incremental development and solutions which run counter to objectives of appropriate assessment[105].

What is clear is that local planning authorities will undoubtedly struggle to get to grips with the SA, SEA and appropriate assessment processes as they each require a slightly different approach and a different mindset. These authorities do not have the resources to give careful and due consideration to the three regimes

[104] *The Application of Appropriate Assessment under Article 6(3) and (4) of the Habitats Directive 92/43/EEC to Development Plans in the Transitional period between now and when the amending Regulations come into force,* ODPM, March 9, 2006, http://www.communities.gov.uk/pub/56/ApplicationofAppropriateAssessmentunder Article63and4 oftheHabitatsDirective9243Es_id1164056.pdf

[105] *Appropriate Assessment of land use plans—preparing for the coming storm,* Riki Therivel, Town and Country Planning, June 1, 2006.

Major Projects and Appropriate Assessment

Issues and tactics for Promoters

For promoters of major projects the appropriate assessment process can often be a very significant hurdle. The process is simultaneously ill-defined and onerous, the decision-making process is unpredictable, the statutory requirements are strictly enforced by the courts, and (at least in theory) all doubt is exercised against the project.

Undoubtedly the first important step for the promoter of a project is to obtain the best expert advice available from the outset. It is then imperative that the correct methodology is adopted and is followed closely. A discussion of the guidance available to promoters is set out below along with two issues applying uniquely to projects of this size.

Multiple Applications One complicating factor with major projects is that each authorisation applied for may require a separate assessment. Due to the level of detail involved in the assessment it is unlikely that one appropriate assessment could be used to cover all of the applications. A good example is the London Gateway Port scheme where the OPA and HEO applications required separate ''Information for Appropriate Assessment'' submissions.

For major infrastructure projects this situation may be avoided if the proposals contained in the recent Planning White Paper[106] are implemented. For example, major port developments will be subject to the proposed new unified consent regime, replacing the potential current requirement for planning applications, Coast Protection Act applications, Transport and Works Act Order applications and Harbours Act applications with a single unified application.

However, where only one of the applications involved in such a scheme would have been subject to an appropriate assessment, under a unified consent regime the whole scope of the unified application will now be assessed and this could increase the overall burden on both the developer and competent authority.

Multiple Competent Authorities Even where there is only a single application there may be several competent authorities involved in its determination. Regulation 52 of the Habitats Regulations allows for the most appropriate competent authority to perform the appropriate assessment on behalf of the others. In an extreme example, the recent Kingston upon Hull Waste Water Treatment Works (and related) projects involved authorisations determinable by seven competent authorities.

Again, the proposed unified consent regime in the Planning White Paper will have an effect on those infrastructure sectors (such as air, transport and water) that are subject to it. In such cases the independent Infrastructure Planning Commission will in future be the sole competent authority.

Issues and tactics for stakeholders, the public and objectors

For those wishing to oppose a development the most useful weapon is the often the letter of the law itself, although the recent *Humber Sea Terminals* case did demonstrate the courts' disdain of ''technical'' challenges.

[106] *Planning for a Sustainable Future*, HMSO, May 2007, http://www.communities.gov.uk/pub/669/Planningfora SustainableFutureWhitePaper_id1510669.pdf

There is a strong degree of policy lying behind the Habitats Directive and it is essential that competent authorities apply the Directive and the Regulations correctly, if their decision is not to be susceptible to challenge. As with other European law it must be applied to give effect to the purpose of the Directive and this has resulted in the strict application of its provisions, including the precautionary principle. Accordingly, any doubt over the effects of a project will be exercised against the proposal and normally, therefore, in favour of an objector. Given that major infrastructure projects are highly complex in nature there are likely to be ''loose threads'' or areas where doubt can be cast. Where there are differing technical opinions on the same point then the precautionary principle requires that the worst case is used in the assessment.[107]

The use of public opinion is a simple but powerful tool; at the Dibden Bay inquiry the Inspector took comfort in the great disparity between the number of objections and statements of support received by the Secretary of State when making his recommendation to refuse planning permission, etc.

Case study—comments on major port decisions

There are various points to be taken from the recent decisions on proposed container port facilities at Dibden Bay, Bathside Bay, Port of Felixstowe South Reconfiguration and London Gateway Port.

The applications were as follows:

Dibden Bay Container Terminal, Southampton Associated British Ports made a total of six applications, including an application for a Harbour Revision Order, to authorise the construction of a new deep water terminal at Dibden Bay, Hampshire, with a quay length of some 1,850m. On April 20, 2004 the Secretary of State agreed with the Inspector's recommendation that none of the Orders, consents and permissions should be made or given. This was because the proposals would have a likely significant effect alone and in combination with other plans and projects on an SPA, a Ramsar site and two cSACs.

Bathside Bay Container Terminal, Harwich Hutchison Ports (UK) Ltd's proposal was for the reclamation of Bathside Bay and development to provide an operational container port, comprising engineering and reclamation works including construction of a cofferdam and a 1,400m quay wall. At the time of the public inquiry Bathside Bay was a proposed Special Protection Area and in accordance with PPG9 was to be treated as if it were a classified SPA.

By decision letters dated December 21, 2005 and March 29, 2006 the ODPM and the DfT agreed to grant the necessary consents and approvals (there were eight applications and appeals before the Secretaries of State, including an application for a Harbour Revision Order).

The Secretary of State confirmed the agreement between all parties to the inquiry that the proposed container terminal would have an adverse effect on the integrity of the pSPA. This therefore led to the consideration of alternatives and IROPI under reg.49 and the project was approved on the basis that there were no alternative solutions and that there were IROPI.

[107] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, C-172/02, [2005] Env. L.R. 14.

Port of Felixstowe South Reconfiguration[108] The Felixstowe Dock and Railway Company made four applications for orders and consents, and one planning appeal for authority to extend and realign the quay line at the southern end of the port of Felixstowe, which would provide additional deep water berths and container handling capacity. By decision letters dated February 1, 2006 the Secretaries of State approved the proposals on the basis, inter alia, that they would not have a significant effect on the Stour and Orwell Estuaries SPA and Ramsar site.

London Gateway Port[109] P&O, subsequently purchased by DP World, applied for two orders and submitted one planning appeal to authorise a new container port on the north banks of the river Thames at the site of the former Shellhaven oil refinery, Essex. By decision letters dated July 20, 2005, August 8, 2006 and May 30, 2007 the proposals were approved, despite there being considered a possible adverse effect on the Thames Estuary and Marshes SPA.

The Secretary of State confirmed the agreement between all parties to the inquiry that the proposed container terminal may have an adverse effect on the integrity of the SPA. This therefore led to the consideration of alternatives and IROPI under Regulation 49 and the project was approved on the basis that there were no alternative solutions and that there were IROPI.

Extracts from the relevant decision letters are contained in Appendix 3.

Evaluation The differing outcome of the applications highlights a number of key differences between the projects, and produces a number of learning points in three key areas: the proposal, the context of the application, and the application itself.

The proposal at Dibden Bay was always going to be problematic due to the location of the proposed port in relation to a number of European sites, whereas other proposals, notably Felixstowe South, enjoyed more favourable locations.

The context in which the applications were received and then decided was somewhat different for each of the applications due to the progressive development of a national ports policy, albeit an informal one, based on anticipated national need. The applications were also determined in a period when appropriate assessment was a relatively unfamiliar concept and possibly as a result of this were handled in sharply contrasting ways.

Looking at the applications for Dibden Bay and London Gateway Port (LGP) there are a number of obvious differences in the documents themselves and their approach to appropriate assessment, which may have contributed to their respective outcomes:

- The selection of a competent authority—at Dibden Bay the developer (ABP) acted as its own competent authority and produced its own appropriate assessment which was savaged by the Inspector. It was always inevitable that the Secretaries of State would have to make their own appropriate assessment of these applications, so the developer's risk was for no gain. Compare this with the applications made for LGP, where the Developer produced a comprehensive package of information *for use by* the Secretaries of State, without seeking to make its own decision.

[108] Sometimes also referred to as land in the vicinity of the Landguard Terminal
[109] Sometimes also referred to as Shellhaven.

- Effective consultation—at Dibden Bay English Nature was consulted but their opinion was not taken on board by ABP. As a result the appropriate assessment conflicted with English Nature's written opinion (which was attached to it!). Contrast this with the position at LGP where English Nature was consulted and the proposal was not submitted to the competent authorities until an agreement with English Nature was reached. Ultimately, the developer's applications contained statements of common ground with the appropriate conservation body, which from a conservation perspective was tactically sound because it made their conclusion difficult for the Secretaries of State to disagree with.

So far as the application of the IROPI test is concerned, although it requires a strict application, the approaches of various national authorities varied, as can be seen from the decisions.

The Secretary of State's decision to reject the Dibden Bay proposal was made on a strict interpretation of the IROPI test and the use of the precautionary principle; there were credible alternatives at other sites though whether they would (or would be allowed to) proceed was unclear. This is clearly the correct approach when considering derogation from reg.48; and it is interesting to note that the Inspector considered that a temporary adverse effect on the UK's *national* economy was not sufficient to constitute IROPI and to compare this with other Member States' approaches.

Of the later proposals: Felixstowe South avoided habitats issues at the screening stage as no significant effect was found, but Bathside Bay and London Gateway Port (LGP) were approved using IROPI justifications on economic grounds. These cases focussed primarily on need, and established the principle that the need for a proposal must be demonstrated before the consideration of alternative solutions and finally of overriding public interest.[110] Once the need for all three proposals was accepted the approval was straightforward: there were only three alternatives, all were required, and the UK's economy was at risk if sufficient container handling capacity was not provided.

The degree of challenge made by the Inspectors and Secretaries of State to the Bathside Bay and London Gateway Port proposals was much less than in Dibden. In the case of LGP the Secretary of State for Transport's language is telling: ''it *would be possible* to conclude that there was an overriding interest'' and that ''there was *no reason to dissent* from the Applicant's evidence on the topic of public interest''. The Secretary of State for Transport also accepted the Applicant's evidence on need and went on to agree with the Inspector's recommendation on IROPI, despite the Inspector declining to even consider alternative solutions as in his opinion: ''these are beyond the remit I have been given.''

Reading the Bathside Bay and LGP decisions it would be difficult to imagine an approach more different to that in Dibden Bay; the reader might readily conclude that the process used in these two later decisions was considerably more sympathetic to the developments.

Planning White Paper—the Appropriate Assessment of National Infrastructure Policy Statements?

In addition to the benefits listed earlier in this paper and brought about by the introduction of a unified consent regime, there may be other proposals in the White Paper which have an effect on compliance with the Habitats Directive.

The main issue may arise from the introduction of National Infrastructure Policy Statements (NIPSs), and the proposal that they incorporate a degree of spatial specificity. Without the incorporation of

[110] Bathside Bay Container Terminal Inspector's Report, at para.18.27.

any spatial specificity the NIPSs should, according to Commission guidance,[111] fall outside of the definition of plans for the purposes of Art.6(3). However, with spatial specificity, as with land use plans they could fall within the scope of Art.6 of the Habitats Directive and therefore be subject to the requirement for an appropriate assessment. The distinction is a fine one and it is worth reading the guidance in full:

> "Sectoral plans can also be considered as within the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, waste management plans and water management plans. However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or a region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land use or sectoral plan. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied. Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) in relation to details not covered by the plan assessment."

NIPSs are not currently included within the definition of land use plans contained in the new reg.85A. Furthermore, attempts to carry out appropriate assessment on an RSS[112] have demonstrated that complexity often increases commensurately with the size of the area under consideration. To perform an appropriate assessment on a nationwide NIPS would be a colossal task, whereas to the extent that an element of spatial specificity is incorporated into a NIPS, e.g. a proposal to site a power station in Yorkshire, then an appropriate assessment of that element need not be more complex than the appropriate assessment of the RSS itself.

A final consideration is that as with land use plans and the Commission's argument centering around the effect of s.54A, if (as the White Paper says) these NIPS are to have a particular determining status in the context of the subsequent consideration of individual applications by the Commission, that would seem to indicate that they should be subject to appropriate assessment. This autumn's Planning Reform Bill should reveal all!

Smaller Projects and Appropriate Assessment

Issues and tactics for Promoters

Despite the difference in scale, in practice a small developer in an area affected by a European site will also need to employ the services of an environmental consultancy to carry out the necessary work on his behalf, and therefore a detailed knowledge of the Habitats Regulations is unnecessary.

The requirements of appropriate assessment are now reasonably well known in the major projects field. As more smaller projects become affected by the Regulations it seems sensible to borrow from larger projects and scale down appropriately. Key learning points here are the need to:

[111] *Managing Natura 2000 Sites*, European Commission, 2000, at s.4.6, http://ec.europa.eu/environment/ nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf.

[112] *The Draft Regional Spatial Strategy for the South West 2006—2026*, South West Regional Assembly, June 2006, http://www.southwest-ra.gov.uk/media/SWRA/RSS%20Documents/Final%20Draft/draftrssfull.pdf

- build in compliance from the start of the project by choosing the right option;
- provide the LPA with sufficient data on which to make its appropriate assessment; and
- consult the relevant nature conservation body early and thoroughly.

The key learning point from some recent (unreported) decisions to refuse planning permission for dwelling houses that would have had a small adverse effect on a European site is that developers need to take the Regulations seriously. The purpose of Art.6 and reg.48 is to prevent the approval of proposals that would have an adverse effect, and no longer will such effects be considered *de minimis*. All of the stages of the assessment process, including mitigation where necessary, must be addressed by the developer before submitting the application.

Issues and tactics for stakeholders, the public and objectors

The issues here will be largely the same as those for the parties to major projects. There may, however, be two significant differences: (a) that the resources available to the parties will be smaller; and (b) the quality of the decision-making by local planning authorities who are unfamiliar with the process may be variable and, as a result, the outcome may be more open to influence by the parties.

Case study—Thames Basin Heaths SPA

Introduction

The Thames Basin Heaths (TBH) comprises 8,400ha of heath land in 14 discrete areas spread across 15 local authorities in Surrey, Hampshire and Berkshire. TBH were classified as a SPA in March 2005 due to their significant populations of three heath land birds: woodlark, nightjar and Dartford warbler. In many cases the SPA borders or lies close to major centres of population. Most of the SPA is open to the public as it is either common land, designated open country or owned by public or conservation bodies.

The primary way in which residential development can affect the SPA is through leisure use: dog walkers on the heaths cause disturbance to the ground nesting birds. In March 2005 Natural England adopted a policy of objecting to all residential developments within 5km of the SPA, as any increase in the local population would increase the amount of leisure use therein[113].

Due to the size and fragmented nature of the SPA a significant number of planning applications are already affected by it, and the draft South East Plan envisages that another 40,000 new homes will be built in the vicinity of the SPA over the plan period.

