

Habitats Law Update

Matthew Fraser

mfraser@landmarkchambers.co.uk

7 October 2019

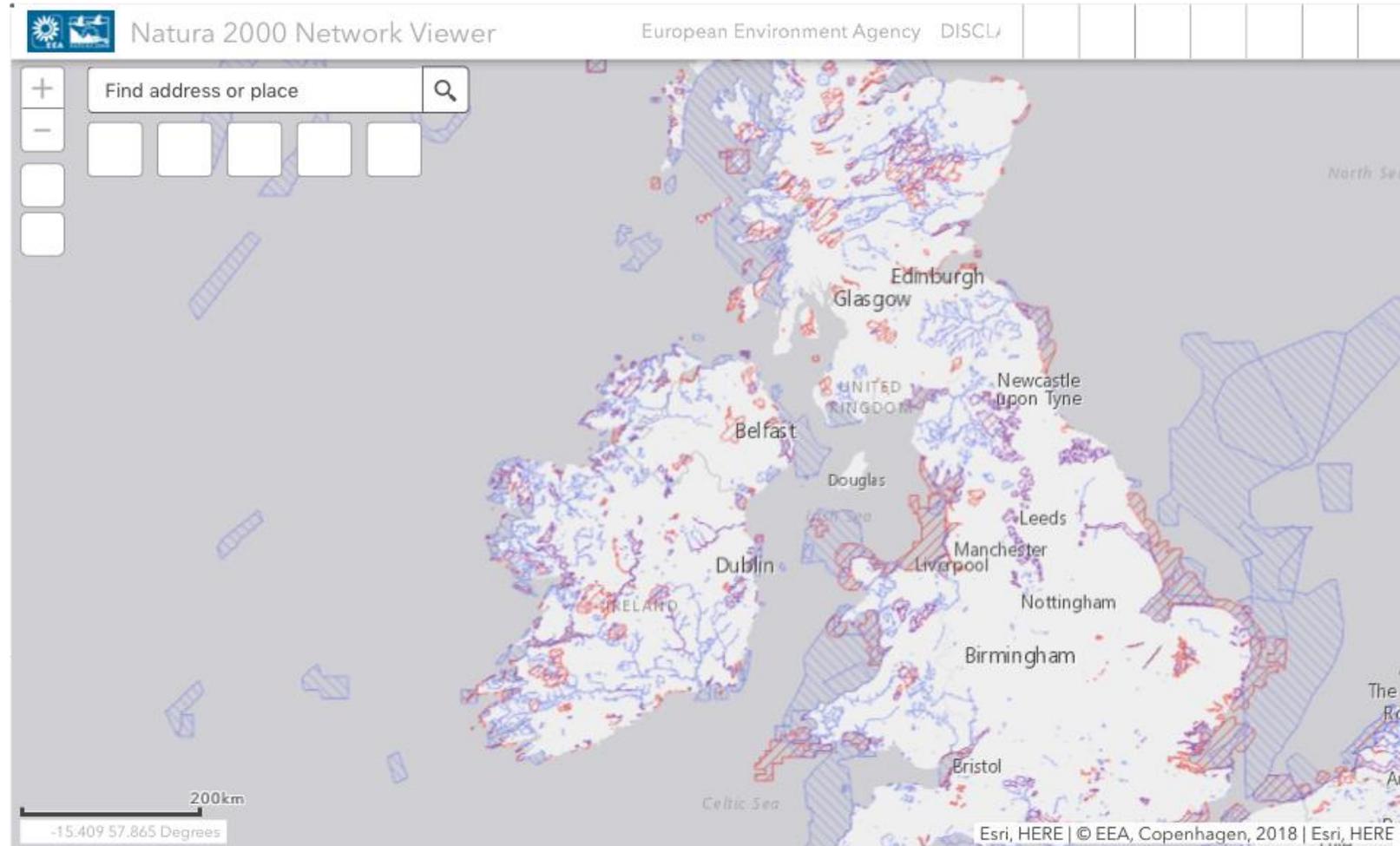
Protecting habitats and species

- The Habitats Directive identifies 189 habitat types and 788 species protected by Special Areas of Conservation.
- These areas are identified as making a significant contribution to conserving those listed habitats/species.
- 78 of the 189 habitat types are found in the UK, and 43 of the 788 species are native to and normally resident in the UK.
- There are 658 designated SACs, SCIs or cSACs in the United Kingdom including cross border sites (excluding Gibraltar).
- Special Protection Areas (SPAs) are protected areas for birds under the Wild Birds Directive. There are 275 in the UK.

SACs and SPAs in the UK

Natura 2000 Network Viewer

14/09/2019, 17:36



Article 6(3) of the Habitats Directive

“Any plan or project ... likely to have a significant effect [on a protected site], 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”

Habitats Directive

Article 6(4) of the 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.”

Domestic law

Article 6(3)-(4) of the Habitats Directive is transposed in regulations 63 and 64 of the Conservation of Habitats and Species Regulations 2017.

***Landelijke Vereniging tot Behoud van de Waddenzee and Another v
Staatssecretaris Van Landbouw, Natuurbeheer en Visserij*** (Case C-127/02)
[2005] 2 C.M.L.R. 31

*"... [T]he 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."* [45]

*“... the plan or project in question may be granted authorisation only on the condition that the competent national authorities are **convinced** that it will not adversely affect the integrity of the site concerned.” [56]*

Sweetman v An Bord Pleanála (Case C-258/11) [2014] P.T.S.R. 1092

Proposal for a road near Lough Corrib in Ireland that would result in the permanent loss of 0.5% of a protected habitat known as Limestone Pavement within an SAC.

