ENVIRONMENTAL IMPACT ASSESSMENT,

STRATEGIC ENVIRONMENTAL ASSESSMENT and

THE HABITATS DIRECTIVE: RECENT DEVELOPMENTS

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1. The EIA Directive (85/337 as amended) and the Habitats Directive (92/43) have provided ample opportunities for those seeking to challenge decisions to grant planning permission. The SEA Directive (2001/42/EC) is likely to gain increased prominence as those who seek to challenge plans rely upon it.
2. In this paper I do not attempt to set out a comprehensive assessment of the relevant law. I seek to draw attention to recent developments.

Environmental Impact Assessment

3. Despite the fact that all practitioners are very familiar with the prohibition on granting planning permission or subsequent consent without taking into consideration the environmental information[1], challenges based on a failure to comply with the requirements of the EIA Directive[2] are still commonplace.
4. In this paper I consider:
    a. The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 EIA Regulations");
    b. The screening stage; and
    c. The adequacy of the environmental assessment.

The 2011 EIA Regulations

[1] Regulation 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 EIA Regulations") and regulation 3(4) in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. A similar provision is to be found in the regulations which implement the EIA Directive in other fields.
[2] 85/337/EEC as amended by 97/11/EC and 2003/35/EC

5. The 2011 Regulations came into force on 24th August 2011. They replace the 1999 Regulations. Save in the case of certain defence projects the 2011 Regulations apply to England.
6. The 1999 Regulations continue to apply to applications lodged or received by an authority before the 24th August 2011[3].
7. Regulation 8 of the 2011 EIA Regulations deals with "subsequent applications".
    a. That term is defined in regulation 2(1) as :

    "subsequent application" means an application for approval of a matter where the approval—
    (a) is required by or under a condition to which a planning permission is subject; and
    (b) must be obtained before all or part of the development permitted by the planning permission may be begun;

    b. Where it appears to the LPA that the existing environmental information is adequate they shall take that into account. If it is not adequate the LPA shall serve a notice seeking further information[4].
    c. Applicants may wish to consider whether the initial ES should assess a range of options so as to avoid the need to provide further information when submitting details.
    d. Applicants and LPAs should consider the regulation 8 requirements when considering discharge of pre-commencement conditions.
8. The duty to give reasons why adopting a screening opinion (regulation 4(7)) applies whether the conclusion is that the development is or is not EIA development. Regulation 4(6) in the 1999 EIA Regulations required that reasons be given in cases where a screening opinion to the effect that the development is EIA development has been adopted. The duty to give reasons in a case where no EIA is required was identified by the CJEU in R (Mellor) v. Secretary of State (case C-75/08) [2010] Env LR 18.
9. The ability of any person to request that the Secretary of State make a screening direction is clarified by regulation 4(8)(b) of the 2011 Regulations.
10. Installations for the capture of carbon dioxide streams for the purposes of geological storage and sites for such storage are added to Schedule 1[5].
11. Paragraph 13 of Schedule 2 has been amended to take account of the decision in R (Baker) v. Bath and North East Somerset Council [2010] 1 P & CR 4, that in the case of changes to

[3] Regulation 65(2) of the 2011 EIA Regulations
[4] Regulation 8(2) and (3) 2011 EIA Regulations
[5] An addition is also made to Schedule 2 at paragraph 3(j)

projects it is the development as changed or extended not just the extension or change which has to be considered when determining whether EIA is required.

The Screening Stage

12. The decision to be taken at the screening stage is likely to involve two issues, is the development proposed Schedule 1 or Schedule 2 development? and/or is the development Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size, or location[6]? It is the second issue which appears to cause the greater number of problems.

Schedule 1 or Schedule 2

13. Before deciding whether a proposal falls within schedule 1 or schedule 2 it is necessary to consider whether it is a "project" in Article 1.2 of the Directive.
14. In Commission v. Ireland[7] the CJEU held that demolition fell within the ambit of the words "other interventions in the natural surroundings and landscape" and that demolition works come within the scope of the EIA Directive and may constitute a project within the meaning of Article 1.2.
15. In R (Save Britain's Heritage) v. Secretary of State [2011] EWCA Civ 334[8] the Court of Appeal considered the question that had been before CJEU in Commission v. Ireland, namely whether demolition works were a "project" for the purposes of the EIA Directive. Sullivan LJ (with whom the other members of the court agreed) held that execution of demolition works fell within "the execution of ... other ... schemes" in the definition of project in Article 1.2. He went on to hold that if demolition is capable of being a project or scheme it is also capable of being an "urban development project" within paragraph 10(b) of Annex II[9]. As a consequence the court quashed paragraphs 2(1)(a)-(d) of the Town and Country Planning (Demolition- Description of Buildings) Direction 1995.
16. The consequence of Commission v. Ireland and Save is that demolition projects must be screened to determine whether EIA is required.
17. Brussels Hoofdstedelijk Gewest v. Vlaamse Gewest[10] gives an indication as to the limits which apply to the meaning of the word "project" in Article 1.2. CJEU rejected an argument that the renewal of an environmental permit to operate an airport should be subject to

