Tread Carefully: A hop, skip and jump through the Habitats Regulations

Introduction

1. This paper explains the operation the Habitats Regulations (Conservation of Habitats and Species Regulations 2010 (SI 2010/490), paying special regard to those aspects of the regulations which have been the subject of controversy in the courts.

Provenance, Guidance and Relevance to Planning


3. Guidance on the interpretation of the Directives (which is not binding in law) can be found in the publications of the European Commission entitled “Managing Natura 2000 Sites – the Provisions Of Article 6 of the Habitats Directive 92/43/EEC” (2000) and “Assessment Of Plans and Projects Significantly Affecting Natura 2000 Sites” (2001). Domestic guidance can be found in DEFRA Circular 01/2005 which accompanied PPS 9 (the NPPF did not withdraw the Circular even though PPS9 has been revoked). The Circular predates the latest reincarnation of the Habitats Regulations, and therefore some care has to be taken in applying the guidance set out in it.

4. The regulations apply to the planning process through two statutory routes.
5. Firstly, the provisions of the regulations are clearly a material consideration under section 70(2)(c) of the Town & Country Planning Act 1990 (i.e. they fall within the ambit of “other material considerations” to which regard must be had if their provisions have any or any potential bearing on an application for planning permission).

6. Secondly, regulations 9(1) of the regulations provides that the Secretary of State (the “appropriate authority”) must exercise his functions so as to secure compliance with the requirements of the Directives, and regulation 9(3) provides that “competent authorities” (which include local planning authorities) “must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.”

**Scope of Protection**

7. The regulations have a wide ambit and contain provisions dealing with a number of very important matters, including the imposition of duties for the selection and designation of sites of European importance, power to make special nature conservation orders and bylaws, and provisions for establishing the advisory role of bodies such as Natural England.

8. In this paper we concentrate on the two key matters that the regulations address and which have the greatest relevance for day-to-day decision-making in the planning sphere, namely the protection of habitats and the protection of animal species.

*Protected Animals*

9. The regulations protect “European protected species of animals.” These comprise any of those species of animals listed in schedule 2 to the regulations. A quick glance at schedule 2 shows the usual suspects (including the developers’ particular favourites, great crested newts, bats, and dormouse).
Protected Habitats

10. The regulations protect European Sites and European offshore marine sites. The latter are simply defined as European Sites so far as they consist of marine areas (regulation 8 (4)). “European Sites” are defined as special areas of conservation, sites of community importance which have been placed on the list referred to in the Habitats Directive, sites hosting a priority natural habitat type or priority species protected in accordance with the Habitats Directive, areas classified under the Wild Birds Directives, and all sites which have been proposed to the European Commission as sites eligible for identification as of community importance until such time as they have been placed on the list or a decision has been taken not placed them on the list.

11. In the UK, the European Sites are SPAs (Special Protection Areas), SACs (Special Areas of Conservation) and Ramsar Sites.

Mechanisms of Protection

12. The mechanisms utilized to confer protection differ as between animals and sites. European species of animals are protected through the creation of criminal offences, and European sites are protected through a system of appropriate assessment. In both cases protection is lifted if strict conditions are satisfied. In the case of protected species of animals this is done through a system of licensing. In respect of European sites it is done by allowing the authorities to grant consent for development despite a negative assessment.

Protected species of animals: criminal offences, licensing and the role of planning authorities

13. Regulation 41 makes it a criminal offence for any person to deliberately disturb, capture, injure or kill protected species, to take or destroy their eggs, or to damage or destroy the breeding sites or resting places of such animals.
14. Regulation 41 does not apply to anything done under and in accordance with
the terms of a licence granted under regulation 53. The licensing body is
Natural England, so that if development will involve committing one of the
offences set out in regulation 41, the development cannot go ahead without a
license. A licence may only be granted for purposes specified in reg. 53(1),
and the relevant purpose that is usually relied upon in a development context
is that of

“preserving public health or public safety or other imperative reasons of
overriding public interest including those of a social or economic nature
and beneficial consequences of primary importance for the
environment.”

15. However, Natural England must not grant a licence unless satisfied that “there
is no satisfactory alternative” and “the action authorized will not be detrimental
to the maintenance of the population of the species concerned at a favourable
conservation status in their natural range.”

16. Two particularly difficult questions have arisen in the application of these
provisions. The first relates to what is meant by “disturbance” (and thus when
is a licence actually required) and the second relates to the role of the local
planning authority or inspector in deciding whether a licence would be
granted.