Inspector in Ireland said “this relatively small loss would not, in terms of quantity, amount to an adverse effect on the integrity of the area”.

Sweetman

「Landmark
Chambers」



AG Sharpston's Opinion:

- The “likely significant effect” threshold is “very low”, intending only to exclude situations where there is “no appreciable effect”. It means “should we bother to check?”
- At the appropriate assessment stage, the question is “what will happen to the site if this plan or project goes ahead; and is that consistent with “maintaining or restoring the favourable conservation status” of the habitat or species concerned?”.

AG Sharpston's Opinion:

- “... in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is “why was this particular site designated and what are its conservation objectives?”
- A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone. ... An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. Provided that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site.

AG Sharpston's Opinion:

“Conversely, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally—and irreversibly—compromised. The facts underlying the present reference fall into this category.”

CJEU:

“40. Authorisation for a plan or project, as referred to in art.6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects ...”

Briels v Minister van Infrastructuur en Milieu [2014] PTSR 1120

Project to widen a motorway in the Netherlands which included a proposal to offset the negative effects of the project (damage to protected meadow by increased nitrogen deposits) by the future creation of an area of equal or greater size of the protected meadow in another part of the site which would not be directly affected by the project.

AG Sharpston:

“41. ... Where deterioration of the kinds described cannot be ruled out, it must in my view be concluded that the integrity of the site, viewed in the light of its conservation objectives, is adversely affected.

42. The fact that new areas of habitat may be created elsewhere in the same site does not appear to me to be relevant in that regard, even if a net beneficial effect is predicted. There is still an adverse—possibly even irreparable—effect on the existing natural habitat, and thus on the integrity of the site. The new habitat will be, to some extent, artificially created and cannot become a true natural habitat for some, possibly quite considerable, time”

CJEU:

“29. ... protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in article 6(3).”

People Over Wind

People Over Wind v Coillte Teoranta (C-323/17) [2018]

P.T.S.R. 1668 – mitigation measures can only be considered in appropriate assessment, not screening stage.

Grace v An Bord Pleanala (C-164/17) [2019] P.T.S.R. 266 – mitigation measures must guarantee no adverse effect beyond all reasonable doubt, and compensatory measures cannot be considered in appropriate assessment.

R. (Cairns) v Hertfordshire CC [2019] Env. L.R. 6, [28]-[29] - exclusion of mitigation measures at the screening stage is confined to the habitats context, and had no application to the regulatory regime for environmental impact assessment.

R. (Langton) v Secretary of State for Environment, Food and Rural Affairs
[2019] Env. L.R. 9 – High Court held that conditions attached to badger culling licences are “integral features of the project” rather than mitigation measures.

Court of Appeal gave judgment on 17 September 2019 ([2019] EWCA Civ 1562) but did not rule on the point because Natural England had re-authorized fresh licences on the basis of an appropriate assessment, rendering the point academic.

Coöperatie Mobilisation C-293/17 & C-294/17 – can be a “project” under habitats law even if not a “project” under EIA law. Mitigation measures only relevant if expected benefits are certain at time of appropriate assessment.

Holohan v An Bord Pleanala (C-461/17) [2019] Env. L.R. 16 – appropriate assessment must cover non-listed habitats/species and habitats/species outside site if they affect conservation objectives and might be affected by plan/project.



Canterbury City Council v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1211 (Admin) – Court will not quash a planning permission due to unlawful failure to carry out appropriate assessment if the assessment was “in substance” undertaken at screening stage.

R. (Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin) and R. (on the application of Heathrow Hub Ltd) v Secretary of State for Transport [2019] EWHC 1069 (Admin) – Not unlawful to exclude Gatwick scheme as an “alternative solution” under Article 6(4) given that it did not fulfil aim of maintaining “hub status” [355].

Landmark Chambers



Heather Hill

Heather Hill Management Company CLG v An Bord Pleanála [2019] IEHC
450 (21 June 2019)

The screening assessment had excluded likely significant effects caused by emissions into the Galway Bay SAC and SPA due to the combination of (1) the quick dissipation of any emissions by tidal currents and (2) the use of “best practice measures”.

A requirement in a planning permission to use “best practice measures” in construction management constitutes a mitigation measure caught by the rule in *People Over Wind*.

Simons J: “[t]he litmus test must be whether the measure is intended to avoid or reduce harmful effects” [165].

“[t]he key determinant of whether a measure is an avoidance / reduction measure is its intended purpose. This can only be ascertained by reference to the predicted impact of the proposed development on a European site, and whether the measure is intended to avoid or reduce a potential impact”: [176].

The planning permission (for housing development) was quashed due to the lack of an appropriate assessment.

Concluding thoughts

- Habitats regime is onerous and errors can bring down a plan/project.
- Significant increase in Appropriate Assessment.
- Unresolved questions about mitigation measures:
 - What is the scope of a “mitigation measure”?
 - If something is a mitigation measure, when is it sufficiently certain to be taken into account?
- Would CJEU have decided ***Cairns*** or ***Langton*** differently?

Thank you for listening

© Copyright Landmark Chambers 2019

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

 clerks@landmarkchambers.co.uk

 www.landmarkchambers.co.uk

Follow us

 [Landmark_LC](#)

 [Landmark Chambers](#)