

Habitats Update: *People Over Wind* and other developments



Ben Fullbrook

Introduction

- People Over Wind
 - Context
 - Judgment
 - Reaction
- Other developments
 - Real v hypothetical risk
 - Mitigation or Compensation (***Grace & Sweetman***)
 - The Dutch Nitrogen cases

People Over Wind – the context

Council Directive 92/43/EEC on the Conservation of natural habitats & of wild fauna & flora, Article 6(3):

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

People Over Wind – the context

- Transposed by Conservation of Species and Habitats Regulations 2017 – reg. 63.
- **Two-stage process**
 - **Screening** - precautionary approach, any risk of significant effects requires AA, a de minimis threshold to exclude cases where there is clearly no risk of adverse effect - the “should we bother to check” test
 - **Appropriate Assessment** – a detailed assessment of the effect of the proposals on the integrity of the site in the light of the best scientific knowledge. Must produce certainty “beyond all reasonable doubt” – see e.g. *Commission v Poland* at [120] and also at [118]

People Over Wind - the position before

- Mitigation could be considered at the screening stage
- ***R (Hart DC) v SSCLG*** [2008] 2 P & CR 302, per Sullivan J: “*If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA*”
- “*Ludicrous*” to think otherwise!!

People Over Wind – the judgment



People Over Wind – the judgment

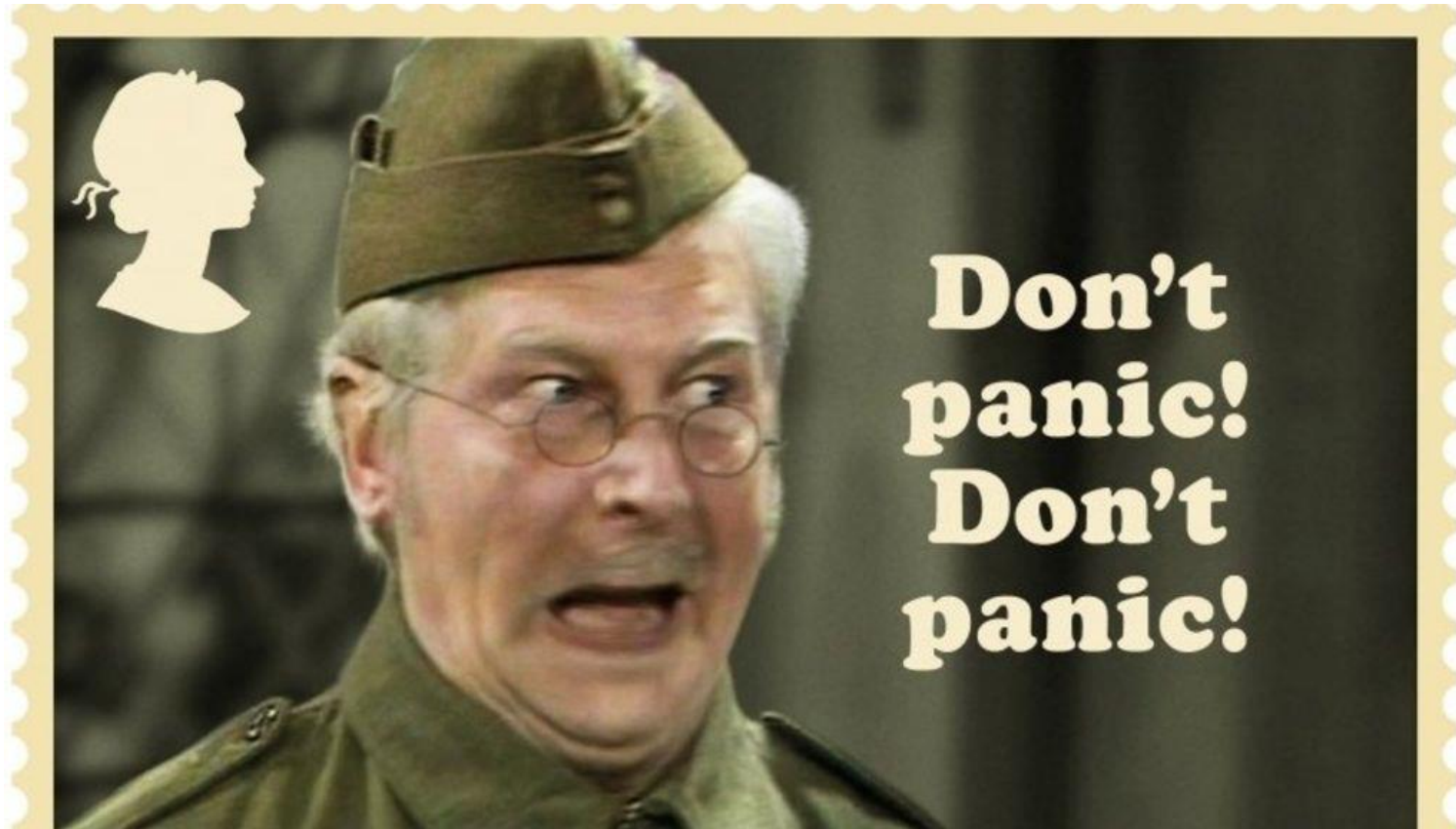
- The application was screened out on the basis of expert advice –

