

After Morge: What is the planning system's role?

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Introduction

1. A decision on a planning application is often the first stage at which the impact of development on nature conservation interests is considered. The planning system, whether at plan making stage or decision taking stage, offers the opportunity to avert potential adverse effects, and in some cases enhance the natural environment.
2. The National Planning Policy Framework (NPPF) draws attention to the duty to protect the natural environment and to the opportunities for its enhancement. Local planning authorities are exhorted to conserve and enhance biodiversity and further the conservation of habitats and species of principal importance¹.
3. Further, section 40 of the Natural Environment and Rural Communities Act 2006 places a duty on all public authorities in England and Wales to have regard, in the exercise of their functions, to the purpose of conserving biodiversity.
4. Under domestic and European legislation, protection is also given to certain species of wild plants, bird and animals.² In particular, a number of species are protected under the Habitats Directive. These species are often referred to as “European Protected Species” (“EPS”).
5. Not only is the presence of EPS a material consideration when a planning authority is considering a development proposal, but additional obligations are imposed on local planning authorities and developers by the Habitats Directive

¹ See, for example, paragraphs 109, 117 and 118.

² For example, species and Habitats of Principle Importance included in the England Biodiversity List published by the Secretary of State under section 41 of the Natural Environment and Rural Communities Act 2006

and the Conservation of Habitats and Species Regulations 2010 (“the 2010 Regulations”).

6. The extent of these obligations were considered by the Supreme Court in **R. (Morge) v Hampshire CC** [2011] Env. L.R. 19 and in a number of subsequent decisions.

European Protected Species and the licensing regime

7. Article 12(1) of the Habitats Directive requires Member States to establish a system of strict protection for EPS by prohibiting, among other things, the deterioration or destruction of their breeding sites and resting places. It provides as follows:

Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;*
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;*
- (c) deliberate destruction or taking of eggs from the wild;*
- (d) deterioration or destruction of breeding sites or resting places.*

8. Annex IV(a) to the Habitats Directive sets out the EPS. It lists “*Animal...species of Community interest in need of strict protection*”. These are either identified by an asterisk as being “*endangered*” species within the meaning of Article 1(g)(i) and (h); or simply “*vulnerable*”, “*rare*”, or “*requiring particular attention*” as defined by Article 1(g) (ii)-(iv).
9. Article 16(1)(c) permits Member States to derogate from the requirements of Article 12 for “*imperative reasons of overriding public interest*”, provided that “*there is no satisfactory alternative*” and that “*the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*”. As with the other grounds for derogation, Article 16(1)(c) should be strictly construed, so as to impose the burden of proof on the authority permitting the derogation. The ECJ put it as follows in Case C-342/05, **Commission v Finland** at paragraph 25:

Since [Article 16] provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions, and requirements laid down in Article 16(1).

10. The Habitats Directive, including Articles 12 and 16, is given effect domestically by the Conservation of Habitats and Species Regulations 2010 (“the 2010 Regulations”). Article 12 is primarily transposed by creating new criminal offences. Under Regulation 41(1) of the Regulations, the prohibited activities set out in the Article are made criminal offences, unless they are conducted pursuant to a licence made under Regulation 53(1) and (4).
11. Regulation 53(1) provides that *“the relevant licensing body may grant a licence for the purposes specified in paragraph (2)”*. These purposes include, in paragraph (2)(e) *“preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment.”*
12. In England, licensing on the grounds of *“imperative reasons of overriding public interest”* is by the Secretary of State for the Environment.³ This function has been delegated to Natural England (“NE”) under arrangements in place under section 78 of the Natural Environment and Rural Communities Act 2006.
13. Such licences may be granted under reg.53, provided that three statutory tests are met. These statutory tests (also known as the derogation tests) are set out in subparagraphs (2)(e), (9)(a) and (9)(b):

- (1) Regulation 53(2)(e) states: a licence can be granted for the purposes of *“preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment”*.