17. Although regulation 41 (2) provides a non-exhaustive definition of what
“disturbance” can include in this context, the matter remains unclear despite
consideration by the Supreme Court. In R (Morge) v Hampshire County
Council [2011] 1 WLR 268 the judge at first instance said that there would be
disturbance in the event of “certain negative impact likely to be detrimental”. The Court of Appeal ruled that this was too low a threshold, and held that

“for there to be disturbance within the meaning of article 12(1)(b) that
disturbance must have a detrimental impact so as to affect the
conservation status of the species at the population level... [I.e.] the
long-term distribution and abundance of the population.”

18. Applying this definition of disturbance Ward LJ stated that “loss of foraging
habitat occasioned by cutting a swathe through the vegetation [such] that the
bats have to travel further and expend more energy in foraging” would not
constitute disturbance unless “their survival would be in jeopardy [so that] the
population of the species will not maintain itself on a long-term basis”. So by
way of example drawn from the facts of that case he said “the occasional
death of a bat” as a result of collisions with buses “will be a trivial disturbance
not having a negative impact on the species as a whole so as to have any
ecological importance”.

19. The Supreme Court held that this was too high a threshold. It rejected the
idea of a de minimus threshold, and stated that disturbance need neither be
“significant”, nor affect the long-term conservation status of the species, but
declined to further define what disturbance actually meant and what level of
disturbance would be sufficient to constitute an offence. Lord Brown stated
that what was needed was an assessment of the nature and extent of the
negative impact of the activity in question upon the species (rather than
specimens of the species) and, ultimately, a judgment as to whether that is
sufficient to constitute a “disturbance” of the species. This judgment would
include having regard to the species in question and the situation.

20. The Supreme Court also considered what was required of the local planning
authority (or inspector) by the provision in the regulations that it must have
regard to the requirements of the regulations in the discharge of its planning
functions. In the earlier case of R (Simon Woolley) v Cheshire East Borough
Council [2009] EWHC 1227 (Admin) the High Court had ruled that the
planning committee might grant planning permission if satisfied that there
would be no breach of the regulations. If, however, it was satisfied that there
would be a breach of the regulations, the committee had to consider whether Natural England would grant a licence. If it concluded that a licence would not be granted it must refuse planning permission. If it remained uncertain whether or not a licence would be granted, the committee must refuse planning permission.

21. The Supreme Court in *Murge* ruled that this placed too great responsibility on the planning committee. It ruled that planning permission should be granted unless the planning committee was satisfied both that there was likely to be a breach of the regulations and that Natural England would be unlikely to grant a licence. What this means is that planning permission can be granted even if there is uncertainty as to whether there would be a breach of the regulations. The Supreme Court said that the regulations did not require the planning committee to consider and decide for itself whether there would be a breach of the regulations – that was the job of Natural England. Planning permission should be refused only if the local planning authority concluded there would be a breach and that Natural England would be unlikely to grant a licence. In *R (on the application of Prideaux) v Buckinghamshire CC* [2013] EWHC 1054 Lindblom J swept away any vestiges of the Woolley approach, confirming that the law was now as set out in Murge and that no gloss on that position was possible.

22. The upshot of all this is that there is uncertainty at the very heart of decision making when it comes to the application of the regulations. In *Murge* the Supreme Court stated that in the absence of an objection from Natural England the local planning authority was entitled to assume that there would be no breach of the regulations. However, Natural England have now made it clear that it does not wish to be consulted in respect of most planning applications which may be liable to harm protected species, and neither does it indicate in advance of planning permission being granted whether it would be willing to grant a licence. It has instead published “standing advice” which it states provides guidance by which local planning authorities can assess the likelihood of disturbance or a licence being granted themselves. Its guidance
states that it is for local planning authorities to apply the derogation tests.

23. The situation is therefore one in which non-experts (planning committees and planning inspectors) have to decide whether there will or will not be disturbance to a protected species, and they must do so by reference to a definition of disturbance which the Supreme Court has deliberately left unclear and which requires the exercise of expert judgment. Further, the decision-makers in the planning system have to second-guess whether Natural England will or will not grant a licence if there is disturbance, which requires them to judge the adequacy of any mitigation measures. Finally, the derogation tests are such that one of them (namely whether or not there is a satisfactory alternative) contains a clear planning component, and yet the function of deciding whether a licence should or should not be granted is that of Natural England.