[6] See the definition of "EIA development" in regulation 2(1) of the 1999 EIA Regulations
[7] Case C-50/09, see paragraphs 97-101 of the judgment of the CJEU
[8] [2011] EWCA Civ 334 at paragraph 17
[9] [2011] EWCA Civ 334 at paragraph 26
[10] C-275/09 (CJEU)

environmental assessment. The court held that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a "project" within the meaning of Article 1.2[11]. The court also pointed out that the requirements to carry out an assessment do not apply to all projects which are likely to have significant environmental effects, but only to those projects referred to in Annexes 1 and II[12].

18. In Chetwynd v. South Norfolk DC [2010] EWHC 1070 (Admin) Collins J held that a liberal approach should be adopted to ensure where possible that developments which would be likely to have a negative impact on the surrounding environment are properly investigated[13]. In that case, which concerned a development of four fishing lakes, the Court appeared to be prepared to stretch the meaning of the words in Schedule 2 when the judge held "*And it seems to me that ' infrastructure' can cover a development which changes the characteristic of a piece of land by providing something enabling a particular use to be carried out in that land."*

19. The meaning of the term "urban development project" was considered by the Court of Appeal in R (Condron) v. Merthyr Tydfil BC [2010] EWCA Civ 534. In holding that a disposal point relating to coal mining was not an "urban development project" Arden LJ stated:

> *39 In my judgment, the judge was again plainly correct. It is a necessary requirement of paragraph 10(b) that the project be "urban". Some of the features of the development, such as the visitors' centre and car parking, occur in an urban or city environment, but in this case these are features of an industrial development in a rural setting. The Commission guidance is dealing with projects that are urban even if situated in a rural area. One of the examples which it gives is sewerage networks. But the CDP is not urban in this sense. It does not form part of some conurbation or settlement or provide the setting for an activity provided for the direct benefit of the community. The CDP is provided for the benefit of the coal and energy industries.*
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> *40 Paragraph 10(b) does not therefore apply, and the position in my judgment is again acte clair .*
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> *.....*

20. In Bateman v. South Cambridgeshire DC [2011] EWCA Civ 157 Moore-Bick LJ observed that an extension to a grain storage and handling facility could not "..by any stretch of the imagination be described as an urban development ..."[14]

[11] C-275/09 at paragraph 24 of the judgment
[12] C-275/09 - paragraph 25 of the judgment
[13] At paragraph 21
[14] [2011] EWCA Civ 157 paragraph 14

21. In contrast, in R (Warley) v. Wealden DC [2011] EWHC 2083 (Admin) Rabinder Singh QC (sitting as a deputy High Court Judge) held that the term "urban development project" was capable of including tennis courts. The judge identified at two stage approach:

54 In my view, there is, on proper analysis, no conflict between any of these authorities as to the approach to be taken by the court in cases of this kind. Without in any way wishing to summarise what I have more fully set out in the passages already quoted, it is clear that the correct approach is to envisage two stages. The first stage is to ask whether on well established principles of administrative law there has been any misdirection by the local planning authority as to the law. If there has, then it is the proper role of the court to correct that error of law.
55 The second question is to do with situations where the law is being applied to a particular set of facts. The court may only intervene in such a situation if the conclusion to which a local planning authority has come is one which is irrational.

22. The conclusions to be drawn are, that if in doubt as to whether a project falls within schedule 1 or 2, consider screening.

Schedule 2 development likely to have a significant effects on the environment

23. If the proposed development falls within the definition of "project" in Article 1.2 and falls within Schedule 2 it is necessary to consider whether it is likely to have significant effects on the environment by virtue of factors such as its nature size or location. This element of the screening process is the most common.
24. In Morge v. Hampshire County Council [2010] PTSR 1882 the claimant challenged a negative screening opinion adopted by a county council in respect of a 4.7km long bus route. The Council was both developer and planning authority. The Court of Appeal held that the question of whether the development proposed was likely to have significant effects on the environment by virtue of its size nature or location was a matter of planning judgment or opinion involving consideration of the chance of any effect occurring and also the consequences were it to occur[15]. Despite the weight of the evidence the Court held that the decision was not irrational and therefore the challenge failed on this ground. The challenge was based on other grounds including an alleged breach of regulation 3(4) of the Conservation (Natural Habitats &c) Regulations 1994 ("the 1994 Habitats Regulations") (now regulation 9(5) of the Conservation of Habitats and Species Regulations 2010 ("the 2010 Habitats Regulations") and Article 12(1)(b) of the Habitats Directive. Although permission to appeal was granted on the Article 12(1)(b) point it was not granted on the EIA screening point.