³ Under reg. 56(3)(a) of the 2010 Regs, the relevant authority for licensing on the grounds enumerated at reg. 53(2)(e) and (g) is the “appropriate authority”, which is defined to be the Secretary of State in relation to England and the Welsh Ministers in relation to Wales by reg. 3(1).

- (2) Regulation 53(9)(a) states: the appropriate authority shall not grant a licence unless they are satisfied “*that there is no satisfactory alternative*”.
- (3) Regulation 53(9)(b) states: the appropriate authority shall not grant a licence unless they are satisfied “*that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.*”

The role of Local Planning Authorities (“LPAs”)

14. The 2010 Regulations provide, in reg. 9(3), that “*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.*”⁴
15. The word “*they*” refers to “*the requirements of the Habitats Directive*” rather than the competent authority (***R (Friends of the Earth) v The Environment Agency and others*** [2003] EWHC 3193 (Admin) at [57] and [58], per Sullivan J).
16. The term “*competent authority*” is defined in regulation 7(1) to include “*any...public body of any description or person holding a public office*”, including therefore NE and LPAs.

The position pre-*Morge*

17. Until the judgment in ***R (Woolley) v. East Cheshire Borough Council*** [2010] Env LR 5, only limited attention tended to be paid to EPS at the planning application stage. Many local planning authorities simply granted planning permission subject to a condition that no development could take place until a licence had been granted under predecessor to the 2010 Regulations.

⁴ Before August 15th 2012, identical wording was found in reg. 9(5) of the 2010 Regulations. Prior to this the duty was found in reg. 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994.

18. In *Woolley*, H.H. Judge Waksman QC, sitting as a deputy judge of the High Court, considered the role of a planning authority in considering a planning application where a derogation licence under reg. 53 would be required. It was submitted that it was sufficient for a planning authority to simply note the existence of the directive and the regulations and to note the existence of the EPS. This argument was rejected, as it was held that a LPA had to “engage” with the provisions of the Directive.

19. H.H. Judge Waksman QC held as follows:

“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.”

The decision in Morge

20. In *R. (Morge) v Hampshire CC* [2011] UKSC 2; [2011] Env. L.R. 19 the Supreme Court re-considered this duty. The Respondent County Council had granted planning permission for a three-mile stretch of highway to provide a rapid bus service. The application was opposed on the basis that the path of the proposed busway ran along the route of an old railway line, which had become an ecological corridor for various flora and fauna.

21. When the planning application was first submitted, Natural England objected on the basis of the impact of the development on bats. Natural England subsequently withdrew this objection after the Council submitted an Updated Bat Survey, which recorded that no bat roosts were found on the site. The appellant challenged

the permission on the basis of its impact on the bats, which were an EPS. The appeal made its way to the Supreme Court, on two issues of general importance:

- (1) The level of disturbance required to engage the prohibition in article 12(1)(b) of the Habitats Directive on “deliberate disturbance” of the bat species in question.
- (2) The scope of the obligation in regulation 3(4) of Conservation (Natural Habitats etc.) Regulations 1994⁵ on local authorities to have regard to the requirements of the Habitats Directive in deciding whether to grant planning permission, and whether the Council complied with the obligation.

22. The Supreme Court held that the duty of the local planning authority is limited to that set out in reg. 9(5) of the Regulations⁶, namely: “*to have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.*” It is the function of NE, and not of the planning authority, to enforce compliance with the Directive, by prosecuting those who had committed offences.

23. In paragraph 28 of his judgment Lord Brown of Eaton-under-Heywood referred to what Ward L.J. had said in the Court of Appeal (in para.61 of his judgment):

*“The planning committee must grant or refuse planning permission in such a way that will ‘establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range ...’ If in this case the committee is satisfied that the development will not offend art.12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it *757 must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status; and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission.”*

⁵ Now regulation 9(3) of the 2010 Regulations

⁶ Now regulation 9(3) of the 2010 Regulations

24. Lord Brown did not agree. In para.29 of his judgment he said this:

“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.”

