

## Recent development in Habitats Law



**David Elvin QC**

## Introduction

- Environment Act 2021
  - There are many provisions which may impact on habitats and conservation e.g. the provisions for biodiversity net gain (Part 6), conservation covenants (Part 7), local nature recovery strategies, species strategies and protected site strategies (Part 6).
  - The species and protected site strategies seem likely to overlap with protections under the 2017 Regulations.
  - There are specific powers, with some protections, to amend the provisions of the 2017 Regulations
- Nutrient neutrality in the discharge of effluent from new developments and appropriate assessment – ***R (Wyatt) v Fareham BC & Ors.*** [2021] EHC 1434 (Admin)

## The Environment Act: ss. 112-113

- New provisions conferring powers to amend the Conservation of Habitats and Species Regulations 2017
- One major provisions, introduced by the HL as cl. 115, did not survive Parliamentary “ping-pong” ... it would have prevented any reduction in protection embodying the notion of non-regression present in the earlier version of the Brexit agreements but omitted from the agreed version.
- ss. 112-113 contains powers for the Secretary of State to amend the general duties and Part 6
- The reasons for the creation of these powers appears questionable. The manner in which these powers may be exercised in conjunction with the new strategies appears unclear at present.

## The Environment Act: s. 112

- S. 112 permits amendment to the 2017 Regs for the purposes in s. 112(2) and also for those matters in (3)-(5) (to clarify the scope of reg. 9). S. 112(2) purposes are:
  - “(a) to require persons within regulation 9(1) of the Habitats Regulations to exercise functions to which that regulation applies—
    - (i) to comply with requirements imposed by regulations under this section, or
    - (ii) to further objectives specified in regulations under this section,
 instead of exercising them to secure compliance with the requirements of the Directives;
  - (b) to require persons within regulation 9(3) of the Habitats Regulations, when exercising functions to which that regulation applies, to have regard to matters specified by regulations under this section instead of the requirements of the Directives.
- (3)The regulations may impose requirements, or specify objectives or matters, relating to—
  - (a) targets in respect of biodiversity set by regulations under section 1 or 3;
  - (b) improvements to the natural environment which relate to biodiversity and are set out in an environmental improvement plan.”

## The Environment Act: s. 112

- S. 112(4) and (5) confers power on the SoS to “impose any other requirements, or specify any other objectives or matters, relating to the conservation or enhancement of biodiversity that the Secretary of State considers appropriate” and to make consequential amendments to any amendments made for the purposes in s. 112(2).
- Although cl. 115 has not survived, s. 112(6) and (7) set some boundaries:
  - “(6) In making regulations under this section the Secretary of State must **have regard to** the particular importance of furthering the conservation and enhancement of biodiversity.
  - (7) The Secretary of State may make regulations under this section **only if satisfied** that the regulations do not reduce the level of environmental protection provided by the Habitats Regulations.”
- The weakness in these provisions are that the first is a “have regard” requirement only and the second is not absolute but only “if satisfied” though there are some protections in (8) and (9) requiring the SoS to lay before Parliament, and publish, a statement explaining why he is satisfied under (7) and to consult such persons as the SoS considers appropriate.

## The Environment Act: s. 113

- Reg. 9 of the 2017 Regulations is a general duty to secure compliance with “the Directives”
  - “(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.”
  - Reg. 9(2) sets out a non-exhaustive list of functions to which 9(1) applies “in particular”
  - “(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.”
- The reference to “the Directives” is to the Habitats and Wild Birds Directive as modified post-Brexit by reg. 3A for the national site network and its management objectives (reg. 16A).
- The Defra policy paper (6.9.21) states confidently -
  - “This power will enable alignment of the Regulations with our new world leading targets, particularly the 2030 species abundance target, and our binding international obligations.”

## The Environment Act: s. 113

- S. 113 permits amendments to Part 6 of the Habitats Regs but within the context that it again requires the SoS to “*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*”
- S. 113(3) only permits regulations again if SoS “*satisfied that the regulations do not reduce the level of environmental protection provided by the Habitats Regulations*” and (7) requires an explanation of this to be laid before Parliament and consultation as in s. 112
- Why have these powers been created?
- The September 2021 policy paper notes -
  - “Where the evidence suggests that amending the Regulations can improve the natural environment, make the processes clearer and more legally certain to help recover the condition of our sites, we will have the means of doing so swiftly. Defra plans to publish a Nature Recovery Green Paper before the end of the year. The paper will set out our approach to driving nature recovery and provide the primary vehicle for developing and engaging on our future plans and proposals.”