_Habitats: Appropriate Assessment_

24. Regulation 61 provides as follows:

61. -Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or authorisation for, a plan or project which

   (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

   (b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment ['"AA"] of the implications for that site in view of that site's conservation objectives.

(2) A person applying for such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

25. The overriding public interest test is set out in regulation 62 (1):

“If the competent authority are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), they may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)”.

26. Regulations 62(2) makes clear that in respect of sites which host a priority natural habitat type or priority species, social and economic reasons will not suffice to overcome a negative assessment. The reasons must relate to human health, public safety or beneficial consequence of primary importance to the environment.
27. After a history of litigation before the European Court, the UK finally accepted that the reference to “plans and projects” had not faithfully transposed the Habitats Directive because there was the possibility that this terminology did not capture development plans. Accordingly, the 2010 relations, at regulations 102-105, make express provision with regard to “land use plans” in terms that are virtually identical to those set out above. In other words, as with plans and projects, development plans are subject to AA if they are likely to have a significant effect, and if the AA is not negative the plan cannot be given effect unless (a) there are no alternative solutions and (b) the plan must be given effect for imperative reasons of overriding public interest (reg. 103). Regulation 107(1)(c) provides that core strategies and area action plans are land use plans for the purpose of regulation 102, as these documents are “local development document[s] as provided for in Part 2 (local development) of the 2004 Planning Act”.

28. It can be seen from the above provisions that there is a two-stage test for AA. The first stage is to decide whether there is likely to be a significant effect. An AA is required only if there is likely to be a significant effect. If an AA is required, the plan, project or land-use plan cannot (in the absence of an overriding public interest) be given consent/effect unless it has been ascertained that “it will not adversely affect the integrity of the European site”.

29. The evidential tests for the first and second stages are different, as was explained by the ECJ in Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C-127/02 (“Waddenzee”):

“49. The threshold at the 1st stage... is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the court has termed “the best
scientific knowledge in the field”...

50. The test which expert assessment must determine is whether the plan or project in question has “an adverse effect on the integrity of the site”, since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the 2nd) stage is noticeably higher than that laid down at the 1st stage. That is because the question (to use more simple terminology) is not “should we bother to check?” (the question at the first stage) but rather “what will happen to the site if this plan or project goes ahead; and is that consistent with “maintaining or restoring the favourable conservation sectors” of the habitat or species concerned?”.

30. The test at the second stage is very high indeed. Authorisation cannot be given unless all reasonable scientific doubt can be eliminated (i.e. if there is reasonable scientific doubt as to whether there will be an adverse affect, authorisation must be withheld). This was made clear in Waddenzee. The Court, approving of A.G. Kokott’s Opinion, stated (at para. 59):

“Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”

31. In Commission v Spain C-404/09 (at para. 100) (again approving A.G. Kokott’s Opinion) the Court elaborated on what could give rise to reasonable scientific doubt: “An assessment made under Article 6(3)...cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed...”
In Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and Local Government v An Bord Pleanála C-258/11, the correct application of the aforementioned provisions was summarised by the Court:

“40. Authorisation for a plan or project, as referred to in Article 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 (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

41. It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

44. So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 Commission v Spain, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”
29. Further guidance is provided in A.G. Sharpston’s Opinion in *Sweetman*, although it should be noted that (with evident intent) A.G. Sharpston uses a different test for the requirement to carry out an AA than the classic test set out in *Waddenzee* (at para. 43: that there must be a “probability or a risk” of likely significant effect ("LSE")), which was not clarified in the Court’s judgment:

“47. It follows that the possibility of there being a significant effect on the site will generate the need for an AA for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an AA. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.

... 49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an AA must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field'. Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment.

... 56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, 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?’” (emphasis in original)
30. Reliance on future mitigation measures in order to address any potential LSE is improper: a decision is unlawful if any reasonable scientific doubt exists at the time it is made. In Commission v Portugal C-239/04 (at para. 24) the Court (again approving A. G. Kokott’s Opinion) stated:

“The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, to that effect, Case C-209/02 Commission v Austria [2004] ECR I1211, paragraphs 26 and 27, and Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 56 and 59).”

33. In Marie-Noëlle Solvay and Others v Région wallonne C-182/10 (approving A. G. Sharpston’s Opinion, and considering whether a Member State can effectively fast-track the procedural requirements of EU environmental law through legislation), the Court emphasised that decision-makers at all levels must comply with the requirements of EU environmental law to the letter:

“37. Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. It is apparent from Article 5(3) of and Annex IV to Directive 85/337 that the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see Linster, paragraph 55, and Boxus and Others, paragraph 43).