25. Lord Brown went on to say (in para.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. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers’ decision report and addendum report ... not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. ... I cannot agree with Lord Kerr JSC’s view ... that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.”

12. Agreeing with Lord Brown, Baroness Hale of Richmond said:

“[44.] ... In my view, it is quite unnecessary for [an officers’] report [to committee] 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). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an “appropriate assessment” if a proposal is likely to have an effect upon a European site. ...

[45.] Furthermore, the United Kingdom has chosen to implement [article 12](#) of the Directive by creating criminal offences. It is not the function of the planning authority to police those offences. Matters would, as Lord Brown JSC points out, have been different if the grant of planning permission were an automatic defence. But it is no longer. And it is the function of Natural England to enforce the Directive by prosecuting these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially

concerned but having withdrawn their objection, Natural England were content that the requirements of the regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.”

26. The effect of the decision in **Morge** is as follows:

- (1) The duty of a local planning authority under reg. 9(5) is simply “*to have regard to the requirements of the directives so far as they may be affected by the exercise of those functions.*”
- (2) As such, there is no need for a planning committee to carry out its own shadow assessment as to whether there would be a breach of Article 12(1) of the Directive, or whether derogation from that Article would be permitted and a licence granted.
- (3) Instead, planning permission should 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.
- (4) In circumstances where NE had expressed themselves satisfied that a proposed development can be licensed and had therefore withdrawn any objection to the planning application, this allowed planning permission to be granted.
- (5) This is because NE is the “appropriate nature conservation body” under the Regulations. Accordingly, its view on any matters relating to nature conservation under those Regulations is to be given “*great weight*” – indeed cogent reasons are required for departing from its views on such matters (see **R (Hart DC) v Secretary of State for Communities and Local Government** [2008] EWHC 1204 (Admin) (2008) 2 P. & C.R. 16, at para. 49, per Sullivan J).

27. The approach in *Woolley* is therefore no longer good law. As it was put by Lindblom J in **R (on the application of Prideaux) v Buckinghamshire County Council** [2013] EWHC 1054 (Admin) ("*Prideaux*"):

Woolley cannot be read now as support for an approach more exacting than was finally sanctioned in Morge. If the majority of the Supreme Court in Morge had wanted to endorse the approach suggested by the judge in Woolley and to adopt what he had said as a gloss on the words of Lord Brown (in para.29) and Baroness Hale (in paras 44 and 45) I think they would have said so. They did not. The whole tenor of their reasoning is less demanding of planning authorities than the observations of H.H. Judge Waksman QC in Woolley. In my view, the law is now to be found in Morge, not in Morge plus Woolley.

28. The approach of the Supreme Court in *Morge* has been applied in a number of subsequent decisions.
29. *Prideaux* concerned a challenge to a decision of Buckinghamshire County Council to grant planning permission for the construction and operation of an Energy from Waste facility and associated works at Calvert Landfill Site in Buckinghamshire. The claimant's grounds of challenge concerned the proposed new access road.
30. It was accepted that the demolition of a farm at the site would lead to the loss of bat roots, and that the construction of the access road would lead to some loss of Great Crested Newt habitat. The claimant's case was that the Defendant Council in granting permission erred in its assessment of whether there was a "satisfactory alternative" to the proposed access road. In response, it was argued that the Claimant had failed to grapple with the significance of the decision of the Supreme Court in *Morge*, and that the Defendant Council was not required to carry out its own independent examination of whether or not a satisfactory alternative existed to the proposed access route, and whether a derogation licence should, or would, be granted.
31. Lindblom J confirmed that this was the correct approach, on the basis of the decision in *Morge*:

“reg.9(5) does not require a planning authority to carry out the assessment that Natural England has to make when deciding whether there would be a breach of art.12 of the Habitats Directive or whether a derogation from that provision should be permitted and a licence granted. If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless in the planning authority's view the proposed development would be likely to offend art.12(1) and unlikely to be licensed under the derogation powers (see para.29 of Lord Brown's judgment in Morge).”