[15] Ward LJ at paragraph 80

25. R (Renfree) v Secretary of State [2011] EWCA Civ 863 the Court of Appeal considered the circumstances in which a decision maker is required to reconsider a screening opinion. The question to be considered is whether the inspector's failure to refer the matter back to the Secretary of State irrational. By adopting that test the Court has reduced the opportunities for challenges based on a failure to reconsider screening decisions. The case of Hargreaves v. Secretary of State [2011] EWHC 1999 (Admin) is an example of a case where a challenge based on that ground failed.
26. In R (Birch) v. Barnsley MBC [2010] EWCA Civ 1180 the Court of Appeal dismissed an appeal against the judge's decision to quash a planning permission on the ground that the development proposed was EIA development and that the negative screening opinion was flawed. The approach taken in the screening opinion which stated that impacts should be controllable was held to be inadequate, and contrary to the underlying purpose of the regulations[16]. The conclusion to be drawn from Birch is that the likely effects of the development must be considered at the screening stage.
27. Although the Court of Appeal has re-affirmed that a decision on screening is an exercise of planning judgment which will only be quashed on *Wednesbury* grounds, it is clear that the courts will still intervene, particularly when a decision is based upon inadequate information. There are some who contend that the court's role is not limited to reviewing the decision maker's exercise of planning judgment but that the court itself to review the adequacy of the information. That contention is based on the CJEU's judgment in WWF v. Bozen [2000] 1 C.M.L.R. 149 [17]; in that case the court held:

    [48] It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

28. In my view the courts will be reluctant to accept that contention, unless and until forced to do so.
29. The duty to give reasons when adopting a negative screening opinion is reinforced by the provisions of regulation 4(7) of the 2011 EIA Regulations. Any reasons are likely to be subject to careful analysis, as occurred in Bateman.

[16] Paragraph 22
[17] [2000] 1 C.M.L.R. 149 at paragraph 48

30. I anticipate that those opposed to planning applications will seek to identify changes in circumstances which could affect the decision on screening, and ask inspectors to refer negative screening decisions back to the Secretary of State for reconsideration.
31. Those promoting development local planning authorities and the Planning Inspectorate too often fail to provide or require a sufficient degree of information at the screening stage. Use of the European Commission Guidance on EIA Screening (June 2001) and the associated checklist could avoid many of the problems which have been encountered.

The Assessment

32. In R (Brown) v. Carlisle City Council [2010] EWCA Civ 523 the Court of Appeal considered a challenge to a grant of planning permission based upon the contention that the ES was inadequate. The development proposed was a freight distribution centre adjacent to Carlisle airport. The developer entered into a section 106 agreement which provided that the freight distribution centre could not be built and occupied without works being carried out to repair or renew the main runway at the airport. The ES did not include an assessment of the effects of the works to the airport. It was held that the ES was deficient and as a result the grant of planning permission was unlawful.
33. It is essential that a developer preparing an ES, or a local planning authority considering whether an ES is adequate, pays careful attention to the requirement to assess the likely significant effects including secondary indirect and cumulative effects of the project. The European Commission publication 'Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions' (May 1999) continues to provide very useful guidance.

Strategic Environmental Assessment

34. The absence of or inadequacy of strategic environmental assessment has contributed to the quashing of plans at all levels.
35. In the Northern Irish case of Seaport Investments Limited [2007] NIQB 62 Weatherup J considered challenges to two plans on grounds of failure to comply with the SEA Directive. The judge held that the environmental report was inadequate, and that the timing of its preparation was such that there was no opportunity for the environmental report to inform the preparation of the plan, in breach of Articles 4 and 6 of the Directive[18].

[18] [2007] NIQB 62 at paragraphs 51 and 52

36. The Northern Irish Court of Appeal referred the Seaport case to CJEU. The CJEU (case C-474/10: 20th October 2011) found the Northern Irish arrangements, whereby the Department of the Environment as responsible authority (the plan making authority) consulted an agency (now the Northern Ireland Environment Agency) which formed part of the same department, was compatible with Article 6(3). The Court also held that Article 6(2) does not require national authorities to specify precisely periods for consultation; such periods can be laid down on a case by case basis.
37. It is clear from Seaport that compliance with the requirements of the SEA Directive will be required in form and substance.
38. In Cala Homes v. Secretary of State [2010] EWHC 2866 (Admin) Sales J held that revocation of a regional strategy amounts to a significant change and so will qualify as a modification of the relevant development plan, and as such will be subject to the requirements of the SEA Directive.
39. For the purposes of the Directive, 'plans and programmes' includes those which are subject to preparation and/or adoption by an authority at national or regional level through a legislative procedure by Parliament[19].
40. The Government intend to revoke regional strategies by legislation. The Localism Bill (shortly to become Act) will authorise the Secretary of State to revoke regional strategies. The Government have begun the process of carrying out SEA of the effects of revocation[20]. It is to be anticipated that revocation will not take place until the SEA process, including the required consultation and consideration of consultation responses, has been carried out.
41. In Save Historic Newmarket Ltd v. Forest Heath DC [2011] EWHC 606 (Admin) the strategic environmental assessment which assessed a core strategy was held to be inadequate as it was not possible to know from the report what were the reasons for rejecting alternatives.
42. The approach taken by most local planning authorities is to rely on the sustainability appraisal as the "environmental report" for the purposes of satisfying the requirements of regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). Regulation 12 provides:

12.— Preparation of environmental report

(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an

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[19] See Article 2(a) of Directive 2001/42/EC.