“This conclusion was reached on the basis of the distance between the proposed Cullenagh grid connection and the European sites, and the protective measures that have been built into the works design of the project.”

People Over Wind – the judgment

- “[40] *the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site*”
- Imposition of mitigation presupposes risk of significant effect [37]
- Otherwise AA stage deprived of its purpose and risk of circumvention [38]
- Deprive interested parties of right to participate in procedure

People Over Wind – Reaction in England and Wales



People Over Wind – Reaction in England and Wales

PINS Note 05/2018

- [11] *“If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation”*
- Distinction between proposal *“integral to the plan or project”* and *“a measure to avoid harm”*

People Over Wind – Reaction in England and Wales

Integral Feature



Too far to lead to increased visitor numbers



Mitigation Measure



Fence reduces visitor pressure



People Over Wind – Reaction in England and Wales

R(Langton) v (1) SSEFRA (2) Natural England [2018]
EWHC 2190 (Admin)



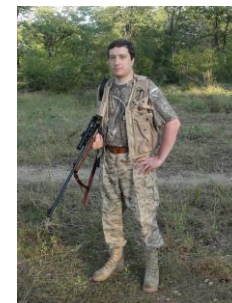
People Over Wind – Reaction in England and Wales

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Canivore Release Effect (CRE)



Disturbance Effect



People Over Wind – Reaction in England and Wales

R(Langton) v (1) SSEFRA (2) Natural England [2018]
EWHC 2190 (Admin)

- NE issues licences to cull badgers
- NE identifies culling area
- NE then considers protected sites within the area
- Consider what measures could be taken to mitigate risk - e.g. by not culling in certain places or at certain times (e.g. bird-breeding season), certain places (e.g. breeding areas)
- Invite culling companies to voluntarily incorporate these into their licence applications
- NE concludes no likelihood of significant effect at screening based on these measure

People Over Wind – Reaction in England and Wales

R(Langton) v (1) SSEFRA (2) Natural England [2018]
EWHC 2190 (Admin)

- Isn't this mitigation?
- NE argued not. Mitigation measures incorporated in to application and therefore “*integral features*” of the plan or project
- Sir Ross Cranston agreed [157]: *They are properly characterised as integral features of the project which Natural England needed to assess under the Habitats Regulations. I accept Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so.”*

People Over Wind – Reaction in England and Wales

R(Langton) v (1) SSEFRA (2) Natural England [2018]
EWHC 2190 (Admin)

Is this right?