Natural England's Draft Delivery Plan (DDP)

In May 2006, to facilitate the assessment of planning applications in the area English Nature produced a draft Delivery Plan (DDP), partly in response to the European Court's judgment in October 2005 that the Habitats Directive applied to land use plans. The DDP has no statutory status but was intended to provide a generic and consistent approach to addressing the impact of new residential development in the vicinity of the SPA. In particular, it aimed to provide a method through which

[113] Recreational pressure, particularly dog walking, has a detrimental impact on ground nesting bird populations. Natural England argued that further residential developments within 5km of the edge of the SPA would exacerbate these pressures either in their own right or in combination.

it believed that competent authorities could meet the requirements of the Habitats Regulations, i.e. by providing a formula by which a mitigation requirement for each proposal can be calculated in the form of provision of alternative greenspace. Some local planning authorities have since used it to produce interim mini delivery plans; others have used it when dealing with large scale applications in their area.

The DDP sought to simplify the process by breaking down the area into zones:

- a zone within 400m of the SPA, Zone A, in which residential development is restricted;
- a zone between 400m and 2km of the SPA, Zone B, in which developments are likely to have a significant effect but may proceed with the right mitigation measures;
- a zone between 2km and 5km of the SPA, in which developments are likely to have a significant effect but may proceed with the right mitigation measures; and
- other areas in which developments are unlikely to have a significant effect.

The DDP specifies the provision of "suitable accessible natural green spaces" (SANGS) as the primary means of mitigation for all developments within Zones B and C, requiring higher amounts for development within Zone B than for development within Zone C. It is argued that the provision of appropriate SANGS makes it unlikely that a development will have a significant effect on the SPA and therefore an appropriate assessment is not required in such cases. In addition the DDP recommends that off-site mitigation through the provision of SANGS is supported by on-site mitigation measures and access management.

Unsurprisingly the approach proposed by Natural England proved to be extremely unpopular with developers/the house building industry and in some cases with local authorities; development has continued to be severely restricted around the SPA and in some cases the DDP has led to a virtual moratorium on house building. For example, in June 2005 the redevelopment of a garden centre to provide 70 dwellings in Church Crookham,[114] in line with the adopted local plan, was rejected by Hart District Council. The applicants then subsequently withdrew their appeal against refusal of planning permission as there was no land around the site available as a SANGS.

The South East Plan

In June 2006 the South East Regional Assembly appointed consultants to undertake a study leading to an appropriate assessment of the potential effects of the draft South East Plan Core Document on European sites, prior to the plan undergoing its Examination in Public.[115] A key aspect of the plan affecting the appropriate assessment was its target figure of 28,900 new dwellings each year, broadly spread geographically. The assessment's focus was on the ecological requirements of the European sites and how these affect the plan, rather than on identifying and analysing those limited parts of the plan that could affect European sites, it being felt that this would give a more rounded view of the plan and would particularly consider the plan's indirect as well as direct impacts on European sites. The consultants' approach to screening also compared sharply with the approach adopted with the East of England Plan (see below): they found it difficult to exclude sites from the assessment process, due in part to the compression of the study programme in order to meet the requirements of the EiP but mainly because of the uncertainties inherent in undertaking an appropriate assessment of a plan at

[114] Redfields Garden Centre, Application Reference No.04/01148/OUT.
[115] A separate appropriate assessment of the South East Plan Implementation Plan (September 2006) was also carried out.

a regional scale. At that scale, impacts such as water abstraction, waste water treatment discharge and air pollution had a ''diffuse'' effect that rendered it more difficult—and potentially misleading—to remove large numbers of sites from the assessment.

As a result of the confusion caused by Natural England's policies and DDP, an assessor for the draft South East Plan was appointed to address the strategic implications of the Thames Basin Heaths SPA for the South East Plan and future housing development, and to consider whether the DDP was a sound solution for the area, focussing on the appropriateness of the zonal approach, the package of mitigation measures suggested in the DDP for on-site mitigation and off-site compensation and access management.

In his report to the panel, published in February 2007, the assessor makes a number of criticisms of the DDP including:

- the confusion of avoidance and mitigation, leading to the incorrect indication that the provision of SANGS would avoid the need for an appropriate assessment;
- the unduly rigorous application of the ''in combination'' requirement; and
- the incorrect application of the precautionary principle, which was not proportionate or consistent.

The confusion of avoidance and mitigation The use of mitigating measures to justify not carrying out an appropriate assessment produced an unsatisfactory result as it allowed a project that could have significant effects to bypass the assessment process. On the other hand avoidance measures, ensuring that the project did not have a significant effect, carried no such problem.

In this case Natural England sought to argue that the provision of alternative green space would prevent dog-walkers from needing to use the heath land. As such the measure was intended as avoidance and not mitigation, but the Assessor rightly pointed out that, as there was no guarantee that the avoidance measure would work, and therefore no clear objective basis on which to conclude that the provision of SANGS would avoid any likely significant effect, an appropriate assessment should still be required.

In essence there were two types of avoidance: genuine avoidance of the risk to the European site *in its entirety,* and avoidance of the risk by ''mitigation to zero''; the difference between the two was important. In the first case the proposal was rendered *incapable* of causing significant or adverse effect on the site; such measures would be extremely rare. Most ''avoiding'' measures fell into the second category: they greatly reduced the risk of damage, but could not render the proposal incapable of causing harm.

The measures proposed by Natural England in the case of developments at the Thames Basin Heaths would undoubtedly reduce the impact of the developments on the SPA but, as they did not prevent recreational use of the Heaths, they could not eliminate the risk to the SPA. As such they probably fell into the second of the European Commission's four categories of mitigating measures: they reduced the impact at source.

But as mitigating measures the Natural England DDP measures could not be used at the screening stage to avoid the need for an appropriate assessment.

It was submitted that, far from avoiding the need for an appropriate assessment, the Natural England DDP provided a generic screening assessment for all proposals within 5km of the SPA. In doing

so the DDP found likely significant effect for all of the proposals and made them all subject to appropriate assessment.

A number of local authorities and house builders had argued that appropriate assessments were not difficult to undertake and allowed each development to be considered in detail and provided the necessary flexibility to determine mitigation measures appropriate to each development.

The Inspector doubted that the approach adopted by the DDP complied with the Habitats Regulations and Directive. He also remarked in passing on the interesting representations made to him as to what constitutes a significant effect, particularly with reference to the German equivalent but seemingly stricter requirement of ''considerable harm or damage''. He noted, however, that what constituted a significant effect was a matter for the relevant competent authority to determine, in this case the Secretary of State ultimately, based on the particular circumstances of each plan or project either individually or in combination with others.

The incorrect application of 'in combination' The DDP had been criticised for its approach of linking all of the proposals around the SPA, i.e. the impact of each application was to be considered in combination with the remainder of the 40,000 homes anticipated in the South East Plan. The use of such a stringent in-combination approach meant that even a single dwelling had to be considered in combination, which was having a very substantial effect on house building in the area.

The Inspector thought that there was now scope for Natural England to take a more flexible approach to the ''in combination'' test in respect of housing located in the vicinity of less sensitive parts of the SPA or residential developments unlikely to give rise to significant use of the SPA. The Inspector also accepted that there was a lack of clarity in the DDP as to exactly how the ''in combination'' test should be applied; it would have been useful had the DDP included further guidance on this issue.

The incorrect application of the precautionary principle The Assessor also found that English Nature's attempts to use the precautionary principle to establish a 5km blanket zone were disproportionate, although he accepted that there remained uncertainty as to the actual effects likely to arise from new housing and so there was sufficient justification for invoking the precautionary principle for at least some of the housing development proposed in the vicinity of the SPA.

The Assessor's conclusions were broadly as follows:

- Whilst he thought that the DDP was unsound for the reasons given above, its weak evidential base and failure to give sufficient weight to other avoidance and mitigation measures in particular, given that the provision of a significant scale of additional housing within 5km of the SPA would be likely to have a significant effect in combination because of increased recreational pressure, it was necessary to have an interim strategic avoidance and mitigation strategy for the SPA (Interim Strategic Delivery Plan).
- The Interim Strategic Delivery Plan only needed to cover developments of more than 10 houses in the 5km zone or developments of less than 10 houses within 1km of sensitive areas of the SPA.
- Zone B should therefore be reduced to 1km, so there would be three zones at 400m, 1km and 5km, with the 1km and 5km zones being defined by travel distance and measured to the edge of the SPA. The 400m zone would still be defined by linear measurement.

- No development would be allowed within the 400m zone unless it could be demonstrated that it would not lead to further recreational use of the SPA or have any other significant effect on its integrity.
- Residential development in zones B and C would have to provide appropriate SANGS mitigation.
- The level of SANGS should generally be reduced to 8ha per 1,000 population.
- Alongside the work on an Interim Strategic Delivery Plan work should be carried out on the availability of suitable land for SANGS and related funding and developers' contributions.
- A loose strategic partnership should be set up between SEERA, the affected local authorities and Natural England to co-ordinate strategy and funding for the SPA.
- In the long term a development plan document should be drawn up to include not only a long term avoidance and mitigation strategy but also access and habitat management plans for the SPA and strategic policies covering other land or activities outside the SPA which could have a bearing on its future integrity.

The Panel's report was submitted to CLG on August 6, 2007. The one page covering letter mentioned the policy for the protection and management of the Thames Basin Heaths SPA and the implications for housing provision levels in this part of the region in particular.

Their recommendations included the increase of housing levels within a 5km radius of the SPA in three or four strategic locations and by 23 per cent from 37,360 to 46,120 in relation to the London Fringe Sub-Region as a whole, for the 2006–2026 period, given the possibility of on-site mitigation land, although it was fully accepted that these would require further SA/SEA work and appropriate assessment testing before any proposed changes accepted by the Secretary of State could be subject to public consultation.

Given the scale of the Thames Basin Heaths and its location in relation to existing and proposed housing developments in some of the most pressured areas of the region, the Panel considered that the impact of the draft Plan's proposals on the integrity of the SPA was of great significance and for this reason they agreed that specific policy protection was required for the SPA in the form of a new regional policy applying to *all* development. The Panel thought that an Interim Strategic Delivery Plan for residential development should be addressed as a matter of urgency and for the longer term the Panel agreed that a strategic partnership to co-ordinate policy for protection and management of the SPA would be appropriate. The Panel did not share the Assessor's fondness of a joint Development Plan Document to encompass a long-term avoidance and mitigation strategy and other management issues although a joint approach, perhaps leading to a joint supplementary planning document, was encouraged.

Relevant Appeal Decisions

The Planning Inspectorate has published its advice note to Inspectors, Housing Delivery in the South East and the Thames Basin Heaths Special Protection Area.[116] This is a well written and helpful summary of Inspectors' obligations under the Habitats Regulations, intended to ensure that a consistent approach is taken to the Inspectorate's handling of an increasing number of appeals in the area. It places English Nature's draft Delivery Plan in context of those regulations and planning law generally:

[116] Last modified February 1, 2007.

> "6. EN's Delivery Plan approach is not Government-endorsed, and our understanding is that at present not all LPAs are content with it and those that may be will need to prepare their own SPD for public consultation.
>
> . . .
>
> 15. As with any emerging policy/advice/guidance, Inspectors must carefully consider the weight to be attached to any reference to the EN Delivery Plan, or any SPD based upon it, having regard to the process that it has undergone and the stage that it has reached.
>
> Annex A
>
> . . . EN has indicated that mitigation in the form of alternative greenspace may be acceptable in some circumstances. It might be suggested to this that this could be achieved by a planning obligation or by a Grampian condition . . . In the current absence of any LPA having published a draft SPD for public consultation and in view of the as yet (formally) unpublished nature of the EN draft delivery plan, you will be required to carefully consider whether such a condition or planning obligation can be regarded as a reasonable approach."

The Royal Borough of Windsor and Maidenhead and Heronsbrook Homes Ltd[117] *(August 2006)* Two appeals dismissed in relation to a proposed residential development in Cheapside Road, Ascot, Berkshire. The site was 3.3km and 4.75km away from the boundary of two SSSIs classified in March 2005 to be part of the Thames Basin Heaths SPA. The Inspector commented:

> "It was also argued that any risk to the SPA would be imperceptible and I accept that, taken alone, either scheme might not be significant in terms of its impact upon the SPA. But it cannot be demonstrated beyond doubt that it would not have an adverse impact. I consider that English Nature has produced compelling evidence from the various research projects that there is a direct and demonstrable link between a reduction in the protected species on the SPA and increased population levels nearby. While it is clear that this is very difficult to quantify, it is my assessment that the population from the additional housing proposed must place some extra burden in terms of recreational use and its associated effects on the nearby SPA, given its proximity and attractiveness for leisure and recreational pursuits. Significantly, I have no evidence to the contrary to disprove this.
>
> The Regulations require the consideration of a project both alone and in combination with other plans or projects. Of major concern is the cumulative effect of a number of like proposals within the 5km threshold that have been brought to my attention, and which would soon undermine planning objectives for the protection of designated nature conservation sites. Cumulatively, additional people and the demonstrable pressures which they generate would erode the fragile habitat of the SPA. As a result, I consider that I am unable to look at this case in isolation . . .
>
> The next step in the process would be to carry out an appropriate assessment in accordance with reg.48 but, since I do not intend to give planning permission, no appropriate assessment need be made. I therefore conclude that at the present time it is not possible to be certain that the appeal proposals would not have an adverse effect on the integrity of the SPA. Hence, as Circular 06/2005 states, permission must not be granted."

[117] Ref. APP/TO355/A/05/1179175 and 1195686; *see* J.P.L., 2007, February, pp.301–309.

Although it should be noted that his comment at the end, that no appropriate assessment need be made, was the result of plainly a wrong interpretation of the regulations.

Guildford Borough Council and Mr C. Voss[118] *(September 2006)* Planning permission was refused on appeal for residential development in Oxford Road, Guildford, a site of a linear distance of about 3.9km from a SSSI which was part of the Thames Basin Heaths SPA. The Inspector commented:

> ''English Nature have submitted evidence based on research that people living close to the SPA are likely to use it for informal recreation. This seems to me to be a reasonable proposition as the heaths offer extensive tracts of natural and unspoilt countryside which are attractive places to relax, exercise and walk dogs. However, the research also establishes that people and their dogs disturb the bird species and that the more people use the site for recreation, the greater the adverse effect on the birds will be.
>
> In this regard the appellant has emphasised the small size of the proposal, which involves a net increase of only one dwelling unit. However, there can be no certainty that a conversion on this limited scale would not bring additional people into the locality, or that the new occupiers would be unlikely to travel to the SPA for recreation. Moreover, even if the proposal is too small in itself to cause harm to the integrity of the SPA, reg.48 of the Habitat Regulations requires consideration of its effect ''in combination with other plans and projects'' and English Nature make it clear that, in this case, their concern is the cumulative impact of the appeal scheme when taken together with other housing proposals in the vicinity of the SPA.
>
> I have been given no detailed information about other residential schemes that have either been granted planning permission or are in the pipeline. However, English Nature point out that, during the 16 weeks prior to the submission of their statement, they received consultations on application equating to a potential 1943 additional dwellings within 5km of the SPA, and I have no doubt that much of the housing growth in this area will be small scale development like the appeal proposal. Moreover, taking a precautionary approach, as advised in Circular 06/2005, I have no evidence that persuades me to the contrary.
>
> The appellant has not proposed the provision or enhancement of alternative green space or any other measure as mitigation aimed at safeguarding nature conservation interest. I thus cannot be certain that there would be no cumulative impact that would harm the integrity of the SPA if planning permission were to be granted in this case. English Nature is in the process of producing a Delivery Plan in order to offer a unified approach to mitigation across the region. In addition, the Council's interim SPA Avoidance Strategy, should it progress beyond its current draft status and be adopted as policy, would enable developers to provide mitigation in the form of financial contributions towards specific improvement works to named recreation areas throughout the Borough, the inspiration being that these would ultimately prove more attractive to the occupiers of new housing than the SPA.
>
> However, whilst it is to be hoped that these measures will offer a way forward for residential development in due course, there can be no reasonable certainty at this early stage when they will reach fruition. Accordingly, I do not find a condition preventing development from taking place until mitigation along these lines has been put in place to present an appropriate solution

[118] Ref.APP/Y3615/A/06/119688; *see* J.P.L., 2007, February, pp.301–309.