[20] The SEA Environmental Reports were published on 20th October 2011 and are open for consultation until 20th January 2012.

environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall 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;

(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.

(4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other Community legislation.

(5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.

(6) Where a consultation body wishes to respond to a consultation under paragraph (5), it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation.

43. In many cases local authorities deal with sustainability appraisal ("SA") and SEA in the same document. That approach leads to a grave danger that the requirements of the SEA Directive and Regulations are not complied with. In very many cases the sustainability appraisal consists of an analysis which scores the plan against various sustainability criteria; in those cases it is difficult to see how the requirements of regulation 12 (and Article 5 of Directive 2001/42/EC) are met.
44. I anticipate potential challenges may arise when local authorities adopt SPDs without carrying out SEA. Although no SA may be required (section 19(5) of the Planning and Compulsory Purchase Act 2004 requires SA of DPDs, not SPDs), SEA may still be required.

45. I also anticipate that the preparation of neighbourhood plans will give rise to challenges based upon inadequate compliance with the SEA Directive and Regulations - will those preparing such plans be equipped to carry out or commission such an assessment?

The Habitats Directive

46. The implications of the EIA Directive[21] on the determination of planning applications are well known and it is to be hoped, well understood. European protected species, such as bats and Great Crested Newts are more widespread, but the effect of the prohibitions imposed by Article 12 on planning decisions is, it may be thought, less well understood.
47. The decision of the High Court in R (Woolley) v. East Cheshire Borough Council [2010] Env LR 5 came as a surprise to many. The court quashed the local planning authority's decision as it had not "engaged with" the provisions of Article 12 of the Habitats Directive at the planning application stage.
48. I will consider the relevance of the protection given to European protected species ("EPS") at the planning application stage and then consider appropriate assessment.

European Protected Species

The UK's implementation of Article 12 of the Habitats Directive

49. Analysis of the UK's attempts to implement the requirements of Article 12 of the Habitats Directive reveals a chequered history.
50. The Conservation (Natural Habitats &c) Regulations were made in 1994. Regulation 39 created a criminal offence which gave effect to the prohibitions in Article 12. Regulation 40(3)(c) exempted any act which was the incidental result of a lawful operation and could not reasonably have been avoided. An act permitted by planning permission was held to be a lawful operation.
51. The European Commission took proceedings against the UK for failing adequately to transpose the Directive. Those proceedings were successful: Commission v. UK[22].
52. The UK's first attempt to respond to the judgment of the ECJ in Commission v. UK took the form of the 2007 amendments to the Habitats Regulations. The exemption for lawful acts was removed but the prohibition on deliberate disturbance was qualified[23].

[21] Directive 92/43/EEC
[22] Case c-6/04, at paragraph 113

53. The European Commission was not satisfied with the 2007 amendments. The Commission issued a reasoned opinion (21st March 2007) and an additional reasoned opinion (18th September 2008).
54. The UK responded by amending regulation 39(1)(b) of the 1994 Habitats Regulations to follow the wording of Article 12(1)(b) of the Directive[24].
55. The habitats regulations are now consolidated in the Conservation of Habitats and Species Regulations 2010 ("the 2010 Habitats Regulations").

The duty when determining planning applications

56. Regulation 9(5) of the 2010 Habitats Regulations imposes the following duty:

> *(5) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.*

57. The meaning of regulation 9(5)'s predecessor (regulation 3(4) of the Conservation (Natural Habitats &c) Regulations 1994) was considered in R (Friends of the Earth) v. Environment Agency [2004] Env LR 31. Sullivan J held that the word "they" referred to the requirements of the Habitats Directive[25]. Regulation 3(4) was described as a "catch all" provision to ensure that no plan or project which is likely to have a significant effect on a Natura 2000 site slips through the net without the environmental implications having first been considered by an appropriate regulatory agency[26].
58. It might have been thought that when the exemption for acts carried out in accordance with a planning permission was in force, impact on EPS at the planning application stage would have been thorough; that may not always have been the case.
59. Until the judgment in R (Woolley) v. East Cheshire Borough Council [2010] Env LR 5 it would be fair to say that the degree of attention paid to European Protected Species ("EPS") at the planning application stage was in general somewhat limited. Before the decision in Woolley many had assumed that sufficient protection could be afforded to EPS by imposing a condition on a planning permission that no development takes place until a licence had been obtained under the provisions of what is now regulation 53 of the 2010 Habitats Regulations.