- Arguably less restrictive definition of mitigation than PINS guidance
- Is this not a “*measure intended to avoid or reduce the harmful effects*” (**POW**)?
- How is this different from the facts in **POW**?
- NE process bypasses the appropriate assessment stage, contrary to CJEU’s stated desire
- Mr Langton has applied for PTA

Other Habitats Developments: “Real v Hypothetical risk”

- ***R (Boggis) v Natural England*** [2009] EWCA Civ 1061 per Sullivan LJ at [37]: a third party who asserts that there is a risk which cannot be excluded on the basis of objective information “*must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered*”.
- Re-stated in several cases: ***R (on the application of DLA Delivery Ltd.) v Lewes District Council*** [2017] EWCA Civ 58, [30], Lindblom LJ; ***Wealden DC v Secretary of State for Communities and Local Government*** [2017] EWHC 351 (Admin), at [44]

Other Habitats Developments: “Real v Hypothetical risk”

What does it mean?

The facts in *Boggis*



Other Habitats Developments: “Real v Hypothetical risk”

Langton

- C relied on evidence of expert ecologist and bird specialist
- Clear evidence that NE accepted a risk in principle
- NE relied on sporadic general monitoring of SSSIs and European Sites to say that it had no observed any impact on protected birds from CRE and disturbance risk.
- Sir Ross Cranston held “[147] *As with the risk of fox predation the claimant bears the burden of producing credible evidence that disturbance is a real risk. Quite apart from Natural England’s evidence, just outlined, the claimant fails to surmount this hurdle since he has produced no evidence that disturbance from badger culling has had a significant negative impact on bird population survival rates since it was introduced six years ago in Gloucestershire and Somerset.*”

Other Habitats Developments: “Real v Hypothetical risk”

Langton

- Seems to impose high bar on claimants. Do they need evidence of actual harm?
- Would appear contrary to precautionary principle – about prevention of harm
- Evidence that no harm now does not mean no risk of future harm.

Other Habitats Developments: Mitigation or compensation

Article 6(4) Habitats Directive

*If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, including those of a social or economic nature, the Member State **shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected**. It shall inform the Commission of the compensatory measures adopted...*

Other Habitats Developments: Mitigation or compensation

***Grace & Sweetman* [2018] (C-164/17)**



Other Habitats Developments: Mitigation or compensation

***Grace & Sweetman* [2018] (C-164/17)**



Other Habitats Developments: Mitigation or compensation

Grace & Sweetman [2018] (C-164/17)

- “*there is a distinction to be drawn between protective measures forming part of a project and intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the project on a protected area and cannot be taken into account in the assessment of the implications of the project”.*

Other Habitats Developments: Mitigation or compensation

Grace & Sweetman [2018] (C-164/17)

- *"As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future "*
- A mitigation strategy may only be taken into account at AA (a.6(3)) where the competent authority is *"sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area"*
- Otherwise it falls to be considered to be a compensatory measure to be considered under a.6(4) only where there are *"imperative reasons of overriding public interest"*

Other Habitats Developments: Dutch Nitrogen cases (C-293/17 and C-294/17)



Other Habitats Developments: Dutch Nitrogen cases (C-293/17 and C-294/17)

- Judgment given on 7 November
- Nitrogen emissions and deposits from farming practices harming European Sites
- Dutch government deals with this via a high-level national scheme for assessing the effects of project (“PAS”)
- The meaning of “project” was considered and the CJEU held that whilst EIA projects would all fall within art. 6(3), the wider approach to “projects” under art. 6(3) means that there may be “projects” which are not within the EIA definition: e.g. grazing of cattle and application of fertilisers

Other Habitats Developments:

Dutch Nitrogen cases (C-293/17 and C-294/17)

*Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an ‘appropriate assessment’ within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation’s objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of **each plan or project** on the integrity of the site concerned, which it is for the national court to ascertain.*

Other Habitats Developments: Dutch Nitrogen cases (C-293/17 and C-294/17)

*Article 6(3) of Directive 92/43 must be interpreted as meaning that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not **certain** at the time of that assessment*

Questions?

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