> at this time. For all of these reasons, I conclude that, in all likelihood, the appeal proposal would have an adverse effect on the integrity of the SPA when considered in combination with other plans and projects. It therefore conflicts with LP Policy NE1 as well as national guidance in PPS9 and its associated Circular 06/2005.''

Council of the Royal Borough of Windsor and Maidenhead and Octagon Developments Ltd (June 2007)[119] This was a case of two appeals that were allowed against the refusal of planning permission in relation to Hakoyanagi, Queens Hill Rise, Ascot, Berkshire for the demolition of one house and its replacement with three or four houses.

The inspector said that he would (and could) have regard to possible conditions (i.e. a form of mitigation) at the screening stage and there are a number of other oddities with his report. In particular his conclusion:

> ''39. Having said this, I take the view that neither the availability of these alternative recreational areas nor the 5.66 kilometre travel distance to the nearest car park would be sufficient in isolation to prevent the current proposals from contributing to an adverse ''in combination'' impact on the SPA. However, I am satisfied that, when considered together, and bearing in mind that the appeal developments involve very small increases in housing provision of only two or three dwellings, they provide the necessary level of avoidance and mitigation.
>
> 40. I conclude that neither appeal proposal would have a significantly adverse effect on the integrity of the SPA when considered in combination with other plans and projects. Accordingly, there is no need for me to proceed to the third box of the flow chart in Figure 1 of Circular 06/2005. Both schemes therefore. . ..could be approved in a way which is Directive and Habitats Regulations compliant.''

Hart DC and Luckmore Ltd and Barratt Homes (July 2007)[120] This decision by the Secretary of State for Communities and Local Government to allow four appeals by developers against refusal of planning permission to build 170 homes at Dilly Lane in Hartley Wintney, Hants came after Natural England withdrew its objection to the developments. Against the advice of the Inspector, the Secretary of State for Communities and Local Government accepted the argument that the provision of SANGS avoided a significant impact on the SPA, and that therefore an appropriate assessment was not necessary.

In her decision letter the Secretary of State commented as follows, seemingly missing the point that had been put to her by the Council about not taking mitigation into account at the screening stage:

> ''Effect on the SPA
>
> 9. For the reasons given in paragraphs 13-15 of her ''minded'' letter of 4 April, the Secretary of State was satisfied she could proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, she did not consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat.

[119] Refs APP/T0355/A/05/1195435 and APP/T0355A/06/1198805

[120] Appeal Reference Nos APP/N1730/A/04/1170984, 06/1199382, 06/1199440 and 06/1199383.

10. Although not a matter on which the Secretary of State sought further representations, Hart District Council took issue with the Secretary of State's approach in their response of 14 May. In particular, it stated that matters relevant to the Special Protection Area (SPA) have moved on significantly, having regard to the availability of new information, and better understanding relevant to the requirements of Article 6(3) of the Habitats Directive. The primary development cited in terms of new information is the report of the Assessor on the Thames Basin Heaths SPA and Natural England's Draft Delivery Plan. In fact, this document was specifically mentioned by the Secretary of State in her ''minded'' letter of 4 April. She gave the report little weight, given its purpose in informing the South East Plan Panel, who will in turn report to her. She concluded that she was therefore not currently in a position to rely upon the Assessor's conclusions and recommendations. She considers that that remains the position.

11. The Secretary of State continues to give great weight to the views of Natural England as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. That body has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. The Secretary of State therefore retains the position set out in her ''minded'' letter.''

Land Use Plans and Appropriate Assessment

Available Guidance

The assessment of land use plans is a new and developing area. The limited amount of guidance issued, and some learning points from early published assessments of plans, is discussed below.

As noted above, there are two guidance documents that cover this area: Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents, issued by CLG in August 2006, and Appropriate Assessment of Plans, published by Scott Wilson et al in September 2006. The documents are quite complementary, with the CLG guidance providing an overview of the requirements, and the Scott Wilson document providing detailed methodology. Between them the documents provide comprehensive coverage for planning bodies.

Although of little use as methodological guidance the CLG document sets out the CLG's expectation of the RPB or LPA in terms of the general format of the appropriate assessment, the consultation requirements and the submission process (to CLG). It also seeks to mandate its approach to appropriate assessment and therefore should be complied with wherever possible. In practice this may mean formatting a completed appropriate assessment in a manner which is consistent with the use of the guidance.

There are surprisingly few completed appropriate assessments of plans freely available (although there is no requirement to publish them). The assessments that are available are clearly the products of the guidance that each authority has followed, and are therefore quite different. The quality of the Assessments published to date is also somewhat variable.

Reading the assessments gives a clear indication that while much of the available guidance has been used, it has been used by assessors whose understanding of the requirements of the Habitats Regulations and the Habitats Directive is somewhat limited.

Draft RSS for the South-West

One published attempt to carry out an appropriate assessment on a RSS is that of the SW Regional Assembly[121]. Although only at the screening stage, the assessment[122] reveals the degree of complexity involved in carrying out an assessment on a land use plan of this scale: the matrix of policies and potential effects was too large to include in the screening report. The report concludes that only 81 of the RSS's 122 policies could be screened out, leaving 41 policies to be assessed in detail because of the potential for direct or indirect habitat loss, water abstraction resulting in decreases in river or groundwater levels, contamination effects such as declining water or air quality, and increased recreational pressure and the occurrence of "urban effects". The figures are worse for the European sites, where all 104 sites are potentially affected by one or more of the 41 policies. It remains for the Assembly to assess in detail the impact of the outstanding 41 policies on the 104 sites (potentially 4,264 combinations!).

A number of comments from Land Use Consultants' Screening Report should be highlighted:

1. They comment that in due course it is very likely that the appropriate assessment will be incorporated within the Sustainability Appraisal and Strategic Environmental Assessment processes, which will mean that the appropriate assessment will be more fully incorporated into the process of policy development and refinement. The appropriate assessment of the draft RSS was being undertaken following preparation of the RSS but before the Examination in Public, which meant that some of the opportunities for iterative cycles of assessment and mitigation identification were limited.

2. Given the regional nature of the appropriate assessment exercise, it was recognised that there was clearly a lot of potential to go into considerable detail in relation to other existing or draft plans and projects, particularly when the need to take account of neighbouring regions was considered. It was considered that a pragmatic approach was required which recognised that the RSS was designed to be an overarching regional document that is itself the product of a significant number of regional level strategies and which sets the parameters for the development of more local level plans. At the screening stage, therefore, the focus was on the RSSs and other regional strategies for neighbouring areas and regions that had the potential to produce in combination effects, particularly cross boundary issues (i.e. the South East Plan, West Midlands RSS and Wales Spatial Plan).

3. Given that an RSS generally only identifies broad locations for development, rather than site-specific allocations which are made at the local level through Local Development Frameworks (LDFs), the nature of the impacts identified during the screening stage and the subsequent appropriate assessment stage for the draft RSS are therefore quite general; a more detailed understanding of potential impacts on Natura 2000 sites should be able to be achieved during the appropriate assessment for lower-tier plans when specific sites and locations for development have been identified. However,

[121] *The Draft Regional Spatial Strategy for the South West 2006–2026*, South West Regional Assembly, June 2006, http://www.southwest-ra.gov.uk/media/SWRA/RSS%20Documents/Final%20Draft/draftrssfull.pdf

[122] *Habitats Regulations Assessment of the Draft Regional Spatial Strategy for the South West*, Land Use Consultants, December 2006, http://www.southwest-ra.gov.uk/media/SWRA/RSS%20Documents/Technical%20Documents/Technical%20Work/Habitat%20Regulations%20Assessment/SW_RSS_Final_HRA_Report.pdf

some policies which provided for a quantum or type of development within specific sub-regions or were likely to have region-wide effects, had the potential to affect one or more Natura 2000 sites.

4. The screening process confirmed that the effects of many RSS policies would only become clear as they were translated into more specific local policies. It would therefore be important to ensure that the development of LDFs, local transport plans and other documents underwent their own appropriate assessment and included adequate safeguards to ensure that Natura 2000 sites' integrity was not affected.

5. It was noted that the subsequent appropriate assessment stage would involve a more detailed assessment of potential impacts and the identification of avoidance and mitigation options—an iterative and consultative process with policies amended by avoidance and mitigation solutions being subject to further rounds of appropriate assessment until it could be established that no significant adverse effects were likely. Alternatives to avoid impact on sites' integrity might include clarifying policies to remove areas of uncertainly leading to predicted impacts, clarifying policies to include conditions or restrictions relating to their implementation or translation to the local level, modifying policies to include alternative solutions or locations for particular developments and omitting policies where there were no alternatives.

The subsequent findings of the appropriate assessment led to a recommendation that the RSS should include an overarching policy statement for Natura 2000 sites. The following draft policy wording was then prepared by the South West Regional Assembly for discussion:

> ''The integrity of Natura 2000 and Ramsar sites will be protected and where necessary enhanced to meet conservation objectives. Local authorities in liaison with relevant agencies should carry out Habitats Regulations Assessments of LDD options, policies and proposals, taking into account direct, indirect and in combination effects on such sites.''

The appropriate assessment also identified a number of thematic components of the draft RSS which could have effects on Natura 2000 sites, concluding that further policy safeguards were necessary within those components of the draft RSS in order to highlight the link between the theme and the potential adverse effects on the Natura 2000 sites, and the importance of taking these issues into account. One such theme was tourism, where the proposed additional text was:

> ''Local planning authorities should work together (where appropriate) and in consultation with Natural England to identify whether increased tourist numbers and recreational pressure could adversely affect the integrity of Natura 2000 and Ramsar sites, and appropriate mitigation should be identified in LDDs including the potential for urban based attractions.''

Draft RSS for the East of England

The choice of assessment methodology has taken on new significance recently following delays to the East of England Plan.

The East of England Regional Spatial Strategy was completed in draft form in November 2004, before the ECJ decision in *EC v UK* that required appropriate assessments of land use plans. In December 2006, following the examination in public and publication of the Panel's report in June 2006, the Government Office (GO) for the East of England published both its amended version of the Plan and a ''Habitats Directive Assessment'' (HDA).

The HDA report made a number of points that are relevant to this paper in addition to some of those made above in relation to the draft South West RSS:

1. Although the draft CLG guidance on appropriate assessment stated that Ramsar sites did not need to be considered because they were not Natura 2000 sites, they were included in the appropriate assessment given the requirements of ODPM Circular 06/2005, which required Ramsar sites to be assessed in the same way as Natura 2000 sites, the substantial overlaps of the boundaries of the Ramsar and Natura 2000 sites and because Ramsar sites need to be assessed as part of the SEA process.

2. It was stressed on a number of occasions that the appropriate assessment was not intended to preclude the need for appropriate assessment of local development documents.

3. Natura 2000 sites in adjacent regions that may be affected by the location and scale of development proposed for the East of England were also considered.

4. The development in the RSS had the potential to affect Natura 2000 sites either because of direct effects (e.g. land take) or indirect effects or secondary effects such as increases in recreational pressure and disturbance, changes in water availability or water quality and air pollution from traffic.

The report's conclusion was that the RSS gave rise to no likely significant effects to Natura 2000 or Ramsar sites, and hence an appropriate assessment of the draft RSS was not required.

The East of England Regional Assembly (EERA) commissioned an independent review of the HDA in February 2007 because it did not feel able to agree with the HDA report's conclusion that none of the policies in the RSS would have a likely significant impact on European designated sites.

The review of the HDA was highly critical of the HDA, making it clear that the HDA did not comply with some of the basic requirements of the Habitats Directive. It was written in such strong terms that it was impossible for the Government Office to ignore it. Criticism was pointed both at the methodology (provided by Natural England in its draft guidance) and at the report itself, and fell into these key areas:

- The assessment methodology was plan and policy-led (not site-led) and was therefore likely to have missed some significant impacts of the RSS on European sites.
- In considering the RSS on a policy-by-policy basis without also considering the plan-wide impacts, this was the equivalent to ''salami-slicing'' in EIA terms: each individual slice could be shown to have an insignificant impact even though the RSS as a whole would clearly have a significant impact.
- The assessment made certain assumptions and was very generous in its assessment generally, screening out certain policies that could have significant impacts on the integrity of European sites, and so was not very precautionary.
- There were internal contradictions including evidence that contradicted the assessment's main conclusion that significant effects were unlikely.
- The HDA did not promote a hierarchy of—avoidance—mitigation—compensation: the approach promoted by Natural England focussed on lower-level mitigation measures (in local development documents and project-level HDAs) rather than avoidance or mitigation of key impacts at source, i.e. in the RSS.
- Indirect and cumulative impacts were not considered.
- As the assessment did not give confidence that the RSS would truly avoid impacts on all European sites, its conclusions could well be challengeable in the courts.

The Regional Assembly submitted its review to the Government Office in March 2007, expressing its concern over the adequacy of the appropriate assessment (as well as the adequacy of the Sustainability

Appraisal and the Strategic Environmental Assessment). prompting an embarrassing announcement by the Government Office in a letter of June 11, 2007 that the Plan would be delayed due to the commissioning of further work to assess the Plan against the requirements of the Habitats Directive. The Government Office letter focussed entirely on the HDA , and tried to put a brave face on it:

> ''The Government Office for the East of England is today announcing that it is commissioning further work to assess the East of England Plan (Draft Alterations to the Regional Spatial Strategy for the East of England) against the requirements of the European Habitats Directive. This decision is in response to the points put to us in representations on the original Habitats Directive assessment work from the Regional Assembly, Natural England and others, and which we consider need to be considered before we can finalise the Plan.
>
> By having this further work carried out, and considering the need for changes to the Plan that may flow from it, we aim to ensure that the final Plan will be fully compliant with the Directive.
>
> As you will realise, this course of action has implications for the timetable for publication of the East of England Plan. The consultants we are appointing will need time to compete their work to the necessary standard, and we may then wish to consult further. All of this means that the final Plan will not now be published before the autumn at the earliest.
>
> This should not hold up putting in place higher levels of sustainable growth within the region, nor should it delay progress on Development Plan Documents. In March Local Authorities submitted finalised programmes for producing Development Plan Documents to us. We will expect them to keep to those programmes notwithstanding these developments in relation to the RSS timetable.
>
> I appreciate that this extended timetable may be frustrating for all concerned. However, you will appreciate that, in the particular area of the application of the Habitats Directive to Regional Spatial Strategies, we have been operating in uncharted waters, without specific precedent in UK law or practice, and without the benefit of previously tested methodology. This is an area that is inherently difficult, given that the Habitats Directive is designed to protect specific habitats, whereas a Regional Spatial Strategy is a high-level document that does not specify development at particular sites.
>
> We found ourselves in a position where, given the stage in the process at which it became clear that the Habitats Directive applies to Regional Spatial Strategies, it was too late for the Regional Assembly to develop the assessment, which would be the normal approach. It therefore fell to the Government Office to pick it up very late in the process. All of this makes it important that we take the time now to ensure we follow the correct processes, reflecting best practice.''

