

Appendix - The LA Perspective

The Legal Picture – Email by Sara Morris Pembrokeshire Local Authority in response to Michael Bool – Micro Architect Practise SME

Sensitive Information

The key statutory framework underlying this area of law is set out in the Conservation of Species and Habitats Regulations 2017 (which in shorthand are known as the Habitats Regulations). These transpose the land and marine aspects of the European Union derived Habitats Directive and certain elements of the EU-derived Wild Birds Directive into domestic UK law. The Habitats Regulations remain in place post-Brexit, unless and until the Government chooses to repeal or amend them.

Due to the EU origin of this domestic law the Habitats Regulations must still be interpreted in line with pre-Brexit EU case law of which there is a plethora, and the following principles are derived from them.

Compliance with the Habitats Regulations required the UK (including the devolved government in Wales) to create a network of sites, including Special Areas of Conservation, in relation to which special protections apply. A set of conservation objectives and a list of any operations which may cause deterioration of natural habitats or the habitats of species, or disturbance of species, for which the site has been designated is developed in relation to each site pursuant to regulation 37(3).

The key provision for the Local Planning Authority and the purposes of the current discussion is reg. 63, which requires the Local Planning Authority to do the following when dealing with planning applications that could impact an SAC:

- i) Screening: establish whether the proposal is likely to have a significant effect on the protected site, either alone or in combination with other proposals, in view of that site's conservation objectives: reg. 63(1);
- ii) Assessment: where the proposal is likely to have a significant effect, to make an "appropriate assessment" of its implications in view of the Site's conservation objectives: reg. 63(1);
- iii) Consultation: for the purposes of the appropriate assessment, to consult NRW and have regard to any representations made by them: reg 63(3);
- iv) Integrity test: only to agree to the proposal after having ascertained that it will not adversely affect the integrity of the Site: reg 63(5)7 . This means that proposals should only be granted consent without an appropriate assessment where they are not likely to have a significant effect on the Site. If they are likely to have a significant effect on the Site, the consent can only be granted if there is no impact on the integrity of the protected site.

The Precautionary Principle

One of the most important legal principles involved is that case law tells decision-makers that they need to apply a precautionary approach at each stage of the habitats assessment process. The first stage is screening, the initial check as to whether a proposal is likely to have a significant effect. Applying the precautionary approach, the courts have made clear that there will be a likely significant effect, such that an appropriate assessment is required, wherever there is a risk of such an effect. A risk exists if it cannot be excluded on the basis of objective information. In cases of doubt, the proposal cannot lawfully be given consent without an assessment. The practical impact is that an appropriate assessment will be required wherever there is a mere possibility that the proposal will have a significant effect on a protected site by undermining its conservation objectives. Where the evidence

is unavailable or uncertain at the screening stage, an appropriate assessment for further consideration will be required.

The case law is also clear that the precautionary approach applies at appropriate assessment stage. What this means is that the assessment must be particularly robust to a high standard of investigation, based on the best up-to-date scientific knowledge and not based on the bare assertion of an expert. Any scientific uncertainty should be addressed by applying precautionary rates to variables. In all, the assessment can have no gaps, and must contain complete, precise and definitive conclusions “capable of removing all reasonable scientific doubt” as to the effects of the proposal on the site. To give to consent to a proposal following an appropriate assessment, the case law is clear that an LPA must be able to rule out all reasonable scientific doubt that the proposal would have an adverse effect on the integrity of the site. This doubt must be ruled out at the date of the decision authorising the project, not based on something that might or should happen later. In light of a recent EU case (known as the Dutch Nitrogen case), the application of a precautionary approach is now considered to constrain decision-makers’ options in terms of consenting to a proposal where that proposal could affect the ecological status of a Habitats Site which is already in unfavourable condition. In such situations, the binding decision of the Court was that the possibility of authorising activities which may affect the ecological situation of such sites is “necessarily limited”.

The precautionary principle is also relevant to mitigation, or measures taken to prevent adverse impacts of proposals on protected sites.