## The Environment Act: s. 113

- See also Expl Notes §956 (HL version) “*where evidence suggests that amending the regulations can make the processes clearer and more legally certain to improve the condition of protected sites and the broader natural environment*”.
- It is not clear what is legally uncertain about Part 6.
- The provisions are very rigorous (*R. (Champion) v North Norfolk DC* [2015] 1 W.L.R. 3710 applying the requirements set out in e.g. *Sweetman v An Bord Pleanala* (C-258/11) [2014] P.T.S.R. 1092) and have generated issues e.g. with regard to new development and nutrient impacts on protected waters (e.g. *R (Wyatt) v Fareham BC* [2021] EWHC 1434 (Admin)), but the issue does not appear to be one of legal certainty.
- Contrast the Government’s Report of the Habitats and Wild Birds Directives Implementation Review (March 2012) which focused on streamlining the procedure. Para 11 noted:
 

“11. It is vital that we maintain the integrity of the purpose of these Directives. In the vast majority of development cases, where major problems do not arise, it is important that the authorisation process under the Directives is as easily understood, accessible and efficient as possible. In those relatively few cases in which problems arise, for one reason or another, there can be unwelcome delays and additional costs for developers, uncertainty for the local communities and the environment, and a risk of clouding the reputation of the Directives as a whole...”



## Species conservation strategies: s. 109

- Defra Policy Note - “a new mechanism to safeguard the future of particular species at greatest risk. The strategies will find better ways to comply with existing legal obligations to protect species at risk and to improve their conservation status.”.
- SCS may be published by Natural England (and reviewed subsequently) with regard to any species of flora or fauna and may (s. 109(4)) relating to an identified area in any part of England
  - Identify areas or features in the strategy area of importance to conservation of the species
  - Identify priorities regarding conservation or enhancement of habitats
  - How NE proposes to exercise its functions to improve the conservation status of the species
  - Include NE’s opinion on
    - the giving of approvals or consents by other public authorities which might affect the conservation status of the species within the area
    - Measures appropriate to take to avoid, mitigate or compensate for adverse impact of the conservation status of species in the area that “might arise from a plan, project or other activity”
- LPAs and any prescribed authority must cooperate with NE in the preparation and implementation of SCSs so far as relevant to their functions (s. 109(6)). Does “cooperation” include compliance with advice regarding approvals and measures? Relationship to local plans? SoS may give guidance to LPAs as to the discharge of this duty (s. 109(7)).

## Protected site strategies: s. 110

- Similar to s. 109, NE given wide powers in respect of local area issues. NE may publish (and amend) a strategy to improve the conservation and management for a protected site to to manage the impact of plans, projects or other activities (wherever undertaken) on the conservation and management of the protected site. The HL Expl Notes give SANGS as an example (§917).
- Protected sites (England only) = European sites, SSSIs, marine conservation zones. PSS may include NE's opinion on
  - (a) include an assessment of the impact that any plan, project or other activity may have on the conservation or management of the protected site (whether assessed individually or cumulatively with other activities),
  - (b) include Natural England's opinion on measures that it would be appropriate to take to avoid, mitigate or compensate for any adverse impact on the conservation or management of the protected site that may arise from a plan, project or other activity,
  - (c) identify any plan, project or other activity that Natural England considers is necessary for the purposes of the conservation or management of the protected site, and
  - (d) cover any other matter which Natural England considers is relevant to the conservation or management of the protected site.
- Consultation under s. 110(5) with public bodies, but only with the public if NE considers they should be consulted (s. 110(5)(g)). Contrast mandatory consultation with landowners for SSSIs under WCA 1981.

## Protected site strategies (2)

- Bodies consulted must cooperate in the preparation of a PSS so far as relevant to their particular functions (s. 110(7)). SoS may give guidance on the discharge of that duty to cooperate
- s. 111(10) “A person must have regard to a protected site strategy so far as relevant to any duty” under the Habitats Regs 2017, ss. 28G-28I WCA 1981 and ss. 125-128 Marine and Coastal Access Act 2009.
- In connection with the various strategies, which are potentially more far-reaching than the policy or notes suggest, these confer a greater extent of power on NE in respect of decisions respecting species, and protected sites, which are intended to be more influential on local authority decision and plan making than at present. The various duties to cooperate (the concept has not been an unqualified success in plan-making) given rise to some uncertainties and scope for dispute and the effect on local decision-making may be significant.
- PPS may place greater burdens on LAs and NE when current circumstances suggest that this is unwise unless the strategies are seen as a means for NE to give their views for a local area in an omnibus form to dictate the course of decisions and plans – though with an apparently lesser degree of accountability than at present. It appears to permit greater control with regard to SSSIs than under the WCA
- The relationship between the new strategies and existing species and habitats protection is not clear and the new may presage a reduction in the manner of protections afforded by the existing mechanisms given the apparent overlap in concepts in ss. 109 and 110 and the powers under ss. 112-113 in order to find a “better way”.