32. Notwithstanding this, in ***Prideaux*** the Defendant Council did in fact consider the question of satisfactory alternatives and Lindblom J further went on to find that the Council had not erred in its assessment of whether there was a “satisfactory alternative” to the proposed access road.

33. ***William Walton v The Scottish Ministers*** [2012] CSIH 19 was a reclaiming motion (appeal) made by Mr Walton against the earlier decision of Lord Tyre to refuse a statutory appeal against the decision of the Scottish Ministers to approve the Aberdeen West Peripheral Route (“AWPR”) following a public inquiry. The Inner House agreed with the Lord Ordinary that there had been no breach of the Habitats Directive relating to the AWPR.

34. The route of the southern section of the AWPR required a bridge crossing over the River Dee. This involved the construction of a three span viaduct bridge in the catchment of the River Dee SAC. In advance of the public local inquiry, the transport secretary instructed Jacobs to prepare a detailed “*report to inform appropriate assessment*” in which among other things, comments previously received from SNH were taken into account. This report concluded, that, with regard to the species requiring protection, with proposed mitigation measures in play, the construction and operation of the AWPR would not adversely affect the conservation objectives of the SAC for the species. This opinion was supported by SNH.

35. It was argued that the decision erred in its approach to regulation 44 of the 1994 Regulations (the predecessor to the 2010 Regulations). At the time of the relevant decision, the Scottish Ministers were the authority charged with the granting of licences, after consultation with SNH. However, applying ***Morge***, the Court held that the Scottish Ministers did not require to be completely satisfied that the

proposal would not offend Art 12 or that a derogation from it would be permissible and granted. The attack on their reasoning as to imperative reasons of overriding public interest and alternatives therefore fell away:

“At the time that the decision which is challenged was taken, the respondents were not reaching any conclusion as to whether a licence should be granted by them or not. They were simply acting as the competent authority in terms of Regulation 3(4), not as the appropriate authority in terms of Regulation 44 of the 1994 Regulations. In terms of Regulation 3(4), when the respondents were exercising their functions under the 1984 Act, the only obligation upon them was to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”

... SNH had advised them that the proposed development would be compliant with Article 12 of the Directive.”

We are entirely satisfied that what was said by SNH, and in the report of the inquiry, as recorded above, which the respondents took into account was enough for the purpose of the respondents fulfilling their obligation to have regard to the provisions of the Directive and that they did not require to have before them any evidence which put the matter beyond reasonable doubt. They did not require to be completely satisfied that the proposal would not offend Article 12 or that a derogation from it would be permissible and granted, although that is a view which, in substance, they arrived at, having regard to the terms of the decision letter and the assessment and review document published on the same date. On that approach it is nothing to the point that, as the claimer contends, there was an inadequacy of reasoning in part due to the exclusion from the remit of the public inquiry detailed consideration of alternatives to the promoted scheme to ascertain if they might have a lesser or no impact on EPS.”

When can a LPA be satisfied that a development is not unlikely to be licensed?

36. As set out above, ***Morge*** establishes that planning permission should 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. Given this, it is likely that any future disputes will centre on whether the views expressed by NE (or the other specified nature conservation bodies) are sufficiently clear to be relied upon by the competent authority.
37. To a great extent, this has been clarified by two cases post-***Morge***.
38. ***Anthony Elliott, John Payne v The Secretary of State for Communities and Local Government, The London Development Agency, The London Borough of Bromley*** [2012] EWHC 1574 (Admin) was a statutory application to quash under

section 288 of the 1990 Act against the Secretary of State's decision to grant planning permission for the regeneration of Crystal Palace Park.