Critically, case law establishes that a different approach must be applied at screening and appropriate assessment stages. **At screening stage, an LPA deciding whether there is a risk of a significant effect cannot take any proposed mitigation measures into account. However, mitigation measures can be considered at appropriate assessment stage when determining whether the proposal will have an adverse effect on the integrity of the protected site. Even at appropriate assessment stage, the only measures that can be taken into account are mitigation measures that are protective or preventive, meaning that they avoid direct damage in the first place. What cannot be taken into account are what the courts call “compensatory” measures, which offset or compensate for damage that will be caused (such as by providing replacement habitats in a different area). Compensation measures have generally been considered to be measures separate from the proposal itself whereas mitigation measures are an integral part of the proposal: the key distinction is whether harm will be caused to the protected site. This means that any mitigation measures must be effective before the proposal adds additional nutrients to the catchment (e.g., before houses are occupied). If a measure simply compensates once damage has been done, it cannot be considered true mitigation.**

Applying the precautionary approach, mitigation can also only be considered as part of the appropriate assessment when it is sufficiently certain that the proposed measures will be effective in avoiding harm. Mitigation measures might not be sufficiently certain if, for example, available scientific knowledge does not allow the benefits to be quantified with the requisite degree of certainty at the time of assessment. The LPA must be able to guarantee beyond all reasonable scientific doubt that the mitigation will mean that the project will not adversely affect the integrity of the protected site. This represents a particularly high bar. Relevant considerations will include how the measures will be implemented and monitored, and how any enforcement will take place.

However, while the legal test is demanding one, it also requires the Local Planning Authority to make evaluative judgments, having regard to many varied factors and considerations. Even applying a strict precautionary approach, absolute certainty is neither possible nor proportionate. The Local Planning Authority’s assessments are, of necessity, subjective in nature. Similarly, it is up to the Local Planning Authority to judge what mitigation it considers acceptable, in light of the need for (practical) certainty. **While the Local Planning Authority must have regard to NRW’s advice, as the decision-maker they will also need to determine whether they agree with that advice.** In terms of the level of certainty

required for these decisions, case law has held that the question the competent authority must ask itself is whether it is convinced by the information before it that, taking into account all material considerations and exercising an evaluative judgment, the proposal generates a real risk to the integrity of the Site, considered in light of its conservation objectives.

Announcements of NRW in relation to the network of marine SAC's

NRW have recently updated their condition assessments of all of the marine SAC's in Wales. Those that impact specifically on the two Pembrokeshire Local Planning Authorities are :

- The Pembrokeshire Marine SAC
- The Cardigan Bay SAC
- The Carmarthen Bay and Estuaries SAC

Many of the features of interest for which these SAC's have been designated are now identified by NRW as being in an unfavourable conservation status and that effectively means that, even though evaluative judgement is required, the possibility of authorising activities which might affect the ecological situation of such sites is practically limited.

NRW can publish planning guidance relating to these requirements so as to maintain or, where appropriate, restore habitats and species listed in Annexes I and II of the Habitats Directive to a favourable conservation status. They have done so in relation to riverine SAC's but they have not yet done so in relation to the above Marine SAC's. **As discussed yesterday, we anticipate that this additional guidance and further breakdown to waterbodies is likely to be extremely helpful once made available. However, until such time as they do so, the Local Planning Authority must take a strict precautionary approach to assessment, based on the most up to date information available – which is that many SAC features are in unfavourable condition. It cannot ignore that and it must apply the precautionary principle to identifying whether there are risks of a likely significant effect of a proposal on marine water quality.** As we established yesterday – we are screening out proposals which do not create additional foul flows to the Marine SACs, but given the current level of information published by NRW we are not able to screen out proposals which do create additional foul flows. Where there is such a position and risk then appropriate assessment will be required, and that must conclude (based on the current information available) that there is no impact on the integrity of the protected site concerned. There is no legal way out of that process being engaged.

It is extremely disappointing that NRW are releasing the baseline condition information without associated planning guidance and that this information is also being released in a piecemeal way. As discussed yesterday, when additional information is available to LPAs, this will be shared with the Pembrokeshire Planning Agents' Forum.

Pembrokeshire County Council and Pembrokeshire Coast National Park are under no illusions as to the potential impact on development within their respective planning areas and the wider economic impacts of the recent assessments by NRW and will continue to work with NRW and other stakeholders to monitor the situation. **They will continue to make evaluative judgements in an appropriate way, but the challenges they face in approving developments that have the mere possibility of impacting on the integrity of a marine SAC in light of NRW's review of marine SAC's are clear and the Authorities must and will act in accordance with the law in relation to these matters.**