## Nutrient neutrality and appropriate assessment

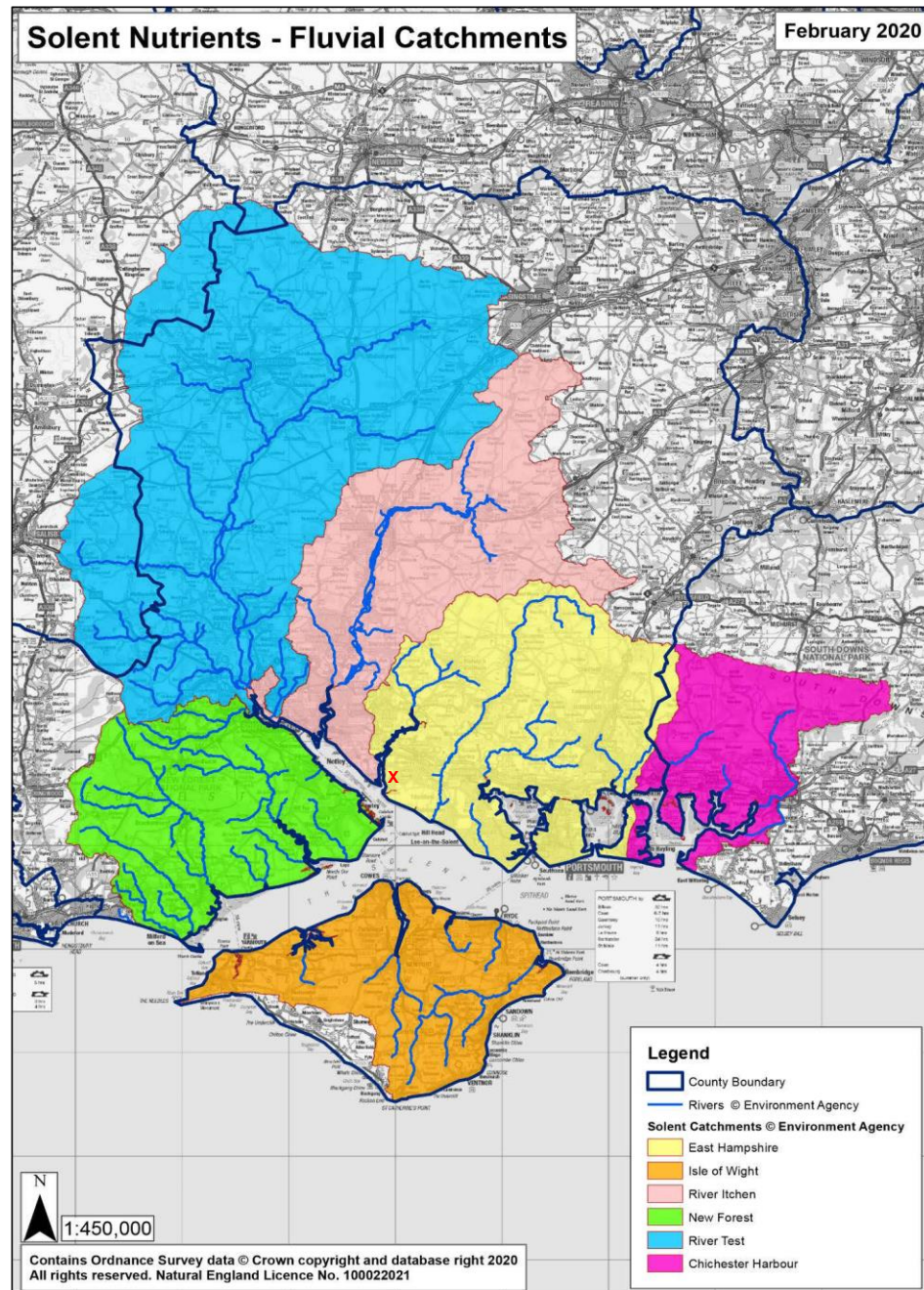
- An important issue at present is the extent to which the discharges of effluent from development (including housing) may have an adverse impact on protected waters/sites due to the increase in nutrients, especially nitrogen compounds, in the water.
- Natural England has issued advice (which was in its 5<sup>th</sup> edition) as to dealing with the effects of nutrient discharge into the Solent, its SPA and SACs and the 12 local planning authorities concerned. This is a precursor to national guidance. Similar issues have occurred elsewhere with the country: see e.g. *Advice on Nutrient Neutrality for New Development in the Stour Catchment in Relation to Stodmarsh Designated Sites* (Nov. 2020)
- See *Advice on achieving nutrient neutrality for new development in the Solent Region* (June 2020) - <https://www.push.gov.uk/wp-content/uploads/2020/06/Natural-England%E2%80%99s-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf>
- The terms of the advice, seeking to achieve nutrient neutrality, came under scrutiny by Jay J. in ***R (Wyatt) v Fareham BC & Ors.*** [2021] EHWc 1434 (Admin), in the form of a challenge to the decision of the LPA to grant permission for new housing and its application of the NE advice. A case heard together with it was quashed for other reasons (unfairness): ***R (Save Warsash) v Fareham BC & Ors*** [2021] EWHC 1435 (Admin).

