

Habitats and Net Gain



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- Habitats protection
- Net gain & the Environment Bill

Habitats

- Effect of Habitats Regulations is largely unchanged after Brexit
- Common issues for major infrastructure:
 - Combined effect of precautionary assessment and Rochdale envelope
 - Addressing “de minimis” impacts
 - Habitats in poor condition
 - Developing a derogation case

Hornsea 3 – an example

- ExA recommended refusal on habitats grounds
- SoS engaged in further consultation on habitats grounds:

“6.3 The Secretary of State is clear that the development consent process for nationally significant infrastructure projects is not designed for consultation on complex issues, such as HRA, to take place after the conclusion of the examination. On occasion, as a pragmatic response to particular circumstances, he may undertake such consultation, but no reliance should be placed on the fact that he will always do so. In this instance, he has, on balance, accepted that the situation in respect of potential significant adverse effects on the sites referred to in para 6.2 was novel...”

Hornsea 3

- Key issue for the ExA was the impact on two SACs from the export cable: in the absence of compensation, it recommended refusal
- SoS took a different view, concluding that an impact on the Flamborough and Filey Coast SPA could also not be ruled out
- SoS went on to apply IROPI test concluding:
 - No alternatives
 - IROPI due to need for renewable energy
 - Accepted the applicant's Kittiwake and Sandbanks Compensation Strategies

Future changes

- Reform of Habitats Regs currently uncertain
- Environment Bill contains new measures including “protected sites strategies” which must be developed by Natural England
- Perhaps a growing need to consider IROPI/compensation at early stages of the project development

Biodiversity Net Gain

- Currently no requirement to deliver net gain
- Confirmed in consultation on Energy NPS suite. Draft EN-1 says:

“4.5.2 Although achieving biodiversity net gain is not an obligation for projects under the Planning Act 2008, energy NSIP proposals should seek opportunities to contribute to and enhance the natural environment by providing net gains for biodiversity where possible. Applicants are encouraged to use the most current version of the Defra biodiversity metric to calculate their biodiversity baseline and inform their biodiversity net gain outcomes and to present this data as part of their application. Biodiversity net gain should be applied in conjunction with the mitigation hierarchy and does not change or replace existing environmental obligations.”

BNG & the Environment Bill

- Recent amendments to Environment Bill contemplate BNG obligations being placed on schemes consented under the PA 2008
- Provision anticipates that such changes may take place outside of the NPS designation process through a “biodiversity gain statement”
- The BGS will set a % for net gain for a type or types of project and specify the manner in which that can be met
- BGS will then be given effect through changes to the determination provisions PA 2008

BNG and land requirements

- Ongoing issue as to whether can acquire land compulsorily to deliver BNG
- Where it is not *required* to achieve development consent, may be challenging
- However, note the Cleve Hill Solar Park DCO decision where the SoS accepted that a CA plot could be included to deliver BNG
- Likely to be more straightforward when BGSs are made

Conclusion and a way forward?

- If projects now anticipate BNG requirement in the future, may serve to protect against implementation of BGS regime
- In the meantime, may be a positive for the development in the planning balance (and in terms of addressing objections)
- In some circumstances a BNG “concept” might be repurposed as a compensatory measure if effects on designated sites cannot be ruled out

Thank you for listening

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