

# The new NPPF: potential litigation

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## Interpreting the NPPF: the starting point



*Tesco Stores Ltd v Dundee CC* [2012] PTSR 983 at [18]-[19]:

“...policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

That is not to say that such statements should be construed as if they were statutory or contractual provisions.”

*Europa Oil and Gas Ltd v Secretary of State* [2014] PTSR 1471 at [13]: an early example of the application of the *Tesco* principle to interpretation of the NPPF (in that case, the issue was the meaning of “mineral extraction” in NPPF para 90)

## It's an ill wind...



*C-323/17 People Over Wind & Sweetman v Coillte Teoranta*, 12 April 2018, at [40]:

“Article 6(3) of 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.”

## For the birds



*C-164/17 Grace & Sweetman v An Bord Pleanala*, 25 July 2018 at [57]:

“Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.”

## No presumption?



### NPPF 177:

“The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined.”

Did the Government really intend or envisage that the entire NPPF 11 presumption should be disapplied just because appropriate assessment is required? Is that what NPPF 177 really *means*? No longer an express reference to “Birds Directive” (cf 1<sup>st</sup> NPPF, para 119), but see the Glossary as to “Habitats site”.

A WMS in the offing...?

## Paragraphs 11(d) and 74



Paragraph 11(d):

“...or the policies which are most important for determining the application...”

Which are?

Paragraph 74:

“A five year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan...”

Does this preclude post-adoption evidence that there is no five year supply?

# Replacing the irreplaceable NPPF 11 n6 and 175(c)



Glossary as to “Irreplaceable habitat”

“Habitats which would be technically very difficult (or take a very significant time) to...replace once destroyed...They include...”

How does technically very difficult to replace = irreplaceable?

How long is a very significant time?

What else is included as an irreplaceable habitat if the list is non-exhaustive?

## Valued landscapes NPPF 170(a)



“Planning policies and decisions should contribute to and enhance the natural and local environment by:

- a) protecting and enhancing valued landscapes...(in a manner commensurate with their statutory status or identified quality in the development plan)”

Can a landscape be a “valued landscape” if it has no statutory status or no identified quality in the development plan?  
Contrast 1<sup>st</sup> NPPF, para 109, and cases such as *Stroud DC v Secretary of State* [2015] EWHC 488 (Admin)



## Full frontal assault...almost



Claim filed by *Talk Fracking* – claimed failure to conduct SEA before issuing new NPPF – not seeking quashing of entire NPPF, but certain policies as to hydrocarbons

Possible claim by *Friends of the Earth* along similar lines – apparently seeking declaration of unlawfulness and mandatory order to conduct SEA