39. The Claimant argued that one of the functions of the Secretary of State in considering the appeal was to consider whether to grant a licence under regulation 53 for an activity which would otherwise be a criminal offence. In making such a judgment, it was said that the Secretary of State needed to consider whether there were imperative reasons of overriding public interest which should permit that activity. The Claimant argued that the Secretary of State had failed to do this, and that this amounted to a breach of regulation 9(1) and 9(5).

40. Natural England had not objected to the proposals but had not actually said it was satisfied that they complied with art.12. Keith J. held (in para.52 of his judgment) that an inspector, when having regard to the requirements of the Habitats Directive, had been entitled to take account of the fact that Natural England had not objected:

“... Of course, Natural England may not in terms have expressed itself satisfied that the proposals in the Masterplan would comply with Art. 12 of the Habitats Directive`. Natural England was only not objecting to the proposals – presumably on the basis that the impact on the foraging and roosting habitats of bats would be relatively modest. But the upshot was that when the Secretary of State was obliged to have regard to the requirements of the Habitats Directive to the extent that they may be affected by his planning functions under the 1990 Act, he was entitled to have regard to Natural England's views about the impact of the proposals on the foraging and roosting habitats of bats, and to grant planning permission unless it was likely that (a) a licence under reg. 53 would be required and (b) when it was applied for, it would be refused.”

41. Keith J. went on to say (in para.53):

“Judgment in Morge was handed down on 9 January 2011, a few weeks after the Secretary of State made the decision which is being challenged in this case. At that time, the test was the more onerous one adopted by the Court of Appeal in Morge ... and [Woolley], ... namely that if the planning committee was uncertain whether or not a licence under reg.53 would be granted, planning permission should be refused. So if the Secretary of State took the view that it was likely that a licence under reg.53 would be granted if it was sought, all the more so for him to have thought that it was unlikely that it would not be granted if it was sought.”

42. The question of whether a “non-objection” was sufficient for a local planning authority to find that a licence was not unlikely to be granted was directly

considered in *Prideaux*. It was said by the Claimant that where NE has not directly expressed a view as to whether or not a licence will be or can properly be granted, it is incumbent on the local planning authority to make their own assessment.

43. This argument was rejected. It was held that it is not necessary for NE to have said in terms that derogations were going to be licensed, or were likely to be. Instead, in a situation where discussions between council officers and NE on the effects of the development on EPS had taken place over a long period, and NE was aware of the presence of the species but did not object to the development on grounds related to bats or great crested newts, the Council could properly conclude that licences were not likely to be refused:

117 It was not necessary for Natural England to have said that the derogations were going to be licensed, or were likely to be. Like the authority in Morge, the County Council was entitled to assume that Natural England was satisfied that the requirements of the Habitats Directive and the regulations were being complied with (see paras 6, 8, 30 of Lord Brown's judgment, and paras 37 to 40 and 44 and 45 of Baroness Hale's). The facts in Elliott were also similar (see para.52 of Keith J.'s judgment).

118 Natural England's position on the European Protected Species potentially affected by the development was not obscure. When it objected to the proposals, in March 2011, it did not do so on any grounds relating to bats or great crested newts. It knew those species were present in areas likely to be affected by the development. It asked for further survey work to be done, to establish whether bats were present on or near the development site. Those surveys were done, and their results were seen by Natural England.

119 I have referred to the relevant correspondence between Natural England, SLR and the County Council in late 2011 and early 2012; I need not repeat the detail now. It is clear from the correspondence that Natural England had no misgivings about the likely effects of the development on European Protected Species and the ways in which those effects were going to be mitigated, with some benefit as a result. There was never the slightest hint of derogation licences being refused in due course. There was nothing to indicate that Natural England was likely to take a different view on any of the derogation tests – including the test of “no satisfactory alternative” – from that expressed by the officers in their advice to the members. In the circumstances the County Council could properly conclude that licences were not likely to be refused. Indeed, any other conclusion would have defied the facts.