Although this case is atypical in that, due to the speed in which the EERA produced its draft plan they preceded the requirement for an appropriate assessment, it provides an insight into both the value of obtaining an independent opinion and the need to adopt the correct methodology from the outset. The case demonstrates that there appear to be a number of different views about the correct approach to implementing the Habitats Directive in relation to RSSs.

Other Ongoing Developments

In addition to the challenges posed by the adoption of national infrastructure policy statements (see above) there are further potential transposition issues and two recent changes with potentially interesting consequences.

Outstanding Transposition Issues

The 2007 amendment Regulations should have corrected the transposition of the Habitats Directive into English law, but will there still be deficiencies? There would appear to be one issue outstanding within the transposition, and a further issue hidden in a CLG guidance note which might lead to inadequate appropriate assessments being carried out.

The Scope of Regulation 48 Regulation 48 requires that competent authorities assess the effect on European sites ''in Great Britain'' before approving plans and projects. A limitation to sites in one Member State's territory or, as in this case just part of one, has no obvious justification and appears to be contrary to the aim of a Directive issued to protect a *Community-wide* network of sites.

Under the current regulations a developer in Kent may be required to assess the impacts on sites in Kent that are further away than some sites in France. What, for example, would be the validity under European law of the approval of plans for new coal-fired power stations on the South coast of England that had foreseeable and significant effects on European sites in France, Belgium or Holland?

Limitation of consideration of 'in-combination' effects. Current CLG guidance[123] to Regional Planning Bodies (RPBs) and Local Planning Authorities (LPAs) on the appropriate assessment of land use plans suggests that:

> ''Only other plans and projects which the RPB or LPA consider to be the most relevant should be collected for the 'in-combination' test. An exhaustive list could render the assessment exercise unworkable.''

While the final sentence may be true, no such limitation exists within the Habitats Directive..

European Offshore Marine Sites

The Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007[124] came into force on the same date as the amendments to the Habitats Regulations,[125] August 21, 2007. They implement the provisions of the Habitats and Birds Directives in relation to what is called the offshore marine area (broadly, the area beyond territorial waters but within the British fishery limits), and in doing so, create a new class of European sites: 'European offshore marine sites'[126], of which the Secretary of State must compile and maintain a register.

[123] *Planning for the Protection of European Sites: Appropriate Assessment: Guidance for Regional Spatial Strategies and Local Development Documents,* DCLG, August 2006, at p.11, http://www.communities.gov.uk/pub /353/PlanningfortheProtectionofEuropeanSitesAppropriateAssessmentGuidanceForRegionals_id1502353.pdf.

[124] SI 2007/1842.

[125] SI 2007/1843.

[126] Reg.15 defines a ''European offshore marine site'' as special areas of conservation, and other sites, located in the offshore marine area.

The detailed effect of these regulations is not within the scope of this paper but in essence European offshore marine sites are now regulated in much the same way as their onshore (and inshore) equivalents and require the appropriate assessment of plans and projects likely to have a significant effect on a European offshore marine site or a European site, and a review of existing decisions and consents by making an appropriate assessment of the implications for the site in question.

EC v Italy *(May 2007)*[127]

In this case, on the date that the ''Valloni e steppe pedegarganiche'' became a SPA and so subject to Art.6(2), (3) and (4) of the Habitats Directive by virtue of Art. 7, a number of developments that would have a negative impact on the Site were ongoing. The Commission sought a declaration that, by allowing the developments to continue, the Italian government was in breach of its obligations under the Habitats Directive.

The Advocate General's opinion states simply that the requirements of Art.6(3) and (4) cannot logically be applied retrospectively to projects that have been implemented. The decision also makes clear that other projects in the same scheme, and other stages of the same project, that have *not* been implemented remain subject to the Art.6(3) and (4) provisions.

> ''50. At that point, Italy had already started work on various projects—work which is, however, continuing.
>
> 51. It follows that Article 6(3) and (4) of the Habitats Directive did not apply at the moment at which an ex ante assessment would have been pertinent. In my view, they cannot logically be applied retrospectively. (21) In respect of what has already been both planned and implemented, Italy thus cannot be held to be in breach of those articles.
>
> 52. If and to the extent that there are further projects, or further stages of the same global project that may be distinguished from earlier stages without artificiality, those would however be subject to the obligation in Article 6(3). They would also be able (potentially, at least) to benefit from the override provisions of Article 6(4). The Commission's pleading does not, however, seek to make such a distinction. Nor does it identify the projects in a way that would enable the Court to carry out such an analysis with any confidence.
>
> 53. It follows that the Commission is not entitled to the declarations which it seeks in respect of Article 6(3) and (4) of the Habitats Directive.''

The opinion breaks new ground and, if confirmed, provides a precedent that projects that are already being implemented need not be subjected to an appropriate assessment. This is of importance because it is (at best) difficult to read such a limitation into the Directive, and therefore to date only projects which were completed were safe from retrospective appropriate assessment.

A final ruling on *EC v Italy* is scheduled for September 20, 2007.

Conclusion

These are certainly interesting times for European nature conservation law and its application to the UK. The surprising number of cases generated by it of late is now bearing some resemblance to the well established EIA litigation, and it seems likely that the trend will continue in that direction.

[127] *Commission of the European Communities v Italian Republic*, C-388/05 [2007] E.C.R. I-00000.

In the early years after the Habitats Directive it is probably right to say that with the exception of the big coastal and estuarine developers there was a general feeling of ''it doesn't affect me''. Partly for that reason the difficulties with the Thames Basin Heaths SPA have come as a shock and as a source of immense frustration to many but it seems clear that we are far from out of the woods in this respect either.

What is perhaps most troubling of all, and this is not just confined to understandable teething problems with the appropriate assessment of land use plans, is the large variation in screening and appropriate assessment methodology and approach amongst local authorities, their consultants and Government. This needs a Government-led programme of education and training if it is not to become a wider issue.

APPENDIX 1

Extracts from the Conservation (Natural Habitats, &c.) Regulations 1994[128]

Definitions

2—Interpretation and application

(1) In these Regulations. . .

''competent authority'' shall be construed in accordance with regulation 6;

''European site'' has the meaning given by regulation 10 and ''European marine site'' means a European site which consists of, or so far as it consists of, marine areas;

[''European offshore marine site'' means a European offshore marine site within the meaning of regulation 15 (meaning of European offshore marine site) of the 2007 Regulations;'']

''marine area'' means any land covered (continuously or intermittently) by tidal waters or any part of the sea in or adjacent to Great Britain up to the seaward limit of territorial waters;

''Natura 2000'' means the European network of special areas of conservation, and special protection areas under the Wild Birds Directive, provided for by Article 3(1)of the Habitats Directive;

''the offshore marine area'' means—

(a) any part of the seabed and subsoil situated in any area designated under section 1(7) of the Continental Shelf Act 1964; and
(b) any part of the waters within British fishery limits (except the internal waters of, and the territorial sea adjacent to, the United Kingdom, the Channel Islands and the Isle of Man); ''statutory undertaker'' has the same meaning as in the National Parks and Access to the Countryside Act 1949;

(2) Unless the context otherwise requires, expressions used in these Regulations and in the Habitats Directive have the same meaning as in that Directive.

The following expressions, in particular, are defined in Article 1 of that Directive–''priority natural habitat types'' and ''priority species''; ''site'' and ''site of Community importance''; and ''special area of conservation''.

[(2A) In these Regulations—

(a) subject to sub-paragraph (b)—

(i) ''the Habitats Directive'' means Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora; and
(ii) ''the Wild Birds Directive'' means Council Directive 79/409/EEC on the conservation of wild birds;

(b) any reference to any Annex to the Habitats Directive is a reference to that Annex as amended from time to time.]

[128] As amended most recently by The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007, with effect from August 21, 2007, those amendments being shown thus: [ ].

6—Competent authorities generally

(1) For the purposes of these Regulations the expression ''competent authority'' includes any Minister, government department, public or statutory undertaker, public body of any description or person holding a public office.

The expression also includes any person exercising any function of a competent authority in the United Kingdom.

(2) In paragraph (1)–

(a) ''public body'' includes any local authority, joint board or joint committee; and
(b) ''public office'' means–
(a) an office under Her Majesty,
(b) an office created or continued in existence by a public general Act of Parliament, or
(c) an office the remuneration in respect of which is paid out of money provided by Parliament

. . .

(3) In paragraph (2)(a)–

''local authority''—

(a) in relation to England, means a county council, district council or London borough council, the Common Council of the City of London, the sub-treasurer of the Inner Temple, the under treasurer of the Middle Temple or a parish council,
(b) in relation to Wales, means a county council, county borough council or community council, and
(c) in relation to Scotland, means a regional, islands or district council;

''joint board'' and ''joint committee'' in relation to England and Wales mean–

(a) a joint or special planning board constituted for a National Park by order under paragraph 1 or 3 of Schedule 17 to the Local Government Act 1972, or a joint planning board within the meaning of section 2 of the Town and Country Planning Act 1990, and
(b) a joint committee appointed under section 102(1)(b) of the Local Government Act 1972, and in relation to Scotland have the same meaning as in the Local Government (Scotland) Act 1973.

10—Meaning of ''European site'' in these Regulations

(1) In these Regulations a ''European site'' means–

(a) a special area of conservation,
(b) a site of Community importance which has been placed on the list referred to in the third sub-paragraph of Article 4(2) of the Habitats Directive,
(c) a site hosting a priority natural habitat type or priority species in respect of which consultation has been initiated under Article 5(1) of the Habitats Directive, during the consultation period or pending a decision of the Council under Article 5(3),
(d) an area classified pursuant to Article 4(1) or (2) of the Wild Birds Directive, or
[(e) a site in Great Britain which has been proposed to the Commission by a devolved administration or the Secretary of State as a site eligible for designation as a special area of

conservation for the purposes of meeting the United Kingdom's obligations under Article 4(1) of the Habitats Directive, until such time as–

(i) the site is placed on the list of sites of Community importance referred to in the third sub-paragraph of Article 4(2) of the Habitats Directive, or
(ii) agreement is reached or a decision is taken pursuant to Article 4(2) of that Directive not to place the site on that list.]

(2) Sites which are European sites by virtue only of paragraph (1)(c) are not within regulations 20(1) and (2), 24 and 48 (which relate to the approval of certain plans and projects); but this is without prejudice to their protection under other provisions of these Regulations.

48—Assessment of implications for European site

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which–

(a) is likely to have a significant effect on a European site in Great Britain [or a European offshore marine site] (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment [or to enable them to determine whether an appropriate assessment is required].

(3) The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.

(4) They shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site [or European offshore marine site (as the case may be)].

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

[(7) This regulation does not apply in relation to a site which is—

(a) a European site by reason only of regulation 10(1)(c);or
(b) a European offshore marine site by reason of regulation 15(c) of the 2007 Regulations].

[(8) Where a plan or project requires an appropriate assessment both under this regulation and under the 2007 Regulations, the assessment required by this regulation need not identify those effects of

the plan or project that are specifically attributable to that part of it that is to be carried out in Great Britain, provided that an assessment made for the purpose of this regulation and the 2007 Regulations assesses the effects of the plan or project as a whole].

49—Considerations of overriding public interest

(1) If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site.

(2) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either–

(a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, or

[(b) any other reasons which the competent authority, having due regard to the opinion of the European Commission, considers to be imperative reasons of overriding public interest].

(3) Where a competent authority other than the Secretary of State desire to obtain the opinion of the European Commission as to whether reasons are to be considered imperative reasons of overriding public interest, they shall submit a written request to the Secretary of State–

(a) identifying the matter on which an opinion is sought, and
(b) accompanied by any documents or information which may be required.

(4) The Secretary of State may thereupon, if he thinks fit, seek the opinion of the Commission; and if he does so, he shall upon receiving the Commission's opinion transmit it to the authority.

(5) Where an authority other than the Secretary of State propose to agree to a plan or project under this regulation notwithstanding a negative assessment of the implications for [the site concerned], they shall notify the Secretary of State.

Having notified the Secretary of State, they shall not agree to the plan or project before the end of the period of 21 days beginning with the day notified to them by the Secretary of State as that on which their notification was received by him, unless the Secretary of State notifies them that they may do so.

(6) In any such case the Secretary of State may give directions to the authority prohibiting them from agreeing to the plan or project, either indefinitely or during such period as may be specified in the direction.

This power is without prejudice to any other power of the Secretary of State in relation to the decision in question.

50—Review of existing decisions and consents, &c.

(1) Where before the date on which a site becomes a European site [or a European offshore marine site] or, if later, the commencement of these Regulations, a competent authority have decided to undertake, or have given any consent, permission or other authorisation for, a plan or project to which regulation 48(1) would apply if it were to be reconsidered as of that date, the authority shall as

soon as reasonably practicable, review their decision or, as the case may be, the consent, permission or other authorisation, and shall affirm, modify or revoke it.

(2) They shall for that purpose make an appropriate assessment of the implications for the site in view of that site's conservation objectives; and the provisions of regulation 48(2) to (4) shall apply, with the appropriate modifications, in relation to such a review.

(3) Subject to the following provisions of this Part, any review required by this regulation shall be carried out under existing statutory procedures where such procedures exist, and if none exist the Secretary of State may give directions as to the procedure to be followed.

(4) Nothing in this regulation shall affect anything done in pursuance of the decision, or the consent, permission or other authorisation, before the date mentioned in paragraph (1).

51—Consideration on review

(1) The following provisions apply where a decision, or a consent, permission or other authorisation, falls to be reviewed under regulation 50.

(2) Subject as follows, the provisions of regulation 48(5) and (6) and regulation 49 shall apply, with the appropriate modifications, in relation to the decision on the review.

(3) The decision, or the consent, permission or other authorisation, may be affirmed if it appears to the authority reviewing it that other action taken or to be taken by them, or by another authority, will secure that the plan or project does not adversely affect the integrity of the site.

Where that object may be attained in a number of ways, the authority or authorities concerned shall seek to secure that the action taken is the least onerous to those affected.

(4) The Secretary of State may issue guidance to authorities for the purposes of paragraph (3) as to the manner of determining which of different ways should be adopted for securing that the plan or project does not have any such effect, and in particular–

(a) the order of application of different controls, and
(b) the extent to which account should be taken of the possible exercise of other powers;

and the authorities concerned shall have regard to any guidance so issued in discharging their functions under that paragraph.

(5) Any modification or revocation effected in pursuance of this regulation shall be carried out under existing statutory procedures where such procedures exist.

If none exist, the Secretary of State may give directions as to the procedure to be followed.