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[23] See regulation 39(1)(b) of the 1994 Habitats Regulations as inserted by regulation 5(13) of The Conservation (Natural Habitats &c) (Amendment) Regulations 2007
[24] Conservation (Natural Habitats &c) (Amendment) (England and Wales) Regulations 2009
[25] At paragraph 57
[26] At paragraph 59

60. In Woolley the submission that it was sufficient for a planning authority making a decision on a planning application to note the existence of the directive and the regulations and to note the existence of the EPS was rejected. The judge held that as LPA has to "engage" with the provisions of the directive. Judge Waksman QC held[27]:

> *"In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the directive cannot be met because there is a satisfactory alternative or because there are no conceivable ''other imperative reasons of overriding public interest'' then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the directive."*

61. The extent of the engagement required in order to comply with the requirements of regulation 9(5) of the 2010 Habitats Regulations was clarified by the Supreme Court in Morge v. Hampshire County Council [2011] UKSC 2.

62. Lord Brown (with whom the majority agreed (Lord Kerr dissented on this issue)) disagreed with Ward LJ (at paragraph 61 of his judgment in the Court of Appeal) and stated[28]:

> *29 In my judgment this goes too far and puts too great a responsibility on the Planning Committee whose only obligation under regulation 3(4) is, I repeat, to " have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1) , the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.*
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> *30 Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12 , the planning authority are to my mind entitled to presume that that is so.*

[27] At paragraph 27

[28] [2011] UKSC 2 at paragraphs 29 and 30

63. Lady Hale stated[29]:

44 It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations , and that the applicable Policy on Protected Species, which also refers to the Habitats Regulations 1994 , was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they " had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4)

Article 12

64. The leading ECJ judgments on Article 12 are Commission v. Greece[30], a case concerning the impacts on the Caretta caretta (sea turtles) as a result of using a beach for recreational activities, and Commission v. Spain[31] (a case concerned with Article 12(1)(a)).
65. The European Commission "Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC" provides a useful guide.
66. The meaning of the word "deliberate" (in Article 12(1)(a)) was clarified in Commission v. Spain.

"*For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species, or at the very least, accepted the possibility of such capture or killing."*[32]

67. In Commission v. Greece it was held that the use of mopeds on the sand beach and the presence of pedalos and small boats in the sea constituted deliberate disturbance of the turtles[33] (contrary to the prohibition imposed by Article 12(1)(b)). The presence of buildings on the breeding beach was held to be liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d)[34].

[29] [2011] UKSC 2 at paragraph 44
[30] Case c-103/00
[31] Case c-221/04
[32] At paragraph 71 of the judgment
[33] See paragraphs 34 and 36 of the judgment
[34] See paragraph 38 of the judgment

68. The ECJ's definition of deliberate in Article 12(1)(a) applies equally to Article 12(1)(b)[35]. As a result an act which might, in English law terms, be described as "reckless" may be sufficient to amount to a "deliberate" act within the meaning of Article 12(1)(a) (b) and (c).

69. In Morge in the Supreme Court, Lord Brown stated[36]:

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species.

70. Two particular issues arose in Morge, namely what is meant by "disturbance" in Article 12(1)(b) and whether the prohibition in Article 12(1)(d) includes indirect effects.

71. The Article 12(1)(d) point was resolved by the Court of Appeal. At first instance the judge departed from the propositions of law agreed between the parties and held that Article 12(1)(d) does not include indirect effects[37]. The Court of Appeal held that the judge at first instance erred[38], and that the prohibition in Article 12(1)(d) does extend to indirect effects. The Court of Appeal's findings on Article 12(1)(d) were not the subject of the appeal to the Supreme Court.

72. Permission to appeal to the Supreme Court in Morge was limited to the Article 12(1)(b) point, and in particular to the meaning of "disturbance".

73. The Court of Appeal, decided that in order to fall within the prohibition imposed by Article 12(1)(b) the disturbance must have a detrimental impact so as to affect the conservation status of the species at population level[39]. That approach was rejected by the Supreme Court[40].

74. Lord Brown (with whom all the other members of the Court agreed, on this issue) set out a number of broad considerations that apply when considering whether an action amounts to disturbance for the purposes of Article 12(1)(b):

19 In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b) . First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b) , in contrast to that in article 12(1)(a) , relates to the protection of " species" , not the protection of " specimens of these species" . Thirdly, whilst it is true that the word " significant" is omitted from article 12(1)(b) — in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having " a significant negative impact on the protected species" — that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a " disturbance" of the species. Fourthly, it is

[35] Morge [2010] PTSR 1882 at paragraph 29
[36] [2011] UKSC 2, at paragraph 14
[37] [2009] EWHC 2940 (Admin) at paragraph 88
[38] [2010] PTSR 1882 at paragraph 53
[39] Ward LJ at paragraph 37
[40] [2011] UKSC 2, at paragraph 21

implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited " disturbance" than activity at other times.