120 As was held in Morge and Elliott, a similar conclusion could be drawn in a case where Natural England had at first resisted proposals for development on grounds relating to European Protected Species, only later to change its stance. There is no reason in my view why this should not be so in a case where Natural England has never opposed the development on such grounds. I do not see a material difference between this case and Morge on the basis suggested by Mr Dove – that in Morge the critical question

was not whether a derogation licence was unlikely to be issued but whether the proposals complied with art.12 . The crucial point in my view is that here, as in Morge, Natural England's position was absolutely plain from what it had said and done – and from what it had not said and not done – during its involvement in the planning process. In that process it could be expected to act in the public interest, just as it could in its own process when deciding whether derogations ought to be licensed.

44. Therefore, in situations where the views of NE are not obscure, and there is no evidence to suggest that derogation licences may be refused in future, a LPA may properly conclude that licences are not likely to be refused.

Practical application of Morge

45. EPS must first be considered at the pre-application stage. LPAs should advise applicants of the need to consider EPS in developing their proposal. Where the presence of EPS is uncertain, LPAs should consider asking for a Phase 1 survey (or risk assessment of a structure) to identify the habitats present and features likely to be used by EPS.

46. Paragraph 99 of Circular 06/05: Biodiversity and Geological Conservation states:

'It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted.'

47. Whilst this guidance is set to be replaced by new Guidance by DEFRA on the law affecting European sites, protected species and Sites of Special Scientific Interest, the new National Planning Practice Guidance gives similar advice:

How should biodiversity be taken into account in preparing a planning application?

Information on biodiversity impacts and opportunities should inform all stages of development design, including any pre-application consultation as well as the application itself. An ecological survey will be necessary in advance of a planning application if the type and location of development are such that the impact on biodiversity may be significant and existing information is lacking or inadequate. Pre-application discussion can help scope the survey work required.

Where an Environmental Impact Assessment is not needed it might still be appropriate to undertake ecological survey, for example where protected species may be present. Separate guidance is to be published by Defra on statutory obligations in regard

to protected species which will replace the advice previously set out in Circular 06/05: Biodiversity and Geological Conservation.

Local Planning authorities should only require ecological surveys where clearly justified, for example if they consider there is a reasonable likelihood of a protected species being present and affected by development. Assessments should be proportionate to the nature and scale of proposed development and the likely impact on biodiversity...

Planning conditions, legal agreements or undertakings may be appropriate in order to provide for monitoring and/or biodiversity management plans where these are needed.

48. NE has published standing advice for protected species.⁷ The standing advice provides guidance on whether there is a “reasonable likelihood” of protected species being present. It also provides advice on survey and mitigation requirements. As standing advice it is a material consideration in the determination of applications in the same way as any individual response received from NE following consultation.
49. Where there are no EPS on site, or protected species are not likely to be affected by the application, the LPA should nevertheless consider attaching an informative on what to do if EPS are found during development.
50. Where there are likely to be EPS on site, the starting point for both applicants and LPAs is that a derogation licence should be regarded as the last available option, where all other reasonable alternative ways of avoiding or minimising impacts on the protected species have been discounted and the action is nonetheless likely to result in an offence or offences under the species protection provisions of the Regulations.
51. The advice from NE is not to formally submit licence applications prior to the development in question securing the necessary planning consents or discharge of planning conditions/reserved matters relating to wildlife, unless there are exceptional circumstances. Even in exceptional circumstances, where a licence is issued prior to the granting of planning permission or its equivalent, no licensable works can be undertaken under the licence until all necessary consents have been

⁷ See:

<http://www.naturalengland.org.uk/ourwork/planningdevelopment/spatialplanning/standingadvice/advice.aspx>

granted and copies of these provided to NE.