52—Co-ordination where more than one competent authority involved

(1) The following provisions apply where a plan or project–

(a) is undertaken by more than one competent authority,
(b) requires the consent, permission or other authorisation of more than one competent authority, or
(c) is undertaken by one or more competent authorities and requires the consent, permission or other authorisation of one or more other competent authorities.

(2) Nothing in regulation 48(1) or 50(2) requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority.

(3) The Secretary of State may issue guidance to authorities for the purposes of regulations 48 to 51 as to the circumstances in which an authority may or should adopt the reasoning or conclusions of another competent authority as to whether a plan or project–

(a) is likely to have a significant effect on a European site [or a European offshore marine site], or
(b) will adversely affect the integrity of a European site [or a European offshore marine site];
and the authorities involved shall have regard to any guidance so issued in discharging their functions under those regulations.

(4) In determining whether a plan or project should be agreed to under regulation 49(1) (considerations of overriding public interest) a competent authority other than the Secretary of State shall seek and have regard to the views of the other competent authority or authorities involved.

53—Compensatory measures

Where in accordance with regulation 49 (considerations of overriding public interest)–

(a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site [or a European offshore marine site], or
(b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment,
the Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

54—Grant of planning permission

(1) Regulations 48 and 49 (requirement to consider effect on European sites [in Great Britain and European offshore marine sites]) apply, in England and Wales, in relation to–

(a) granting planning permission on an application under Part III of the Town and Country Planning Act 1990;
(aa) granting planning permission on an application under section 293A of that Act (urgent Crown development);
(b) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act in respect of such an application;
(c) granting planning permission under–

(i) section 141(2)(a) of that Act (action by Secretary of State in relation to purchase notice),
(ii) section 177(1)(a) of that Act (powers of Secretary of State on appeal against enforcement notice), or

(iii) section 196(5) of that Act as originally enacted (powers of Secretary of State on reference or appeal as to established use certificate);

(d) directing under section 90(1), (2) or (2A) of that Act (development with government authorisation), or under section 5(1) of the Pipe-lines Act 1962, that planning permission shall be deemed to be granted;

(e) making–

(i) an order under section 102 of that Act (order requiring discontinuance of use or removal of buildings or works), including an order made under that section by virtue of section 104 (powers of Secretary of State), which grants planning permission, or

(ii) an order under paragraph 1 of Schedule 9 to that Act (order requiring discontinuance of mineral working), including an order made under that paragraph by virtue of paragraph 11 of that Schedule (default powers of Secretary of State), which grants planning permission,

or confirming any such order under section 103 of that Act;

(f) directing under–

(i) section 141(3) of that Act (action by Secretary of State in relation to purchase notice), or

(ii) section 35(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (action by Secretary of State in relation to listed building purchase notice), that if an application is made for planning permission it shall be granted.

(2) [Scotland].

(3) Where regulations 48 and 49 apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site [or European offshore marine site] would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations.

(4) Where regulations 48 and 49 apply, outline planning permission shall not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site [or European offshore marine site] could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

In this paragraph ''outline planning permission'' and ''reserved matters'' have the same meaning as in section 92 of the Town and Country Planning Act 1990. . ..

55—Planning permission: duty to review

(1) Subject to the following provisions of this regulation, regulations 50 and 51 (requirement to review certain decisions and consents, &c.) apply to any planning permission or deemed planning permission, unless–

(a) the development to which it related has been completed, or

(b) it was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun, or
(c) it was granted for a limited period and that period has expired.

(2) Regulations 50 and 51 do not apply to planning permission granted or deemed to have been granted–

(a) by a development order (but see regulations 60 to 64 below);
(b) by virtue of the adoption of a simplified planning zone scheme or of alterations to such a scheme (but see regulation 65 below);
(c) by virtue of the taking effect of an order designating an enterprise zone under Schedule 32 to the Local Government, Planning and Land Act 1980, or by virtue of the approval of a modified enterprise zone scheme (but see regulation 66 below).

(3) Planning permission deemed to be granted by virtue of–

(a) a direction under section 90(1) of the Town and Country Planning Act 1990 or section 37(1) of the Town and Country Planning (Scotland) Act 1972 in respect of development for which an authorisation has been granted under section 1 or 3 of the Pipe-lines Act 1962,
(b) a direction under section 5(1) of the Pipe-lines Act 1962,
(c) a direction under section 90(1) of the Town and Country Planning Act 1990 or section 37(1) of the Town and Country Planning (Scotland) Act 1972 in respect of development for which a consent has been given under section 36 or 37 of the Electricity Act 1989,
(d) a direction under section 90(2) of the Town and Country Planning Act 1990 or paragraph 7 of Schedule 8 to the Electricty Act 1989, or
(e) a direction under section 90(2A) of the Town and Country Planning Act 1990 (which relates to development in pursuance of an order under section 1 or 3 of the Transport and Works Act 1992),

shall be reviewed in accordance with the following provisions of this Part in conjunction with the review of the underlying authorisation, consent or order.

(4) In the case of planning permission deemed to have been granted in any other case by a direction under section 90(1) of the Town and Country Planning Act 1990 or section 37(1) of the Town and Country Planning (Scotland) Act 1972, the local planning authority shall–

(a) identify any such permission which they consider falls to be reviewed under regulations 50 and 51, and
(b) refer the matter to the government department which made the direction; and the department shall, if it agrees that the planning permission does fall to be so reviewed, thereupon review the direction in accordance with those regulations.

(5) Save as otherwise expressly provided, regulations 50 and 51 do not apply to planning permission granted or deemed to be granted by a public general Act of Parliament.

(6) Subject to paragraphs (3) and (4), where planning permission granted by the Secretary of State falls to be reviewed under regulations 50 and 51–

(a) it shall be reviewed by the local planning authority, and
(b) the power conferred by section 97 of the Town and Country Planning Act 1990 or section 42 of the Town and Country Planning (Scotland) Act 1972 (revocation or modification of planning permission) shall be exercisable by that authority as in relation to planning permission granted on an application under Part III of that Act.

In a non-metropolitan county in England the function of reviewing any such planning permission shall be exercised by the district planning authority unless it relates to a county matter (within the meaning of Schedule 1 to the Town and Country Planning Act 1990) in which case it shall be exercised by the county planning authority.

56—Planning permission: consideration on review

(1) In reviewing any planning permission or deemed planning permission in pursuance of regulations 50 and 51, the competent authority shall, in England and Wales–

(a) consider whether any adverse effects could be overcome by planning obligations under section 106 of the Town and Country Planning Act 1990 being entered into, and
(b) if they consider that those effects could be so overcome, invite those concerned to enter into such obligations;
and so far as the adverse effects are not thus overcome the authority shall make such order under section 97 of that Act (power to revoke or modify planning permission), or under section 102 of or paragraph 1 of Schedule 9 to that Act (order requiring discontinuance of use, &c.), as may be required.

(2) [Scotland.]

(3) Where the authority ascertain that the carrying out or, as the case may be, the continuation of the development would adversely affect the integrity of a European site [or European offshore marine site], they nevertheless need not proceed under regulations 50 and 51 if and so long as they consider that there is no likelihood of the development being carried out or continued.

60—General development orders

(1) It shall be a condition of any planning permission granted by a general development order, whether made before or after the commencement of these Regulations, that development which–

(a) is likely to have a significant effect on a European site in Great Britain [or a European offshore marine site] (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site, shall not be begun until the developer has received written notification of the approval of the local planning authority under regulation 62.

(2) It shall be a condition of any planning permission granted by a general development order made before the commencement of these Regulations that development which–

(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site,

and which was begun but not completed before the commencement of these Regulations, shall not be continued until the developer has received written notification of the approval of the local planning authority under regulation 62.

(3) Nothing in this regulation shall affect anything done before the commencement of these Regulations.

61—General development orders: opinion of appropriate nature conservation body

(1) Where it is intended to carry out development in reliance on the permission granted by a general development order, application may be made in writing to the appropriate nature conservation body for their opinion whether the development is likely to have such an effect as is mentioned in regulation 60(1)(a) or (2)(a).

The application shall give details of the development which is intended to be carried out.

(2) On receiving such an application, the appropriate nature conservation body shall consider whether the development is likely to have such an effect.

(3) Where they consider that they have sufficient information to conclude that the development will, or will not, have such an effect, they shall in writing notify the applicant and the local planning authority of their opinion.

(4) If they consider that they have insufficient information to reach either of those conclusions, they shall notify the applicant in writing indicating in what respects they consider the information insufficient; and the applicant may supply further information with a view to enabling them to reach a decision on the application.

(5) The opinion of the appropriate nature conservation body, notified in accordance with paragraph (3), that the development is not likely to have such an effect as is mentioned in regulation 60(1)(a) or (2)(a) shall be conclusive of that question for the purpose of reliance on the planning permission granted by a general development order.

62—General development orders: approval of local planning authority

(1) Where it is intended to carry out development in reliance upon the permission granted by a general development order, application may be made in writing to the local planning authority for their approval.

(2) The application shall–

(a) give details of the development which is intended to be carried out; and
(b) be accompanied by–

(i) a copy of any relevant notification by the appropriate nature conservation body under regulation 61, and
(ii) any fee required to be paid.

(3) For the purposes of their consideration of the application the local planning authority shall assume that the development is likely to have such an effect as is mentioned in regulation 60(1)(a) or (2)(a).

(4) The authority shall send a copy of the application to the appropriate nature conservation body and shall take account of any representations made by them.

(5) If in their representations the appropriate nature conservation body state their opinion that the development is not likely to have such an effect as is mentioned in regulation 60(1)(a) or (2)(a), the local planning authority shall send a copy of the representations to the applicant; and the sending of that copy shall have the same effect as a notification by the appropriate nature conservation body of its opinion under regulation 61(3).

(6) In any other case [in which the application has been sent to the appropriate nature conservation body] the local planning authority shall, taking account of any representations made by the appropriate nature conservation body, make an appropriate assessment of the implications of the development for the European site [or European offshore marine site] in view of that site's conservation objectives.

In the light of the conclusions of the assessment the authority shall approve the development only after having ascertained that it will not adversely affect the integrity of the site.

Part IVA

Appropriate Assessments for Land Use Plans for England and Wales: Regulations 85A-E

85A—Interpretation

(1) This Part extends to England and Wales only.

(2) In this Part—

''the 1990 Act'' means the Town and Country Planning Act 1990;

''the 1999 Act'' means the Greater London Authority Act 1999;

''the 2004 Planning Act'' means the Planning and Compulsory Purchase Act 2004;

''the 2005 Order'' means the Planning and Compulsory Purchase Act 2004 (Commencement No.3 and Consequential, Transitional and Saving Provisions) (Wales) Order 2005;

''land use plan'' means—

(a) the regional spatial strategy under Part 1 (regional functions) of the 2004 Planning Act;
(b) the spatial development strategy under section 334 (the spatial development strategy) of the 1999 Act;
(c) a local development document as provided for in Part 2 (local development) of the 2004 Planning Act other than a statement of community involvement under section 18 (statement of community involvement) of that Act;
(d) a local development plan as provided for in Part 6 (Wales) of the 2004 Planning Act;
(e) the Wales Spatial Plan under section 60 (Wales Spatial Plan) of the 2004 Planning Act;
(f) an alteration or replacement of a structure plan, unitary development plan, local plan, minerals local plan, or waste local plan under Part 2 (development plans) of the 1990 Act to the extent permitted by Schedule 8 (transitional provisions) to the 2004 Planning Act; or
(g) a unitary development plan as provided for in Part 2 of the 1990 Act to the extent permitted by section 122(3) (regulations and orders) of the 2004 Planning Act and article 4 of the 2005 Order;

''plan-making authority'' means—

(a) a regional planning body recognised by the Secretary of State under section 2(1) (regional planning bodies) of the 2004 Planning Act;
(b) the Mayor of London when exercising powers under section 341(1) or (2) (alteration or replacement) of the 1999 Act;
(c) an authority which, by virtue of Part 1 (planning authorities) of the 1990 Act or an order under section 29(2) (joint committees) of the 2004 Planning Act, is a local planning authority;
(d) the Secretary of State when exercising powers under—

(i) section 21 (intervention by Secretary of State) or section 27 (Secretary of State's default power) of the 2004 Planning Act; or
(ii) section 19(1) (approval of a unitary development plan by the Secretary of State), section 35A(4) (calling in of proposal for approval by the Secretary of State) or section 45(1) (approval of proposals by the Secretary of State) of the 1990 Act to the extent permitted by Schedule 8 to the 2004 Planning Act; or

(e) the Welsh Ministers when exercising powers under—

(i) section 60(3), section 65 (intervention by Assembly) or section 71(4) (Assembly's default power) of the 2004 Planning Act; or
(ii) under section 19(1) of the 1990 Act to the extent permitted by section 122(3) of the 2004 Planning Act and article 4 of the 2005 Order.

(3) References in this Part to giving effect to a land use plan are to—

(a) the publication, under section 9(6) (RSS: further procedure) of the 2004 Planning Act, of a revision of a regional spatial strategy;
(b) the approval, under section 21(9) or section 27(4) of the 2004 Planning Act, of a local development document;
(c) the adoption, under section 23 (adoption of local development documents) of the 2004 Planning Act, of a local development document other than a statement of community involvement under section 18 (statement of community involvement) of that Act;
(d) the publication, under section 341 (alteration or replacement) of the 1999 Act, of alterations of the spatial development strategy or a new spatial development strategy to replace it;
(e) the publication, under section 60 (Wales Spatial Plan) of the 2004 Planning Act, of a revision of the Wales Spatial Plan;
(f) the adoption, under section 67 (adoption of local development plan) of the 2004 Planning Act, of a local development plan;
(g) the approval, under section 65(9) or section 71(4) of the 2004 Planning Act, of a local development plan;
(h) the adoption, under section 35(1) (adoption of proposals), or approval under section 35A(4) of the 1990 Act, of an alteration or replacement of a structure plan to the extent permitted by paragraph 2(2) of Schedule 8 to the 2004 Planning Act;
(i) the adoption, under section 15(1) (adoption of unitary development plans by local planning authority) and that provision as applied by section 21(2) (alteration or replacement) of the 1990 Act, of an alteration or replacement of a unitary development plan to the extent permitted by paragraph 4(1) of Schedule 8 to the 2004 Planning Act;

(j) the approval, under section 19(1) and that provision as applied by section 21(2) of the 1990 Act, of an alteration or replacement of a unitary development plan to the extent permitted by paragraph 4(1) of Schedule 8 to the 2004 Planning Act;
(k) the adoption, under section 43(1) (adoption of proposals) or approval under section 45(1) of the 1990 Act, of an alteration or replacement of a local plan or a minerals local plan or waste local plan to the extent permitted by paragraph 9(1), 10(1) or 14 of Schedule 8 to the 2004 Planning Act;
(l) the adoption, under section 15(1) of the 1990 Act, of a unitary development plan to the extent permitted by section 122(3) of the 2004 Planning Act and article 4 of the 2005 Order; or
(m) the approval, under section 19(1) of the 1990 Act, of a unitary development plan to the extent permitted by section 122(3) of the 2004 Planning Act and article 4 of the 2005 Order.