The approach to be taken by Local Planning Authorities

75. The judgments in the Supreme Court in Morge have addressed two difficult issues, namely the meaning of disturbance in Article 12(1)(b) and the extent of the duty imposed on planning authorities when determining planning applications, but it may be thought that neither issues has been resolved in terms which are absolutely clear.
76. When determining planning applications LPAs will have to grapple with the issues raised by the Supreme Court; how do they do that?
77. No case will be the same as the one the one that comes before or the one that comes after. However the following steps may be of assistance to a LPA in determining an application (and therefore to officers advising members):
    a. Are EPS present on the site or in the vicinity of the site?
    b. Will the development if carried out be likely to offend any of the prohibitions set out in Article 12(1)?
    c. If the development is likely to offend against any of the prohibitions set out in Article 12(1) is a derogation likely to be granted under Article 16?
78. In answering those questions particular reliance can be placed on any consultation response from Natural England.
79. Unless the LPA decide that the development would be likely to offend against a prohibition in Article 12(1), and that a derogation is unlikely to be granted, they can grant planning permission. It would be wise for officers to draw members' attention to the duty imposed by regulation 9(5) of the Habitats Directive , to any Article 12(1) prohibition that may apply, and if such a prohibition does apply, consider the prospects of Natural England granting a derogation (i.e. a licence).
80. When considering whether a derogation is likely to be granted it is important to remember that the exceptions will be construed strictly[41]. It is also important to bear in mind that to come within the derogation, imperative reasons of overriding interest alone are not enough, there must also be beneficial consequences of primary importance for the environment[42]. The general provisos in Article 16(1) must also be considered, namely absence of satisfactory alternatives and that the derogation is not detrimental to the maintenance of the

[41] Commission v. Finland case c-342/05 at paragraph 25
[42] See regulation 53(2)(e) 2010 Habitats Regulations and R (Newsum) v. Welsh Assembly [2004] EWCA Civ 1565 at paragraph 19

populations of the species concerned at favourable conservation status in their natural range.

Appropriate Assessment

The Screening Stage

81. It is the local planning authority or inspector (or Secretary of State) on appeal which is the competent authority[43] within the meaning of regulation 61(1) of the 2010 Habitats Regulations. The first question for the competent authority to consider is whether the plan or project is likely to have a significant effect on a European site either alone or in combination with other plans or projects (the screening stage).
82. The approach to be followed is that set out in Waddenzee[44] at paragraph 45 of the judgment:

45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.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 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.

83. The Waddenzee approach was re-affirmed by the CJEU in Commission v. Belgium[45] . In that case it was held that a general exemption from the need to obtain a permit or permission could only be justified if it could be shown that it could be excluded, on the basis of objective information, that any plan or project subject to the general exemption, will have a significant effect on a Natura 2000 site, whether individually or in combination with other plans or projects. The Commission's complaint that the general exemption was in breach of Article 6(3) was held to be well founded. In England and Wales the Town and Country Planning (General Permitted Development) Order 1995 makes plain (in Article 3(1)) that the permission granted is subject to the provisions of the Habitats regulations.

[43] As defined in regulation 7(1) of the 2010 Habitats Regulations
[44] Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij [2005] Env. L.R. 14
[45] Case C-538/09 judgment on 26th May 2011: paragraph 39

84. It was established in R (Hart DC) v. Secretary of State[46] that mitigation can be taken into account at the screening stage; however the judgment in R (Helford Village Company) v. Kerrier DC [2009] EWHC 400 (Admin)[47] is a reminder that it is not enough to rely on mere hope and trust. The mitigation measures must be secured by an enforceable mechanism.
85. The distinction between mitigation measures and compensatory measures was considered in Hargreaves v. Secretary of State [2011] EWHC 1999 (Admin). HH Judge Pelling QC (sitting as a High Court Judge) held that the Habitats Directive is concerned with likely significant effects on the site not the species, and that as result the provision of additional feeding grounds for geese amounted to mitigation[48].
86. The prudent approach for developers and local planning authorities is to consult Natural England at an early stage, and to obtain their views on screening. If Natural England conclude that a significant effect on a European site can be excluded, then the developer can have some confidence that appropriate assessment is not required. If Natural England do not so conclude the prudent course is for the developer to provide the competent authority with sufficient information to allow an appropriate assessment to be conducted. If mitigation is relied upon, such as the provision of SANG in the Thames Basin Heaths, the provision of that mitigation should be secured by condition or planning obligation.
87. The approach taken to mitigation and avoidance measures in areas surrounding the Thames Basin Heaths may have to be reviewed once the prohibition on multiple planning obligations for the same infrastructure (regulation 123(3) of the Community Infrastructure Levy Regulations 2010) comes into effect. Unless contributions towards Habitats Regulations mitigation or avoidance measures are exempted from the prohibition, I anticipate that local planning authorities will have difficulty in screening out developments on the basis that a contribution will be made towards SANG. Adoption of a CIL charging schedule will not solve the problem, as there can be no certainty that money raised through CIL will be spent on providing SANG to mitigate or avoid the effect arising from a particular development.