...  

40. In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 37 above cannot fall within the scope of Article 1(5) of Directive 85/337 (see Boxus and Others, paragraph 46).
67. A plan or project may be authorised only on condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (see Case C-239/04 Commission v Portugal [2006] ECR I-10183, paragraph 20). Moreover, it is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see Commission v Portugal, paragraph 24).

70. The answer to Question 5 is therefore that Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.”

34. Thus it can be seen that all plans which could possibly lead to LSE must be subject to an AA of the implications of the plan or project in view of the conservation objectives of the SAC before that plan is adopted. The plan must be refused if it cannot be ruled out beyond reasonable scientific doubt that it will not have adverse significant effects on these objectives.

35. The application of these tests is subject to the overarching aim of EU environmental law of ensuring a high level of protection for the environment. This in turn incorporates general principles such as the precautionary principle, the principle that LSE must be identified and taken into account at the earliest possible stage, and the importance of effective public participation in environmental decision-making. Most of these principles were first enunciated in the directive concerning environmental impact assessments, and the case law under that directive remains the best source of guidance on their application.
36. Considering the requirement to identify and take account of LSE at the earliest possible stage in *Brown v Carlisle City Council* [2010] EWCA Civ 523, (in the context of EIA development) Sullivan L.J. stated:

“39...The underlying purpose of the [EIA] Directive is that the environmental effects of a development, including any cumulative effects, are considered at the earliest possible stage in the decision making process: see *R (Barker) v. London Borough of Bromley* [2006] UKHL 52 (2007) 1AC 470 per Lord Hope at para 22. If a decision is taken to permit a development on the basis that any cumulative environmental effects of carrying it out will be considered at some future stage there is the danger that the developer will have obtained a ‘foot in the door’. Even if the later assessment of the cumulative effects might otherwise lead to a conclusion that those effects were unacceptable, the local planning authority would be committed to the development for which permission had been obtained, and that commitment would be a relevant factor in deciding whether cumulative environmental effects which might have been regarded as unacceptable if they had been considered at the outset, must be accepted at the later stage given the prior commitment.

40...Since the object of both the Directive and the Regulations is to ensure that any cumulative environmental effects are considered before any decision is taken as to whether permission should be granted, an assurance that they will be assessed at a later stage when a decision is taken as to whether further development should be permitted will not, save perhaps in very exceptional circumstances, be a sufficient justification for declining to quash a permission granted in breach of regulation 3(2) and/or the Directive.”

37. In *R (Wells) v Secretary of State for Transport, Local Government and the Regions* C-201/02 (again, concerning the application of the earliest possible stage principle under the EIA Directive) the Court considered the position if development authorization occurred in stages:
“52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

38. Patterson J. considered these principles in *No Adastral New Town Ltd v Suffolk Coastal DC* [2014] EWHC 223 (Admin), although in a different context. Sussex Coastal DC had hired a consultancy to carry out an on-going AA at the commencement of the core strategy process, and the question before the Court was whether the AA ought to have been specifically applied to a policy alternative before it was selected as a preferred option. The main issue before the Court, however, was the correct application of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (otherwise known as the Strategic Environmental Assessment Directive (“the SEA Directive’’)). At para’s 119-122 Patterson J. held that it was not consistent with the SEA Directive to have delayed production of an SEA. It had to accompany each step “during the preparation of the plan” (at para. 122):

“To hold that there was no requirement for such steps to be accompanied by a SA would not, in my judgment, be consistent with the scheme of the Directive and domestic Regulations which have, as part of their objectives, a requirement for co-ordinated and joint procedures during the course of plan preparation.”

39. The question of whether an AA is required at an early stage has proved controversial. In the above case Patterson J. stated that there was no obligation to carry out an AA at an “early stage”: 
“142. Whilst it is clearly good practice to carry out an AA at an early stage there is no absolute requirement to do so and it would not defeat the scheme of the Directive or Regulations if that were not done. As a result, a failure to conduct an AA at the beginning of the process cannot vitiate the ultimate decision provided the assessment is carried out before the plan takes effect and the AA does not demonstrate that there is likely to be any significant environmental effect.

143. The case relied upon by the claimants, namely, Case C-6/04 Commission v United Kingdom was about the inadequate transposition of the Habitats Directive into United Kingdom law. Transposition is not challenged in the current proceedings. It was, therefore, a very different and entirely distinguishable situation.”