## Nutrient neutrality and appropriate assessment

- The advice explains the problem:
  - “1.1 The water environment within the Solent region is one of the most important for wildlife in the United Kingdom. It is internationally important for its wildlife and is protected under the Water Environment Regulations and the Conservation of Habitats and Species Regulations as well as national protection for many parts of the coastline and their sea. There are high levels of nitrogen and phosphorus input to this water environment with sound evidence that these nutrients are causing eutrophication at these designated sites. These nutrient inputs currently mostly come either from agricultural sources or from wastewater from existing housing and other development. The resulting dense mats of green algae and other effects on the marine ecology from an excessive presence of nutrients are impacting on the Solent’s protected habitats and bird species”
- The advice notes the current uncertainty and continuing study of the issue and adds:
  - “1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended). ”



Figure 1 Solent Catchment Area Contains public sector information licensed under the Open Government Licence v3.0



## Nutrient neutrality and appropriate assessment

- Advice:
  - “1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended).
  - 1.4 This report sets out a practical methodology to calculating how nutrient neutrality can be achieved. This methodology is based on best available scientific knowledge, and will be subject to revision as further evidence is obtained. It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets.”
- Very similar advice in the Stodmarsh Advice <https://www.ashford.gov.uk/media/13dgnfyu/stodmarsh-nutrient-neutral-methodology-november-2020.pdf>

## Nutrient neutrality and appropriate assessment

- “1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended).
- 1.4 This report sets out a practical methodology to calculating how nutrient neutrality can be achieved. This methodology is based on best available scientific knowledge, and will be subject to revision as further evidence is obtained. It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets.”
- “4.6 For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according to this methodology and demonstrating nutrient neutrality is, in our view, able to provide sufficient and reasonable certainty that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the 'appropriate assessment' stage of the Habitats Regulations Assessment. The information provided by the applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment ...”



## Nutrient neutrality and appropriate assessment

- “4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land / farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.
- 4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.
- 4.9 By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, this approach will ensure that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites.”

## Nutrient neutrality and appropriate assessment

- There were a number of grounds of criticism in the case of which the main one related to the use of national averages in 4.18:
  - “4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.”
- It was said that the use of the national average was not sufficiently precautionary and was irrational. The LPA was criticised therefore for accepting it in the nitrogen calculations and concluding that there would be no adverse effect on the integrity of the protected sites. NE contended that the approach was based on the best scientific evidence and pointed out that there were other precautionary aspects to the assumptions e.g. local occupancy rates and the fact that larger households use less water than smaller but there was not a direct proportionate relationship.
- Jay J. repeated the approach he had set out in **Wealden DC v SSCLG** [2017] EWHC 351 (Admin), at [44]-[47], and drew attention to the distinction between the court’s review of the decision and the legal approach required to be taken by the authority to an appropriate assessment.