The Assessment Stage

88. Article 6(3) of the Habitats Directive provides:

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

[46] [2008] 2 P. & C.R. 16, at paragraph 76
[47] At paragraphs 39 and 40
[48] [2011] EWHC 1999 (Admin) at paragraph 48

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.

89. The European Commission have given guidance on the provisions of Article 6 in "Managing Natura 2000". The guidance advises that "An Article 6(3) assessment should focus on the implications for the site in view of the site's conservation objectives."[49] The guidance also advises that "..the 'integrity of the site' relates to the site's conservation objectives" and "The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives."[50]
90. The basis for establishing a European site's "conservation objectives" is set out on the standard data form for the site, prepared in accordance with Article 4(1) of the Directive.
91. A developer seeking to provide information to inform an appropriate assessment or a local planning authority carrying out such an assessment should consider the site's conservation objectives. The standard data form for the European site is the starting point when considering the conservation objectives, but regard should also be had to any management plans[51].
92. The main issue to be considered is whether the plan or project would adversely affect the integrity of the site concerned. Natural England's view on that issue is likely to be afforded great weight.
93. The issue of the approach to be taken to appropriate assessment in an enforcement notice appeal case was considered in Britannia Assets (UK) Limited v. Secretary of State [2011] EWHC 1908 (Admin). Wyn Williams J[52] expressed disagreement with the submission that a "fall back" should not be taken into account when considering appropriate assessment.
94. I have some doubt as to whether Wyn Williams J was correct; Article 6(3) requires the project under consideration to be subject to appropriate assessment, not the project when compared to alternative projects.

Imperative reasons of overriding public interest (Article 6(4))

95. In the event of a negative assessment it is still possible to grant permission, if there is an absence of alternative solutions and there are imperative reasons of overriding public interest ("IROPI").

[49] Managing Natura 2000 paragraph 4.5.2
[50] Managing Natura 2000 paragraph 4.6.3
[51] Managing Natura 2000 paragraph 4.5.3
[52] At paragraphs 86-88

96. Article 6(4) sets a very high hurdle, as those promoting the Dibden Bay port development discovered. In short reliance on absence of alternatives and IROPI is not to be relied upon except in the most limited circumstances.

97. The case of Commission v. Spain[53] (20th May 2010) warrants a mention as it is an example of a case in which CJEU rejected an application by the Commission for a declaration that a member state (Spain) had failed to fulfil its obligations (under Article 6(2) and Article 12(4)) when a road through a Site of Community Importance (as a habitat for Iberian Lynx) was upgraded to a regional transport link. The Court held that the Commission had not established that the upgrading of the road itself which placed the Iberian Lynx in danger of extinction[54].

The Competent Authority/ies

98. In many cases there will be more than one competent authority for the purposes of the Habitats Regulations.

99. R (Cornwall Waste Forum) v. Secretary of State [2011] EWHC 2761 (Admin) concerned a challenge to a planning permission for an energy from waste plant granted by the Secretary of State on appeal. An environmental permit had been issued by the Environment Agency ("EA") before the Secretary of State made his decision. The inspector and Secretary of State relied upon the EA's view, and did not consider the need for appropriate assessment, notwithstanding the fact that the objectors challenged the EA's view. Such an approach was held to be wrong and the decision was quashed[55].

100. It is clear from the Cornwall case that it is not sufficient for the planning authority to rely upon the fact that need for appropriate assessment will be considered by another competent authority.

Discretion

101. The leading case on the exercise of discretion by the courts in EIA cases is still Berkeley v Secretary of State for the Environment [2001] 2 AC[56]. The obligation on national courts to ensure that Community rights are protected has led the courts to hold that any

[53] C-308/08
[54] C-308/08 at paragraph 52
[55] See paragraphs 58 and 59 of Collins J's judgment
[56] See Lord Bingham at page 608 and Lord Hoffman at pages 613-616

discretion not to quash a decision in cases where there is a breach of a requirement of Community law is very narrow.

102. Discretion in relation to an appropriate assessment case was considered in Boggis, Eason Bavents Conservation v Natural England [2009] EWCA Civ 1061. Sullivan LJ[57] expressed doubt that the approach taken to discretion in EIA cases should apply to cases concerned with appropriate assessment, as the Habitats Directive does not require public involvement to the same way as is required under the EIA Directive.