85B—Assessment of implications for European sites and European offshore marine sites

(1) Where a land use plan—

(a) is likely to have a significant effect on a European site in Great Britain or a European offshore marine site (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site,
the plan-making authority for that plan shall, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) The plan-making authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(3) They shall also, if they consider it appropriate, take the opinion of the general public, and if they do so, they shall take such steps for that purpose as they consider appropriate.

(4) In the light of the conclusions of the assessment, and subject to regulation 85C (considerations of overriding public interest), the plan-making authority or, in the case of a regional spatial strategy, the Secretary of State shall give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(5) A plan-making authority shall provide such information as the Secretary of State or the Welsh Ministers may reasonably require for the purposes of the discharge of the obligations of the Secretary of State or the Welsh Ministers under this Part.

(6) This regulation does not apply in relation to a site which is—

(a) a European site by reason of regulation 10(1)(c); or
(b) a European offshore marine site by reason of regulation 15(c) of the 2007 Regulations.

85C—Considerations of overriding public interest

(1) If the plan-making authority is satisfied that, there being no alternative solutions, the land use plan must be given effect for imperative reasons of overriding public interest (which, subject to paragraph

(3), may be of a social or economic nature), they may give effect to the land use plan notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).

(2) In relation to a regional spatial strategy under Part 1 (regional functions) of the 2004 Planning Act, paragraph (1) applies to the Secretary of State as it applies to a plan-making authority in the case of any other land use.

(3) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either—

(a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, or
(b) any other imperative reasons of overriding public interest, provided that the competent authority has had due regard to the opinion of the European Commission in satisfying themselves that there are such reasons.

(4) Where a plan-making authority, other than the Secretary of State or the Welsh Ministers, desire to obtain the opinion of the European Commission as to whether reasons are to be considered imperative reasons of overriding public interest, they shall submit a written request to the Secretary of State for a plan relating to England and to the Welsh Ministers for a plan relating to Wales—

(a) identifying the matter on which an opinion is sought, and
(b) accompanied by any documents or information which may be required.

(5) The Secretary of State may, if he thinks fit, seek the opinion of the European Commission for—

(a) a plan relating to England; or
(b) at the request of the Welsh Ministers, a plan relating to Wales.

(6) The Secretary of State shall send any opinion obtained under paragraph (5) to—

(a) in the case of a plan relating to England, the plan-making authority, and
(b) in the case of a plan relating to Wales, the Welsh Ministers.

(7) The Welsh Ministers shall, upon receiving the opinion, transmit it to the plan-making authority.

(8) Where a plan-making authority, other than the Secretary of State or the Welsh Ministers, propose to give effect to a land use plan under this regulation, they shall notify—

(a) the Secretary of State, if the plan relates to England; or
(b) the Welsh Ministers, if the plan relates to Wales.

(9) The plan-making authority shall not give effect to the land use plan before the end of the period of 21 days beginning with the day notified by the Secretary of State or the Welsh Ministers as that on which their notification was received, unless—

(a) the Secretary of State, in relation to a plan relating to England, or
(b) the Welsh Ministers, in relation to a plan relating to Wales,

notifies them that they may do so.

(10) Without prejudice to any other power, the Secretary of State (in relation to a plan relating to England), or the Welsh Ministers (in relation to a plan relating to Wales), may give directions to the authority in any such case prohibiting them from giving effect to the land use plan, either indefinitely or during such period as may be specified in the direction.

85D—Co-ordination for land use plan prepared by more than one authority

(1) The following provisions apply where two or more local planning authorities prepare a joint local development document under section 28 (joint local development documents) or a joint local development plan under section 72 (joint local development plans) of the 2004 Planning Act.

(2) Nothing in paragraph (1) of regulation 85B (assessment of implications for European site or European offshore marine site) requires a local planning authority to assess any implications of a joint local development document or plan which would be more appropriately assessed under that provision by another local planning authority.

(3) The Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) may issue guidance to local planning authorities for the purposes of regulation 85B(1) as to the circumstances in which an authority may or should adopt the reasoning or conclusions of another authority as to whether a joint local planning document or plan—

(a) is likely to have a significant effect on a European site or European offshore marine site, or
(b) will adversely affect the integrity of a European site or European offshore marine site.

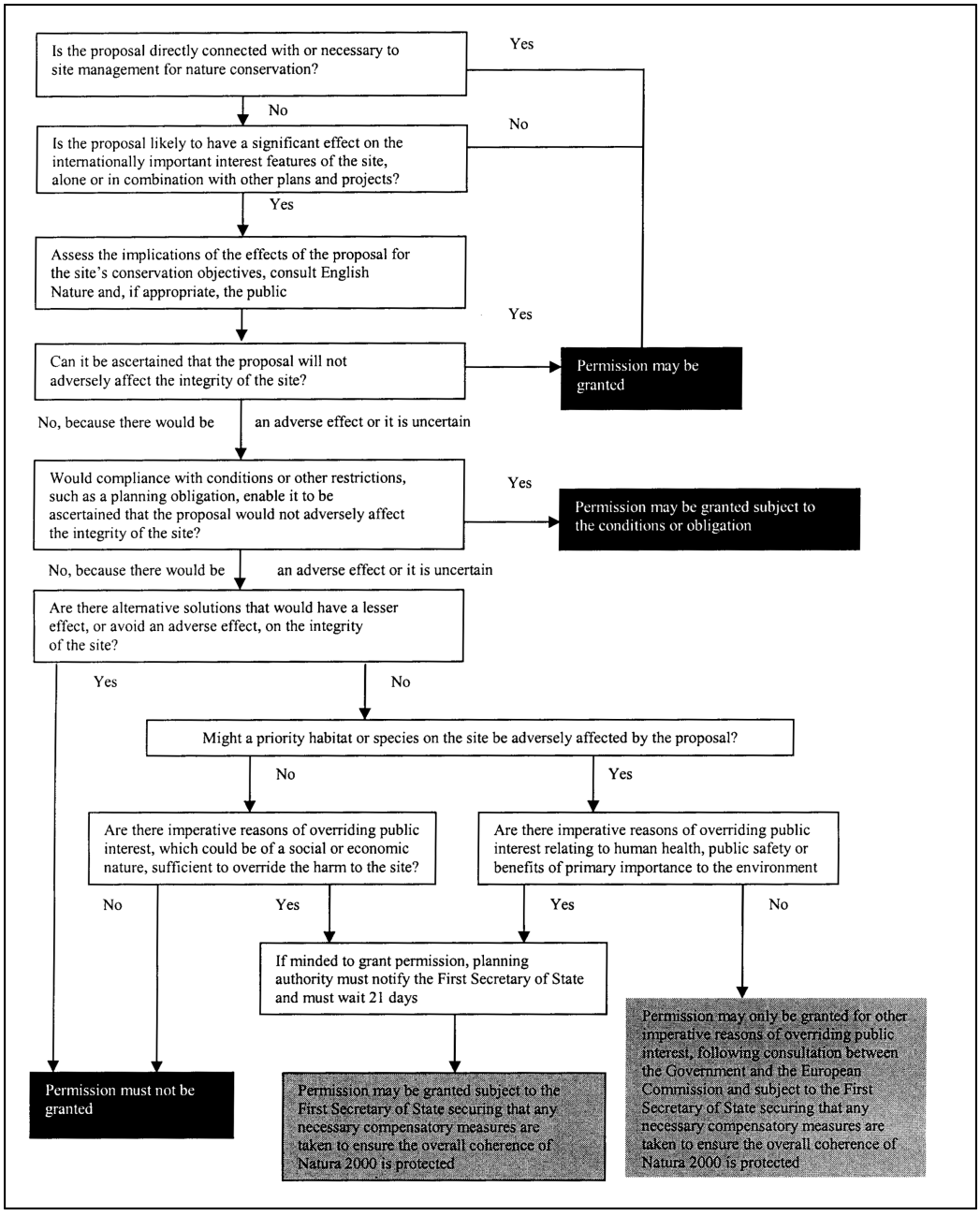
(4) The local planning authorities concerned shall have regard to any such guidance.

(5) In determining whether a joint local development document or plan should be adopted under regulation 85C (considerations of overriding public interest), a local planning authority shall seek and have regard to the views of the other local planning authorities concerned.

85E—Compensatory measures

Where in accordance with regulation 85C (considerations of overriding public interest) a land use plan is given effect notwithstanding a negative assessment of the implications for a European site or European offshore marine site, the Secretary of State (where the plan relates to England) and the Welsh Ministers (where the plan relates to Wales) shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.]

APPENDIX 2: Consideration of development proposals affecting Internationally Designated Nature Conservation Sites[129]



[129] Taken from Fig.1 of ODPM Circular 06/2005 and Defra Circular 01/2005, August 16, 2005.

APPENDIX 3
Extracts from major ports decision letters

Dibden Bay container terminal: Decision letter from the Secretary of State for Transport to Winckworth Sherwood, dated April 20, 2004

Summary of the Inspector's conclusions on the case for the Orders

Statement of Matters

17. The Inspector considered that no reliance could be placed on the Appropriate Assessment undertaken by the Applicant under the Conservation (Natural Habitats, & c.) Regulations 1994 SI 1994 No.2716 (the Habitats Regulations). He noted that the Applicant no longer adhered to the initial conclusion that the proposed development would not adversely affect the integrity of the European sites considered. Moreover, the Applicant had made no assessment of the effects of the proposed development on the River Itchen cSAC (candidate Special Area of Conservation) [36.166]. The Inspector considered that, contrary to the view put forward by the Applicant, the proposals would be likely to have an adverse effect upon the integrity of the designated conservation sites. In reaching this view the Inspector found against the Applicant's ''functional approach'' towards assessing environmental impact [36.169]–[36.172]. He considered the Applicant's assessment fundamentally flawed in that it treated compensatory measures as mitigation and wrongly relied on proposed habitat creation outside the European sites in concluding that the development would not adversely affect their integrity [36.184].

Main Issues

Need for the Project and overall port capacity 21. The Inspector noted in his summary the favourable contribution the Applicant's proposals would make to the development of the port of Southampton and to the national and local economy [36.648]–[36.651]. He considered that the development proposed at Dibden Bay would achieve the objective of the Harbour Revision Order and that there were no realistic alternative sites within the locality which would meet the needs of the port of Southampton for additional container handling capacity [36.319]–[36.322] and [36.649]. Nor would re-configuration or better management of present facilities within the port of Southampton be likely to achieve any more than a limited increase in container handling capacity [36.310]–[36.318].

Environmental considerations 27. The Inspector considered that the most significant harm arising from the proposed Dibden terminal would be to nature conservation interests. There would be direct impacts on sites of local and national conservation importance and on internationally protected sites, to which he attached paramount importance. He had no doubt that the proposed development would damage the integrity of the Solent and Southampton Water Ramsar site and Special Protection Area (SPA). He considered also that it could not be ascertained that the proposed development would not adversely affect the integrity of the Solent Maritime cSAC and the River Itchen cSAC [36.654].

Legal and Policy Tests 29. The Inspector concluded that there was no alternative solution, within the requirements of the Environmental Statement under Sch.3 to the Harbours Act 1964, to the proposed project, the objective of which was to expand substantially container handling capacity for the Port of Southampton [36.40]–[36.45], [36.655]. But to go ahead the project had to satisfy

the criterion of "imperative reasons of overriding public interest", in accordance with the Habitats Regulations. . . .

30. The Inspector doubted that it could satisfy that criterion, for a number of reasons. There was no assurance the works would go ahead if authorised and no contract, provisional or otherwise, in place with a potential terminal operator [36.656]. Neither Government policy nor Regional Planning Guidance, nor local policies indicated that nature conservation protection policies would be overridden by the need for development specifically at the port of Southampton [36.659], [36.661].

31. The Inspector considered that a project satisfying a test of public interest might reasonably be expected to attract a substantial degree of support from bodies representing the public interest. However, he noted that with the exception of the Southampton City Council, no public body had expressed support for the Dibden Terminal project at the Public Inquiries. The weight of public opinion, as expressed at the Inquiries and in the written representations, was heavily against the proposed development [36.660].

32. The Inspector considered that if the foreseeable national need could be met without the Dibden Terminal, there would be no imperative reasons of public interest that should override the protection of the internationally designated nature conservation sites [36.662].

33. The Inspector recognised the potential adverse competitive consequences to the national economy of a failure to proceed with the proposal in the absence of sufficient container handling capacity at UK ports. The key question for the Inspector was therefore whether without the proposed terminal there was a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK's container trade in the foreseeable future [36.663].

Alternative means of serving the public interest 34. The Inspector accepted that unless substantial new port development took place in the South East of England, the UK would have insufficient container handling capacity to handle its foreign trade. He considered that the problem was likely to start to have an effect in about 2006 and that by 2015, the shortfall would be of the order of 3km of deep water container quay. He doubted the usefulness of predictions beyond 2015 [36.665].

35. There were three other schemes being developed in the South East for expanded deep-water container handling capacity, at London Gateway, Bathside Bay and Felixstowe (Landguard) which could, in various combinations, address or exceed the identified quantitative national need for additional capacity [36.666]. The Inspector could not predict whether these developments would proceed but nor was he able to rule out them not proceeding [36.667].

36. The Inspector noted that there were additionally proposals for new container ports at Hunterston on the River Clyde and at Scapa Flow in the Orkney Islands. He considered that, whatever their merits, these were located too far away to be realistic alternatives for meeting the needs of the South East of England [36.336], [36.337]. The Inspector concluded that a further possible development at the Isle of Grain was not credible as an alternative in the immediate future, given the absence of formal proposals for development of container handling capacity there [36.335].

37. The Inspector considered it unlikely that any of the other three South Eastern proposed container terminals could be operational before the forecast shortfall in national handling capacity began to have an impact in 2006. On the other hand, he concluded that there was no guarantee that the proposed Dibden Terminal would be operational in 2006. However, the Inspector, citing in support of his

views European Commission guidance contained in ''Managing Natura 2000'', was not convinced that a temporary lack of handling capacity should be regarded as an imperative reason of public interest that should override the protection of internationally designated sites [36.668].

38. The Inspector considered it a reasonable prospect that any shortfall in national container handling capacity would be short-lived and thus there were, at present, no imperative reasons of overriding public interest to support the Dibden Terminal project, sufficient to outweigh its adverse impacts. He recognised that this conclusion was based on a finely-balanced judgement on which others might conclude differently and that a different conclusion might be drawn if certain other proposed developments failed to materialise [36.669]–[36.670].

The Adequacy of the Applicant's proposed offsetting measures 39. The Inspector identified the third and last main issue to be whether the offsetting measures proposed by the Applicant would be adequate in environmental terms. The Inspector considered the answer to be clear-cut, namely that the proposals advanced by the Applicant would not be adequate to permit the Secretary of State to meet the requirements of regulation 53 of the Habitats Regulations. Nor would they meet the wider requirements of Policy EC6 of the Structure Plan Review. The Inspector considered that this should be determinative and, accordingly, recommended against the HRO being made [36.671].