# Nutrient neutrality and appropriate assessment

- He set out his approach at [29]-[37] reviewing UK and EU authority.
  - “29. First of all, it is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct, pace a number of passages in Mr Jones' skeleton argument which suggested otherwise. The application of first principles impels this conclusion, but I will be referring below to relevant authority.
  - 30. Secondly, the CJEU has stated on a number of occasions that appropriate assessments must be based on "the best scientific knowledge in the field" (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see *Smyth v SSCLG* [2015] PTSR 1417, at para 83 ).
  - 31. Thirdly, the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (*Cooperatie Mobilisatie for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 (the "Dutch Nitrogen case"), at para 94 of the opinion of Advocate General Kokott).’

## Nutrient neutrality and appropriate assessment

- “32. Fourthly, a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular **Waddenzee** (Case C-127/02) [2004] Env LR 14 and the **Dutch Nitrogen** case. In **Waddenzee**, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being "at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned". A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108). The ECJ accepted the Advocate General's interpretation of the Habitats Directive in the light of these general principles of EU law, expressing their conclusions in a slightly different way (see paras 44, 58, 59 and 61). At para 58 the CJEU confirmed that the authorisation criterion in the Habitats Directive "integrated" the precautionary principle.”
- Having considered submissions made regarding the **Dutch Nitrogen** case he concluded that it did not alter the approach to be adopted.
- para. 35 to the effect that a competent authority (which includes the Council as planning authority) must give “*condign weight to the expert advice of Natural England*” and “*if minded to deviate from that advice furnish cogent reasons for doing so.*”

## Nutrient neutrality and appropriate assessment

- Para. 36 – the decision as to whether the proposals adversely affect the integrity of the protected sites for the purposes of reg. 63(5) of the Habitats Regulations is one for the competent authority applying **R (Champion) v North Norfolk DC** [2015] 1 WLR 3170 (Lord Carnwath at [41], referring to Advocate General Kokott in **Waddenzee** at [107])
- para. 37 Jay J. warned that if NE's advice relied on was flawed for public law reasons, then the Council's decision would be Challengeable regardless of whether the advice itself was directly challenged, relying on his earlier decision in **Wealden DC v Secretary of State** [2017] Env LR 31 at para. 109 (in the context of NE advice that was wrong) -
  - "... if expert advice induces a decision-maker into error in carrying out the judgments mandated by article 6(3), I consider that it would be artificial and wrong to hold that the court should not characterise what has occurred as irrational. The Wednesbury error in the underlying advice creates, without more, an equivalent Wednesbury error in the evaluative assessments carried out in formulating the HRA."
- While Jay J. had concerns about the use of the national average and considered that the Advice should be revised to give clearer guidance on the use of bespoke information (since a different rate would have been best evidence here) but, on the facts, given the other elements of precautionary assumptions he refused to find the grant of permission unlawful on habitats assessment grounds: [85]-[88].

## Other decisions

- In ***R. (RSPB) v Natural England*** [2021] EWCA Civ 1637 the Court of Appeal rejected an appeal against Lang J's dismissal of the challenge of the grant of licence for a scientific trial of a brood management scheme for hen harriers. Lang J. had properly considered the application to be one for permission to carry out a research project within s.16(1)(a), rather than a conservation project under s.16(1)(c) and had correctly found the structure and wording of s.16(1) and s.16(1A) to be clear. The "purpose" in respect of which the "other satisfactory solutions" had to be considered was the specific purpose for which the licence was sought. The language of art.9 of the Directive was less precise, but the effect was intended to be the same as that implemented by s.16(1). The judge had correctly held that NE was not required to consider alternative solutions for the evidence-gathering process and had not been required to consider alternative conservation techniques. Brood management in SPAs was not designed to displace hen harriers from their natural habitat, but to reduce their persecution and increase their population.
- ***R. (Langton) v Secretary of State for Environment, Food and Rural Affairs*** [2021] EWHC 2199 (Admin) Griffiths J rejected a challenge to the SoS's "*Next steps for the strategy for achieving bovine tuberculosis free status for England: 2018 review - government response*" to have regard to "the purpose of conserving biodiversity", as required by s. 40 of the NERCA 2006. S. 40 was not engaged because the duty had been discharged previously, when the implications of the statutory purpose of conserving biodiversity had been expressly examined, and second because the document did not effect any change as far as badger culling was concerned, except to suggest that it should be ended in the foreseeable future.

# Thank you for listening

© Copyright Landmark Chambers 2021

**Disclaimer:** The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

## London

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

## Birmingham

Cornwall Buildings  
45 Newhall Street  
Birmingham, B3 3QR  
+44 (0)121 752 0800

## Contact

✉ [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

## Follow us

🐦 @Landmark\_LC  
📘 Landmark Chambers  
📺 Landmark Chambers