103. The distinction between the exercise of discretion in a case founded on breach of the EIA regime and one based upon breach of the Habitats Regulations was considered in R (Hulme) v. Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin). Frances Patterson QC held:

> *97. The inspector had then substantially complied with the requirements of the regulations, albeit he did not attribute his conclusions to the letter of the regulations for the reasons I have set out earlier. The circumstances here are very different from an EIA case where the provision of an environmental statement is the cornerstone of that regime. There, the ES, including mitigation measures, is the basis of public consultation prior to a decision being made. Here there is a different statutory regime. The decision maker is not under a comparable consultation requirement based upon a single accessible compilation of the relevant information provided by the applicant at the start of the application process. He has to satisfy himself on the considerations set down in the regulations. Reading the decision letter as a whole, the inspector here did so.*
>
> *98. In those circumstances, I do not have to go on to consider the issue of discretion but, for the sake of completeness, I deal with that matter and make it clear that, if I had had to consider it, I would have exercised it in favour of the defendants and upheld the planning permission.*
>
> *99. In Berkeley v Secretary of State for the Environment [2001] 2 AC 63, Lord Bingham emphasised that the discretion of the court to quash a decision, even in the domestic context, was very narrow. In Bown v Secretary of State for Transport [2003] EWCA Civ 1170 Carnwath LJ emphasised that the speeches in Berkeley needed to be read in context. In Edwards v Environment Agency [2008] EKHL 22 Lord Hoffman agreed with that observation and considered that both the nature of the flaw in the decision and the ground for the exercise of discretion had to be considered. In the*

[57] At paragraphs 39 and 40

circumstances of Edwards when he carried out that exercise, Lord Hoffman agreed with the Court of Appeal and the judge below that it would be pointless to quash the pollution permit granted under the Pollution Prevention and Control Regulations 2000. Applying those principles here, the flaw in the decision would be one of form but not of substance. It would thus be another occasion where it would be pointless to quash the planning permission granted.

104. The issue of discretion was raised in Morge in the Supreme Court but did not fall for determination.

105. The limited ambit for the exercise of discretion in Habitats Regulation cases was identified In Cornwall Collins J. He considered that he could not properly exercise his discretion not to quash following his finding that there was an error of law consisting of a breach of the Habitats Directive (paragraph 79).

Delay

106. Although CPR 54.5 provides that the claim form in judicial review proceedings must be filed promptly an in any event no later than 3 months after the grounds to make a claim first arose, recent attempts to defeat claims on the grounds of delay have been meant with the argument that in cases where a breach of European law is alleged, the "promptly" requirement cannot be relied upon.

107. Although Uniplex (United Kingdom) Limited v. NHS Business Services Authority [2010] PTSR 1377 was concerned with the provisions of the Public Contracts Regulations 2006 and not CPR 54.5 the principles have been held to apply to cases concerned with alleged breaches of the EIA Directive. In R (U and Partners(East Anglia) Limited) v. The Broads Authority [2011] EWHC 1824 (Admin) Collins J held:

44 It was suggested that Uniplex and Ireland were limited to Directive 89/665 . As the citations from those cases show, this limitation cannot be justified. The Court was making the point that the principle of effectiveness was breached by a limitation provision which lacked certainty and so such a provision could not represent a proper transposition of a Directive which required that a person who claimed that action adversely affecting him was in breach of the Directive could take proceedings to challenge it. That was the conclusion reached by HH Judge Thornton Q.C. in R(Buglife) v Medway Council [2011] EWHC 746 (Admin) : see paragraph 63 of his judgment. Miss Busch unsurprisingly did not feel able to put forward any submissions to the contrary.

108. Defendants should proceed on the basis that the effective limitation period for claims for judicial review in cases where breaches of European law are alleged is, in effect, three months.

Conclusions

109. Those opposed to development have achieved considerable success in the courts by placing reliance on breaches of European law when challenging decisions to grant planning permission.

110. The approach taken by decision makers when considering screening for the purposes of both EIA and appropriate assessment merits very careful scrutiny. Those promoting development should seek to provide sufficient information to allow an informed decision to be made. All parties should keep a negative screening opinion under review.

111. The UK has introduced a series of regulations to transpose the requirements of Article 12 of the Habitats Directive. The criminal law and associated licensing regimes bring the prohibition into effect. The requirement to have regard to the Habitats Directive when making decisions including those on planning applications introduces an additional layer of regulation, although following the decision of the Supreme Court in Morge the obligation imposed on LPAs should not be over burdensome.

112. At the planning application stage those promoting development must be careful to ensure that all the necessary information is provided to allow decision makers to conduct an appropriate assessment if required, and to address the prohibitions imposed by Article 12 of the Habitats Directive and the prospects of derogation under Article 16.

113. The aim of the Habitats Directive, as identified in Article 2, is to contribute to ensuring biodiversity through the conservation of natural habitats of wild fauna and flora. There is a danger that the Directives could provide to be more effective in encouraging litigation and favouring lawyers than maintaining or restoring to favourable conservation status natural habitats and species.

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13th November 2011