

Nature Conservation in Europe: Approaches and Lessons

Annex UK.6. Implementation of the Habitats Directive Articles 6(3) and 6(4) in the UK: Some Challenges and Solutions

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The first major case in the UK, which made both environmentalists and industry sit up and take notice, was the Dibden Bay decision in 2004, which concerned Associated British Ports' planning application for a major container port development at Southampton. After a 120-day planning inquiry, planning permission was refused primarily because it was deemed to have failed the legal tests embedded in Habitats Directive (HD) Articles 6(3) and 6(4). The inspector's report and the subsequent decision of the Secretary of State addressed a number of legal and procedural issues, including the definitions of 'mitigation' and 'compensation', the imperative reasons of overriding public interest (IROPI) concept, and alternative solutions, in what was consequently a landmark case in the UK. However, Dibden Bay also became a cause célèbre simply because developers had not foreseen that such a major project, with all its perceived economic benefits, could be brought to a halt by the need to protect Natura 2000 sites.

Following Dibden Bay there was a realisation that HD Articles 6(3) and 6(4) had to be taken seriously, and consequently the planning and development sector began to explore the legal tests in greater depth. Equally, campaigning NGOs, notably the RSPB, had demonstrated that they had a new and powerful legal weapon in their armoury. One of the key challenges has been the structure of Article 6(3) which, unusually both in law and science, requires proof of a negative. The legal test of ascertaining that a plan or project will not adversely affect integrity of a Natura 2000 based on objective data presents a high hurdle which, having been repeatedly emphasised by rulings in the CJEU, has tested many practitioners.

The administrative burden that Habitats Regulation Assessments place on planning authorities and statutory conservation bodies is significant, particularly because the Dibden Bay case, and a series of legal judgments since,¹ have emphasised the need for rigorous application of Article 6(3) and 6(4) and the risks of legal challenge to any cutting of corners (e.g. inappropriate screening out of projects). Efforts to streamline the process have included the development of strategic approaches to mitigation that could be applied to multiple projects and avoid the need for each to be subject to an assessment.

The first such strategic approach was developed to address recreational and urban pressures around the Thames Basin Heaths SPA in southern England. The RSPB successfully argued that new housing within the vicinity of the SPA risked increasing recreational use of the site and therefore greater disturbance of the three bird species for which the sites were designated: Dartford Warbler (*Sylvia undata*), Woodlark (*Lullula arborea*) and European Nightjar (*Caprimulgus europaeus*). To address the risk of further disturbance impacts, English Nature (now Natural England) required local planning authorities to consider even small residential developments against the tests of the Habitats Regulation. To make this feasible, the planning authorities in the vicinity of the SPA developed the mitigation concept of Strategic Alternative Natural Greenspace (SANGs) – the evolution and application of which are discussed in Ricketts and Bischoff (2012). These are existing areas of open space that are enhanced to draw more visitors, thereby diverting recreational pressure, including from the occupants of new housing, away from the SPA heathlands. They can be delivered locally, at the level of an individual development site or strategically, with larger strategic SANGs able to mitigate impacts deriving from third-party development proposals unable to secure their own land and mitigation. The approach was tested in the High Court in 2008,² which importantly ruled that such

¹ For example, *People Over Wind and Peter Sweetman v. Coillte Teoranta* (C323-17).

² *Hart District Council v. Secretary of State for Communities and Local Government, Luckmore Ltd and Barratt Homes Ltd* [2008] EWHC 1204.

mitigation could be considered in the screening stage of an assessment. This case led to the introduction of many such strategic approaches to mitigate perceived impacts of recreation activities on breeding and roosting birds on upland, coastal and estuarine sites.

In the marine environment, problems arose from the wording in HD Article 6(3) that refers to impacts from any plan or project. For many years, fishing was not deemed to be a project or a plan by the UK authorities, and therefore its impacts on Natura 2000 sites were not regulated under these provisions. Consequently, for example, the benthic habitats of several SACs were damaged by scallop dredging. However, following the CJEU ruling on the Waddenzee case (C-127/02), and numerous complaints to the European Commission from The Wildlife Trusts, in 2004 the Department for Environment, Food and Rural Affairs (DEFRA) concluded it had to consider fishing as a project or plan in Natura 2000 sites. Following a campaign begun in 2008 by the Marine Conservation Society (MCS) and ClientEarth, in 2012 DEFRA therefore announced what is called the revised approach to fishing, which aims to ensure all commercial fishing operations are managed in line with HD Article 6 (Clark *et al.*, 2016).

Under this approach, Inshore Fisheries and Conservation Authorities (IFCAs), the Marine Management Organisation (MMO), DEFRA (with advice from Natural England and the Joint Nature Conservation Committee) systematically assess commercial fisheries in relation to impacts on the Natura 2000 sites. The Habitats Regulations Assessments consider the nature, scale and frequency of fishing activities alongside the sensitivity and recoverability of site features, to determine whether or not this is leading to adverse effects — in which case fishing restrictions are implemented. Restrictions can be voluntary agreements, fishing licence or permitting conditions or fisheries by-laws. Using a Risk Matrix, the ‘Red Risk’ gear-feature interactions within designated sites were addressed first, resulting in 18 by-laws being introduced in 2015 to restrict the activities of mostly mobile fishing activity such as scallop dredging and bottom trawling (Clark *et al.*, 2016). For example, to protect benthic habitats and associated species, in 2019 the MMO enacted a Bottom Towed Fishing Gear By-law³ which prohibits this type of fishing in an area covering the majority of the West of Walney Marine Conservation Zone⁴ in the Irish Sea.

References

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www.cambridge.org/natureconservation

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917867/MMO_WoW_Byelaw_002.pdf

⁴ www.gov.uk/government/publications/marine-conservation-zones-west-of-walney