52. Nevertheless, in July 2012, NE introduced a Pre-submission Screening Service, which enables developers to submit a draft application to gain a view on whether the three licensing tests are likely to be met prior to having all necessary planning consents in place and formal submission of the application. This service aims to increase the certainty that the application will be successful on formal submission of the application reducing potential delays and costs should further information be required.⁸ In cases where an applicant for planning permission considers that there is a risk that a LPA may find that the likelihood of a licence being granted by NE is not sufficiently clear, seeking a screening opinion from NE may be sensible.
53. In order to obtain a screening indication from NE, applicants should have requested (or be about to request) planning permission (and any other consents) and have their application form, method statement and reasoned statement in draft form. Wherever possible, a master-plan (if appropriate), survey information, maps, plans, figures and photographs should also be available.
54. The normal position, however, will be that when a LPA is determining an application for planning permission where the likely presence of EPS is established on site, a derogation licence will not have been granted. In this situation, the LPA must consider its duty under reg. 9(1) and have regard to the requirements of the Habitats Directive.
55. As is established by *Morge*, there is no need for a LPA to carry out its own shadow assessment as to whether there would be a breach of Article 12(1) of the Directive, or whether derogation from that Article would be permitted and a licence granted.
56. However, this does not absolve the LPA of all responsibility to consider EPS, as it must still have regard to the Directive. Therefore, the LPA should consider the

⁸ For further information see:
<http://www.naturalengland.org.uk/ourwork/regulation/wildlife/species/epsscreening.aspx>

harm to EPS, after mitigation, and therefore whether the development is *likely* to offend article 12(1). This does not require consideration of whether there will in fact be a breach of article 12(1). It should then set out the three statutory tests and consider in the light of those tests whether the development is *unlikely* to be licensed pursuant to the derogation powers. Again, this does not require assessment of whether the statutory derogation tests have in fact been met.

57. In considering whether the development is “unlikely to be licensed”, the views of NE are crucial.

58. If the local planning authority has the benefit of a consultation response from Natural England which confirms that no breach of the Directive will occur or that a derogation will be permitted, this will be considered adequate to allow a LPA to determine that a development is not unlikely to be licensed. Similarly, where NE indicated that it has “no objection” to the development or it objects and then this objection is withdrawn, this is likely to be sufficient to show that a licence is not unlikely to be granted.

59. However, this question remains one of fact, and it must be directly considered.

60. In this regard, it should be noted that the planning and licensing regimes are separate, and that NE has two legally distinct and separate roles in relation to both. It is the Government’s statutory conservation adviser for England and provides conservation advice to planning authorities. It is also the competent authority charged with determining applications for licences under the Regulations. As NE puts it in its guidance note “*European Protected Species and the Planning Process*”: “*Natural England has maintained functional separation of these roles to ensure that it exercises effective and transparent stewardship in both roles.*”

61. Therefore, in some circumstances, it may be necessary to consider whether further information is likely to come to light at the licensing stage which may mean that, although no objection has been made by NE at the planning stage, the grant of a licence is unlikely. This point is made in NE’s own guidance:

The high level advice provided by Natural England at the planning stage however, does not indicate that it has made a full assessment of the scheme against the licensing tests. The level of detail (including specific information on the timing of implementation) required for a licence application is not usually available at the planning application stage. The level of species detail in respect of the compensation, mitigation and its delivery for any proposed development that is required at the licensing stage when Natural England will be required to satisfy itself of the three tests, will also be higher than that ordinarily required in the planning consent process. Such level of detail often may only be available at a detailed stage of the development's evolution.

62. Notwithstanding this, in nearly all cases, the information and evidence required by NE in order to determine a licence application will also be before the LPA as part of the planning application. If NE has considered the application and not objected to the development at this stage, it is clear from *Prideaux* that the LPA can proceed on the basis that a licence is not unlikely to be granted in the future.
63. In considering whether or not NE is likely to grant a licence, applicants and LPAs should have regard to NE's Guidance Note "*European Protected Species and the Planning Process. Natural England's Application of the 'Three Tests' to Licence Applications*" which sets out the approach that NE will take to applying the three statutory derogation tests.

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