Secretary of State's Consideration

Main issues

Need for project 42. The Secretary of State agrees with the Inspector's conclusions on need for the project in relation to the port of Southampton, the economy of the South East of England, and the wider economy. With regard to financial viability of the project, he draws attention to his policy, as set out in ''Modern Ports—a UK Policy'', which is that where solely private funding is involved developers are best placed to assess their projects' sources of funding and commercial viability.

Alternative means of serving the public interest 43. The Secretary of State agrees that the UK will require new port development to meet forecast container handling capacity to handle foreign trade and considers that development in the South East of England would be appropriately placed to meet that need. He notes the existence, referred to in several places in the Inspector's Report, of three other proposed projects in the South East of England for the expansion of container capacity ports, and their individual forecast potential handling capacities.

44. At the time of the Public Inquiries these projects were at more or less early stages of development. Since the Inspector's Report was received by the Secretary of State, a Public Inquiry has been held into the proposals for London Gateway, a date has been set for a Public Inquiry into the proposal for terminal development at Bathside Bay and a formal application has been made for works at Felixstowe South (Landguard).

45. The Secretary of State considers that these proposals are therefore firmer than was the case at the time of the Public Inquiries. The Secretary of State does not prejudge whether any of those developments would proceed but he concurs with the Inspector that, in principle, they are feasible and credible alternatives for meeting forecast national needs within the short to medium term. There is no reason at this stage to rule them out as not being capable in principle of providing the

additional capacity for container handling in the South East of England which has been identified in the Inspector's Report.

46. The Secretary of State notes, in addition, the Inspector's references and conclusions concerning projected developments at Hunterston and Scapa Flow. He accepts that the location of the two Scottish projects referred to makes them in relative terms less realistic alternatives to a Dibden Terminal than would be the case with the afore-mentioned three southern English projects. The Secretary of State agrees with the Inspector's conclusion that the Isle of Grain is not credible as an alternative given the absence of formal proposals for development of container handling capacity there [36.335].

47. On the question of meeting a predicted short-term shortfall in capacity, the Secretary of State agrees with the Inspector's interpretation of guidance from the European Commission in *Managing Natura 2000*, which states that short term economic interests or other interests which would only yield short term benefits for society would not be sufficient to outweigh the long-term conservation interests protected by Council Directive 92/43/EEC of May 12, 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive) [36.668]. He therefore concludes that a predicted shortfall in handling capacity for a short term should not be determinative in assessing imperative reasons of overriding public interest.

48. The Secretary of State notes, moreover, the Inspector's conclusion that there is no guarantee that the proposed Dibden Terminal would be operational in 2006 [36.668]. The Secretary of State agrees and draws attention to the long construction period of up to 10 years for the Dibden Terminal identified in the Report and to uncertainties over the precise uses of its land area, which may cast doubt as to whether the project would be capable of meeting a potential shortfall of capacity in 2006. The Secretary of State, while accepting that additional container handling capacity is needed nationally, has no particular reason to identify a precise year or years in which a shortfall in capacity would arise if no further development projects were to proceed.

49. In the light of the foregoing, the Secretary of State sees no reason to depart from the reasoning and conclusions of the Inspector in this respect in paragraphs [36.664]–[36.670] of his Report.

Environmental matters, including the adequacy of the Applicant's offsetting measures

Consideration of alternatives 50. The Secretary of State agrees with the Inspector's assessment of the alternatives to the project in so far as they are required to be considered for the purposes of Sch.3 to the Harbours Act 1964, namely that it is legitimate to consider only those which would meet the needs of the port of Southampton [36.41]–[36.42] and that no suitable alternative which would meet that need exists within the locality [36.319]–[36.322].

51. The Secretary of State notes, however, that the consideration of alternatives for projects which would have a significant impact upon a site designated in accordance with the Habitats Regulations must necessarily range more widely. The Secretary of State agrees with the Inspector's conclusion that the Applicant's proposal would have a significant effect upon the integrity of designated sites. It follows that consideration of alternatives must concern alternative ways of avoiding impacts on the designated sites. The Secretary of State considers that such alternatives would not be confined to alternative local sites for the project. He draws attention to the European Commission's methodological guidance on the Assessment of Plans and Projects significantly affecting Natura 2000 sites, which interprets Art.6(4) of the Habitats Directive. The guidance states that a competent authority should not limit consideration of alternative solutions to those suggested by a project's

proponents and that alternative solutions could be located even in different regions or countries. On this point, the Secretary of State refers to the reasons set out in paras 43–49 above.

Assessment of the Project 53. The Secretary of State agrees with the Inspector that, contrary to the view put forward by the Applicant, the proposals would have an adverse impact upon the integrity of the designated sites. The Secretary of State also agrees with the Inspector that the Appropriate Assessment undertaken by the Applicant, in accordance with the Habitats Regulations, is inadequate as regards both its conclusion and its coverage [36.166].

54. The Secretary of State agrees with the Inspector that the Applicant's proposed off-setting measures cannot be considered as mitigation in terms of the Habitats Regulations. As the Inspector noted, the Secretary of State's practice distinguished clearly in the Harwich dredging case between measures which would mitigate adverse effects upon a site and those which would provide compensation [36.177]. The Secretary of State agrees with the Inspector's interpretation of European Commission guidance contained in *Managing Natura 2000* on the difference between mitigation and compensation measures [36. 178]-[36.182] and concurs that the Applicant's Appropriate Assessment and its conclusion are fundamentally flawed in this regard [36.184].

57. In all circumstances the Secretary of State agrees with the conclusions of the Inspector in his paragraph [36.671] that the off-setting measures proposed by the Applicant would not be adequate compensatory measures as required under reg.53 of the Habitats Regulations and Art.6 (4) of the Habitats Directive.

60. The Secretary of State as a competent authority is required under reg.48(1) of the Habitats Regulations to undertake an Appropriate Assessment of the likely impact of the proposals on designated European sites should he be minded to consider consent for a project affecting such sites.

61. The Secretary of State has in any case as a matter of policy sought advice which would be relevant to an Appropriate Assessment of the proposed project under reg.48(1) and (3) of the Habitats Regulations. In the opinion of English Nature, as the Secretary of State's statutory adviser, which was presented in evidence to the Inquiries, the Dibden terminal project would have a likely significant effect alone and in combination with other plans or projects on each of the Solent and Southampton Water SPA, the Solent and Southampton Water Ramsar site, the Solent Maritime cSAC and the River Itchen cSAC. The position of English Nature is set out in their letter of January 21, 2004 to the Secretary of State. The Secretary of State notes that there is a serious prospect that the impact on the River Itchen cSAC can be eliminated by measures which could be taken by the Applicant (albeit that it does not yet appear that final agreement has been reached on this). However, even after taking account of the measures relating to the River Itchen cSAC, English Nature advises that in respect of the other European and Ramsar sites, there is no new information that could affect the content or conclusions of an Appropriate Assessment of the implications for any of these sites and that it is not possible for the proposals to avoid an adverse effect on their integrity. It remains the position of English Nature that the package of measures offered by the Applicant at the Inquiries is inadequate to provide compensatory measures required by reg.53 of the Habitats Regulations 1994.

62. Having taken the advice of his statutory advisers, the Secretary of State concludes, in agreement with the Inspector, that the proposal would have negative consequences for international and European conservation sites. He further concludes, in agreement with the Inspector, that the compensatory measures proposed by the Applicant would not adequately off-set the detriment caused to natural habitat were the proposed terminal to go ahead.

63. The Secretary of State is persuaded by the reasoning of the Inspector on this point and by the advice of English Nature. In the circumstances he considers that he should not give consent for the Harbour Revision Order to be made, having regard to the requirements of reg.53 of the Habitats Regulations and of Art.6(4) of the Habitats Directive.

64. As the Secretary of State does not propose to authorise the project he sees no reason to undertake his own Appropriate Assessment under the afore-mentioned Habitats Regulations.

Overall conclusions by the Secretary of State

Conclusions on Application for Harbour Revision Order

65. The Secretary of State agrees with the Inspector that, in accordance with the relevant conservation legislation, the project can only be allowed to proceed for imperative reasons of overriding public interest.

66. The Applicant asserts that other sites for proposed container terminals suggested by objectors as alternatives are not alternatives to this project, the object of which is to achieve expansion of container handling capacity in the port of Southampton. The Secretary of State agrees with the Inspector that this is the case with regard to fulfilling the requirements of Sch.3 to the Harbours Act 1964 and similarly with the other orders and applications, though not with regard to fulfilling the requirements of the Habitats Regulations.

67. The Secretary of State has no reason to suppose that proposals for other container developments may not in time be put forward. There are three credible proposals in the South East of England already identified in the Inspector's Report. In considering impacts in this case, the public interest for which an internationally and nationally designated site would be adversely affected is different from the interests of the Applicant or of the port of Southampton. The Secretary of State considers the public interest to be of wider application and to include the economy of the South East of England and beyond. The Secretary of State agrees with the Inspector that there are credible alternatives for container port development, for the reasons already given in paras 43–49 of this letter. While the Secretary of State agrees with the Inspector that it is not possible at this stage to determine whether other projects will be approved or proceed, he agrees there is equally no reason to rule them out as credible alternative proposals.

Bathside Bay Harbour Revision Order: Minded View Letter from the Secretary of State for Transport to Rees & Freres dated December 21, 2005

Assessment of the Impact of the Project

Imperative Reasons of Overriding Public Interest

76. . . . The Secretary of State has considered the argument that for such reasons to be imperative they also need to be immediate [IR 18.65]. However he believes, in line with the Inspector, that the timescales required to plan and implement new container capacity, including dealing with surface access implications, which are not far advanced in the case of Bathside Bay, mean that it is appropriate to take decisions approving such capacity sufficiently in advance of such need arising to allow for sensible planning and implementation of those proposals [IR 18.66].

Bathside Bay Planning Appeal: Minded View Letter from the First Secretary of State to DLA Piper Rudnick Gray Cary dated December 21, 2005

Habitats Regulations

General approach

9. Regulation 48 of the Habitats Regulations requires, when considering a proposal likely to have a significant effect on a European site, that an appropriate assessment be made of the implications for the site in view of its conservation objectives. If it is established that the proposal will have an adverse impact on the integrity of the European site, reg.49 requires an assessment of whether there are any alternative solutions and, if not, whether the proposal must be carried out for Imperative Reasons of Overriding Public Interest (IROPI). If it is found that there are no alternative solutions, and that there are imperative reasons of overriding public interest, reg.53 states that any necessary compensatory measures must be secured to ensure that the overall coherence of Natural 2000 is protected.

10. The Secretary of State agrees with the inspector that, in this case, an essential element of IROPI is, in broad terms, the need for terminal capacity and that, without a need for the development being established, there is no need to look at alternative solutions. He also agrees, for the reasons given in para.[18.27], that it is necessary to know the extent of any need before considering the feasibility of any alternative solutions. The Secretary of State has therefore proceeded to consider the extent of need for the proposal.

Need

11. For the reasons given in paras [18.60]–[18.77], the Secretary of State agrees with the Inspector that an appropriate assessment period for examining need is to at least 2030 and that it is advantageous to concentrate business at major hub ports [IR 18.43]. He also agrees with the views of RSPB that the South East quadrant of the UK is the correct location for new container port capacity to meet the needs of the container port industry [IR 18.43]. Furthermore, he agrees with the Inspector, for the reasons given in paragraphs 18.78—18.88, that the developer's utilization rate of 85 per cent is a reasonable compromise which serves to demonstrate the point at which capacity would be stretched too far [IR 18.111]. The Secretary of State also agrees with the Inspector that, if there were sufficient capacity and efficient operations, there is no reason why the loss of transshipment trade to foreign ports should not be reversed. For the reasons given in paragraphs [18.95]–[18.97], the Secretary of State agrees with the Inspector that a new terminal at Bathside Bay should achieve at least the same level of productivity as the Trinity part of the Port of Felixstowe, giving a capacity of 2.1 million TEUs [IR 18.113].

12. For the reasons given in paras [18.100]–[18.110], the Secretary of State agrees with the Inspector that Bathside Bay would be required to be in place well before 2020 and that, even with Bathside Bay fully operational, it is likely that more capacity would be needed between 2020 and 2030 [IR 18.113]. There was some discussion at the inquiry concerning the level of productivity improvements on a port by port basis up to 2010. Although it is not possible to be specific about productivity gains after that date, there was no dispute that they would continue [IR 18.113]. Nevertheless, the Secretary of State agrees with the Inspector that productivity improvements by themselves could not deliver a modern competitive ports industry and that therefore productivity improvements at other locations would not obviate the need for a container terminal at Bathside Bay [IR 18.114]. Overall, the Secretary of State agrees with the Inspector that a container port at Bathside Bay would help to

meet the national need for container terminal capacity as part of a modern competitive ports industry [IR 18.1151].

13. Having concluded that there is a need for the additional container capacity *provided by* a terminal at Bathside Bay, the Secretary of State has considered whether there are any alternative solutions which could meet the need in other ways.

Alternative solutions

14. Having regard to the Inspector's conclusions in paras [18.116]–[18.120], the Secretary of State has considered not only whether there are any alternative solutions to the Bathside Bay container terminal proposal but also whether another port proposal elsewhere could be an alternative solution. In considering these matters he has borne in mind his earlier conclusion in para.11 that the South East quadrant of the UK is the correct location for new container port capacity to meet the needs of the container port industry.

15. For the reasons given in paras [18.122]–[18.123], the Secretary of State agrees with the Inspector that there are no alternative solutions to the proposal at Bathside Bay. He also agrees with the Inspector, for the reasons given in paras [18.124]–[18.129], that possible locations at Hunterston, Scapa Flow and further development of Thamesport do not represent an alternative solution to Bathside Bay. Whilst London Gateway could be an alternative solution, he agrees with the Inspector that there is a need for both of these schemes to help to meet the national need for container terminal capacity, and that meeting that need is of vital importance to the UK [IR 18.115]. He also agrees with the Inspector, for the reasons given in para.[18.130], that a ''no development'' option would not constitute an alternative solution.

16. Overall, the Secretary of State agrees with the Inspector that there is no alternative solution to the Bathside Bay container terminal [IR 18.131].

Assessment of the Impact of the Project

Appropriate Assessment

17. Before granting consent for the project, the Secretary of State as a competent authority under the Habitats Regulations is required to make an Appropriate Assessment of the implications for the Stour and Orwell designated European site likely to be significantly affected by the project.

18. The Secretary of State considers it necessary first to consider the definition of the project to be assessed. He adopts a broad definition of the project and considers that it comprises the Bathside Bay Container Terminal proposal which was the subject of the eight applications and appeals considered at the public inquiry. He notes the agreement between HPUK, EN and RSPB recorded at [IR 2.62] that the information necessary to inform an Appropriate Assessment is contained within the application, supported by material provided to the RSPB in letters of March 26, 2004 and May 17, 2004 [H205.5]; there is agreement on the implications of the proposed container terminal and managed realignment on the designated sites within the respective estuarine systems; and EN has agreed the range of impacts identified on other biodiversity matters (for example, protected species) associated with Bathside Bay Container Terminal and the realignment scheme at Little Oakley.