40. In Forest of Dean Friends of the Earth v Forest of Dean DC [2013] EWHC 1567 it was argued that it was unlawful for the council to have delayed its decision to carry out an AA until the AAP stage. The Council identified the possibility of LSE in the CS [TB/1000] and thus at this point was under a duty to carry out an AA. The Council instead delegated AA to the lower tier plan, the CAAP. It was submitted that the Council’s obligation to carry out an AA when LSE cannot be ruled out includes the principle that this must be done at the earliest possible stage. This was particularly important because the CS fixed the boundary of the land designated for major development under the CAAP (pursuant to Wells, at para. 52).

41. The High Court rejected these submissions and held that it was lawful for the council to prepare its core strategy and to delay an AA until the AAP stage, in a context where both documents were to be examined together. The decision is the subject of an application for permission to appeal. Although the High Court relied on Patterson J’s decision No Adastral New Town, this decision does not appear to have had regard to A. G. Kokott’s Opinion in that case. In Commission v UK C-6/04 A.G. Kokott expressly applied the “earliest possible stage” principle to AA under the Habitats Directive:
“48. In addition, the early taking into account of the interests of site protection prevents faulty planning that may have to be remedied, if it does not become apparent until the time of the specific permission that the proposal cannot be implemented in that form because areas of conservation are adversely affected. Therefore, the idea developed in respect of Directive 85/337 on the assessment of environmental effects that an impact assessment should be carried out at the earliest possible stage also applies in the context of the Habitats Directive.

49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure.”

42. In the recent domestic case of The Royal Society for the Protection of Birds, Lydd Airport Action Group v The Secretary of State for Communities and Local Government, Secretary of State for Transport v London Ashford Airport Limited, Shepway District Council [2014] EWHC 1523 (Admin) – the court examined whether a planning inspector considering an application for permission to extend an airport runway had been entitled to conclude that he had sufficient evidence about the impact of bird control measures to decide that an AA was not required.

43. The RSPB contended that the decision was unlawful because the evidence before the Inspector could not lawfully have satisfied that no AA was needed. Fundamentally, the challenge centred on whether the inspector had the
evidential basis (and whether the data presented was safe to rely upon) in order to reach the decision that he did. The judge’s careful analysis of each party’s submissions and his conclusions are at paragraphs 68-109.

44. In rejecting the criticisms of the Inspector, the judge said that the Inspector was entitled to conclude, on his reasonable appraisal of all the material, that there was no need for an AA, correctly applying the Wadenzee test. (para 74). This case raises all sorts of technical questions about the detail of information put before an Inspector, and the extent to which he is expected to have regard to all that detail, how he scrutinises it, and on what he decides to base his decision and what is ultimately ignored.

45. On the approach to the relevant reports, the judge commented, (86)

“…reading the Report as a whole, that there was no reasonable scientific doubt about the absence of adverse effects if the measures became continuous, because there would be no adverse effects; and not because he concluded that there would be adverse but that they could or would happen anyway.”

46. Interestingly, the judge accepted the submission that an AA might have provided further relevant information, but went on to say that he did ‘not accept this as supporting a case that the Inspector was bound to conclude that a reasonable scientific doubt existed, nor do I accept that any or all of those studies would have been a necessary part of a proper appropriate assessment.’ (88) Rejecting arguments based on speculation (91). The judge then went on to conclude,

“The Inspector had a proper evidential basis for coming to the conclusions he did about the future impact of off-site measures, that nothing showed the need now for an [AA], and what at present would be possible but wholly speculative measures and impacts would be subject to the same procedural requirements on an unchanged baseline.”
47. Another interesting element in this case was a request to the CJEU on behalf of the applicant, which was duly rejected. This is unlikely to be the end of the story; there is now an appeal outstanding.

48. At the Inspectorate level this issue continues to be fiercely contested. In a recent example, the issue of the Habitats Directive came up in the development of a low carbon employment zone in Poole, Dorset.¹ The question again was whether an AA was required for the purpose of determining whether there would be significant effect on the European sites. (52-53). The Inspector then considers carefully the body of research put before him at the inquiry and crucially, the mitigation measures proposed – with the Inspector paying close attention to all the details. (54-77)

49. What is noteworthy is the way the Inspector was prepared to look at all the potential impacts, alone and in combination, reaching a pragmatic view that the mitigation measures proposed would be sufficient. (78). Again the careful approach taken by the Inspector accords with the general attitude and approach taken (as described above): namely the potential need for an AA need not be an obstacle to development.

50. Watch this space.

¹ (APP/Q1255/A/13/2204098)