19. The Secretary of State has carried out an appropriate assessment of the impact of the proposals and, in doing so, has sought the views of English Nature, whose advice is attached to this letter. This assessment is under review, pending the comments of parties on the matters set out in paras

23 and 38 of this letter. There is no dispute in this case that the proposal would adversely affect the integrity of a European site [IR 18.23]. The Habitats Regulations require an assessment of alternative solutions before looking at whether there are any imperative reasons of overriding public interest. For the reasons given in paras 14–16 above, the Secretary of State concludes that there are no alternative solutions and he has therefore considered whether there are Imperative Reasons of Overriding Public Interest.

Imperative Reasons of Overriding Public Interest

20. The Secretary of State has concluded above that there is a need for the Bathside Bay Container Terminal and he agrees with the Inspector that its development to help meet the national need for container terminal capacity as part of the development of a modern competitive ports industry is of vital importance to the UK. The Secretary of State agrees with the Inspector that these factors would constitute imperative reasons of overriding public interest [IR 18.135]. For the reasons given in paras [18.137]–[18.141], the Secretary of State agrees with the Inspector that Bathside Bay Container Terminal would also be able to significantly assist in enhancing the socio-economic and economic interests of the sub-region.

21. Overall, the Secretary of State agrees with the Inspector that the various elements of the need argument for Bathside Bay constitute imperative reasons of overriding public interest. He agrees that the very significant enhancement from Bathside Bay of the socio-economic and economic interests of the sub-region would not in itself comprise an imperative reason of overriding public interest but that it would be a substantial benefit from the scheme [IR 18.142].

Compensatory measures

22. Regulation 53 of the Habitats Regulations seeks to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Nature 2000 is protected. For the reasons given in paras [18.146]–[18.165], the Secretary of State agrees with the Inspector, and the views of English Nature, the Environment Agency, Tendring DC and Essex Wildlife Trust, that the managed realignment site would be a suitable and adequate compensatory habitat. He agrees with the Inspector that the proposals, including the mitigation, compensation and monitoring measures referred to in para.5, would represent the necessary compensatory measures that would need to be taken to ensure protection of the overall coherence of Natura 2000, in accordance with reg.53 of the Habitats Regulations.

23. However, since the inquiry, PPG9 (Nature Conservation) has been replaced by PPS9 (Biodiversity and Geological Conservation) and Circular 06105; Biodiversity and Geological Conservation. As stated in para.17 above, the Secretary of State has carried out an appropriate assessment of the impact of the proposals in the light of the new PPS9 and, in doing so, has sought the advice of English Nature. However, as parties would not have had an opportunity to comment on this new policy in the context of the proposals, the Secretary of State will consider the views of all parties on this matter before reviewing the appropriate assessment and forming a final conclusion.

Felixstowe South Reconfiguration Harbour Revision Order: Decision Letter from the Secretary of State for Transport to Messrs Rees and Freres dated February 1, 2006

Harbour Revision Order

Adequacy of Environmental Statement and Environmental Information

26. The Inspector considered that the Secretary of State would not need to undertake an appropriate assessment under the Conservation (Natural Habitats, &c) Regulations 1994 (the Habitats Regulations) but that should he do so the Environmental Statement contained adequate information on which to make an assessment [8.320].

Secretary of State's Consideration

Harbour Revision Order and Coast Protection Act Consents

Need for the proposal and justification of the particular works described

40. The Secretary of State agrees with the Inspector, for the reasons the Inspector gives, that there is a pressing need for additional deep water container handling facilities in the UK and that the works which would be authorised by the HRO and the associated consents under the Coast Protection Act are suitable for meeting that need and if granted would help to do so [8.18]–[8.33], [8.302]–[8.303], [8.325]–[8.327].

Appropriate assessment under the Habitats Regulations 1994

60. Before granting consent for the project, the Secretary of State as a competent authority under the Habitats Regulations is required to consider making an appropriate assessment of the implications for the site likely to be significantly affected by the project. Adopting a precautionary approach, the Secretary of State considers that it is possible a significant effect may arise on a European site.

61. The Secretary of State considers it necessary first to consider the definition of the project to be assessed. He adopts a broad definition of the project and considers it comprises the Felixstowe South Port Reconfiguration which was the subject of the four applications and the appeal considered at the inquiry.

62. The Secretary of State has reviewed the evidence submitted to the inquiry relating to the predicted impact on European sites of nature conservation importance within the meaning of the Habitats Regulations. He agrees with the Inspector's conclusion that there is sufficient evidence in the Environmental Statement and other evidence provided to the inquiry to conclude that the Orders and applications for consent, in combination with other plans or projects including the application for planning permission, would not have an adverse effect on European sites or on sites proposed to be so classified or designated [8.305]. He notes that English Nature has advised that the Environmental Statement contains the information required for an appropriate assessment [6.27].

63. The Secretary of State notes in this regard Statement of Common Ground 9 (SCG9) agreed between the Applicant, English Nature, the Royal Society for the Protection of Birds (RSPB) and Suffolk Coastal DC. The view expressed therein by English Nature was that the proposed scheme was likely to have a significant effect on the Stour and Orwell Estuaries Special Protection Area (SPA) and Ramsar site. However, after evaluation of the likely significant effect English Nature, and the RSPB, concluded that there would not be an adverse effect on the integrity of the Stour and Orwell Estuaries SPA as a result of the scheme [6.9], [6.27], [8.98].

64. The Secretary of State notes that SCG9, agreement of which was made dependent on mitigation and monitoring provisions, has since been complemented and given force by the executed section 106 Agreement (Sch.1, s.11) which he notes has superseded references in the SGC9 to a future agreement of a Mitigation and Monitoring Statement.

65. Following the publication of Planning Policy Statement (PPS) 9 and Circular 06/05 on Biodiversity and Geological Conservation in August 2005, the Secretary of State sought the views of English Nature as to whether the publication of those documents altered the evidence which they gave at the inquiry. English Nature have confirmed their view that the proposed reconfiguration would not give rise to an adverse impact on the integrity of the Stour and Orwell Estuaries SPA.

66. Taking into account all relevant considerations and evidence, and the expert advice of his statutory advisers, and having regard to the mitigation and monitoring measures proposed, the Secretary of State concludes that the proposed project will not have an adverse effect, either alone or in combination with other plans and projects, on the integrity of the Stour and Orwell Estuaries SPA and Ramsar site [8.98].

67. The Secretary of State agrees with the Inspector in his para.[8.30] that the consideration of alternative solutions to the plan or project under Art.6(4) of the Habitats Directive does not arise in this case, as there is no adverse impact on a European site.

London Gateway Port Harbour Empowerment Order: Minded view letter from the Secretary of State for Transport to Messrs Bircham Dyson Bell dated July 20, 2005

Matters of particular interest to the Secretary of State

Justification for the port

11. The Inspector concluded that the proposals for the port and for the particular works described in the HEO were justified on grounds of national need and of the appropriateness of the site and works to meet that need [15.1.40]–[15.1.42].

Environmental effects of the HEO proposals

15. The Inspector reported that impacts on the environment, both natural and man-made, were considered in the updated Environmental Statement, the Appropriate Assessment, in side agreements and in earlier chapters of his report. He had concluded in para.[11.88] that there were no reasons to object in principle on nature conservation grounds to the HEO, either alone or in combination with the other applications. Mitigation of significant adverse environmental effects would be subject to detailed monitoring and review agreements.

Adequacy of information in Environmental Statement for appropriate assessment

18. The Inspector noted the advice of English Nature that the information met the requirements of the Habitats Regulations (the Conservation (Natural Habitats & c.) Regulations 1994) [15.1.56].

Inspector's Overall Conclusions

24. The Inspector concluded that the port should be permitted and the HEO application granted. He also considered how permission for the port to proceed would also be affected in combination were the other statutory applications under the Transport and Works Act and the Town and Country Planning Act to be approved. [15.2.1]–[15.2.2].

25. The Inspector arrived at his conclusions on a number of grounds. He concluded that the need for additional container port capacity in the UK had been clearly quantified and that the port to be authorised under the HEO proposals would be well situated and on a suitable scale to meet that need. It would also meet a regional need for increased ro-ro capacity. In spite of the proximity of a very sensitive nature conservation area and fish breeding ground the works would not have significant effects on the environment which could not be satisfactorily mitigated [15.2.3].

33. The Inspector concluded that, on the balance of consideration, his firm view was that approval of the port was desirable, both in the interests of the efficient and economic transport of goods and to further the Government's regeneration and transport policies. Most identified potential harm could be adequately mitigated and that which remained would be greatly outweighed by the benefits of the proposal [15.2.14].

34. The Inspector stated that the consideration of alternatives to the proposed port was beyond his remit, noting that in the context of considering the impact upon a Special Protection Area the consideration of alternatives was a matter for the Secretary of State. It was also beyond his remit to consider other locations most suitable to meet the need for additional container port capacity [15.2.15].

Secretary of State's consideration

Statement of Matters of particular interest to the Secretary of State

40. The Secretary of State is minded to agree with the Inspector, for the reasons the Inspector gives, on the justification of the need for the proposed port and in the location proposed and of the scale of works. The Secretary of State considers the objectives of the proposed port to be the relevant objectives for the purposes of section 16 (1) and (5) of the Harbours Act 1964 and to be capable of being so justified [15.1.40]–[15.1.42, and Ch.4 of Vol.1].

41. The Secretary of State agrees with the Inspector that measures are required to maintain the special nature conservation status of the Thames Estuary and accepts the Inspector's finding that the proposed works at Sites A and X are suitable, and would be required, to compensate for the impact of the port on designated sites of European and international nature conservation significance [11.75]–[11.77], [11.82]–[11.83], [14.4.5]–[14.4.6], [15.1.43].

Adequacy of Environmental information for Appropriate Assessment

56. The Secretary of State accepts the view recorded by the Inspector concerning the advice of English Nature that the environmental information available is adequate to meet the requirements of the Habitats Regulations [15.1.56], [11.27].

Appropriate Assessment in accordance with Habitats Regulations

92. The Secretary of State as a competent authority under the Habitats Regulations is required under reg.48 (1) to undertake an Appropriate Assessment of the likely implications for classified or designated European sites should he be minded to consider consent for a project affecting such sites.

93. The Secretary of State has sought advice which would be relevant to an Appropriate Assessment of the proposed project under reg.48(1) and (3) of the Habitats Regulations from English Nature as the relevant nature conservation body. English Nature's view, which was presented in evidence

to the inquiries, is that the proposed port, both on its own and in combination with the other applications considered at the inquiries, is likely to have a significant effect upon the Thames Estuary and Marshes Special Protection Area (SPA) and Ramsar site and that such an effect is likely to be an adverse one. The Secretary of State notes also that this view was accepted by the Applicant.

94. The Secretary of State has considered the table of potential effects on designated nature conservation sites agreed between English Nature and the Applicant presented to the inquiries and reproduced in para.[11.30] of the Inspector's report. He notes that it is agreed that the only European sites which may be affected by the proposed port development are the Thames Estuary and Marshes SPA and the Benfleet and Southend Marshes SPA. It was moreover agreed that any effect on the latter SPA would not be significant. It was also agreed that more distant European sites would not be affected. The effect on the Thames Estuary and Marshes SPA would be an indirect one, arising from the loss of 5ha of intertidal habitat within the SPA, a loss of 9ha of contributory intertidal habitat outside the SPA and a functional change potentially in up to 60ha within the SPA [11.30]–[11.33].

95. The Secretary of State has also taken account of Government policy laid down in Planning Policy Guidance (PPG) Note 9 on nature conservation.

96. The Secretary of State notes that the Applicant had undertaken a comprehensive assessment of alternative locations both local to the site and further afield for the proposed port and had considered increased use of existing terminals at Southampton and Tilbury. The assessment concluded there were no alternative sites fulfilling the same need. The Secretary of State accepts this conclusion.

97. The Secretary of State notes the representations that proposals for a new container port terminal at Bathside Bay, Harwich and, later also, that re-configuration of the port at Felixstowe South would serve as alternatives to meet the identified need. He addresses the arguments received after the close of the inquiry later in this letter under post-inquiry events. He notes that at the inquiry only Dibden Bay, the application for which he has since refused, and Bathside Bay were put forward as possible alternatives. He agrees with the Inspector that on the basis of what was put to the inquiry that there is no realistic alternative scheme and that it would be possible to conclude that there was an overriding public interest in the scheme proceeding [11.51], [11.53]–[11.55].

98. The Secretary of State agrees with the Inspector's conclusion that there was no reason to dissent from the Applicant's evidence on the topic of public interest and that the requirements of the Habitats Directive had been met in this respect [11.56].

99. Having concluded that the scheme would be in the overriding public interest, in the absence of sufficient alternative solutions to the national need for additional port container capacity and the regional need for additional ro-ro capacity, the Secretary of State has considered the proposals for mitigating any adverse effects of the scheme and compensation measures put forward, to enable the requirements of reg.53 of the Habitats Regulations to be met.

100. The Secretary of State agrees with the conclusion of the Inspector and with the advice of English Nature, as the appropriate statutory nature conservation body, that the implementation of the Mitigation, Compensation and Monitoring Agreement and of the appropriate management of land at Sites A and X would enable the requirements of reg.53 of the Habitats Regulations to be met.

Post-Inquiry events

Hutchison Ports UK Ltd

106. The Secretary of State has considered representations made by Herbert Smith on behalf of Hutchison Ports UK which assert that the Applicant had admitted in evidence to the Bathside Bay inquiry that the proposed Bathside Bay container port scheme is an alternative for the proposed London Gateway port. On the other hand, Hutchison deny that London Gateway is an alternative to Bathside Bay. It is therefore asserted that the Secretary of State cannot make a determination on the present application without at the same time considering the report of the inquiry held into the proposals for Bathside Bay, on account of the application to both projects of the Habitats legislation, though the reverse situation would not hold true.

107. Representations made in response by Macfarlanes refute the interpretation put by Herbert Smith of the Applicant's evidence at inquiry and their interpretation of the Habitats Directive (Council Directive 92/43/EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora) and the Habitats Regulations.

108. The Secretary of State has considered the representations from both parties on this question. He accepts the case of the Applicant that their evidence at the Bathside inquiry did not mean that they viewed Bathside as an alternative to the present application, nor does he consider that it is sufficient to apply the tests of the Habitats legislation merely on the basis of an oral statement, disputed or otherwise, of a party at an inquiry, even if that party is the Applicant.

109. The Secretary of State draws attention to the matter set out in his consideration of the application for a container port at Dibden Bay. The Secretary of State's policy is to determine applications for port developments on their individual merits. He further considers that it is in the public interest, as well as in developers' interest, to give a sufficiently timely determination of each application rather than to defer unduly his consideration, pending consideration of the reports of inquiries into other developments. However, in the case of this particular application under consideration he sees no evidence in this Inspector's report, in the report of the Inspector on Bathside Bay which he has recently reviewed or in the publicly known facts about the Bathside Bay application, presented to that inquiry, which would lead him to defer consideration because of the Habitats Directive or Regulations, or on any other grounds, of the proposed London Gateway port. These grounds include his stated intention for a review of national ports policy over the next year or so. It is reasonable to determine the applications before him in a reasonable time scale and inappropriate to pre-empt now any conclusion he might make on port policy in the medium term.