IMPLEMENTATION OF THE HABITATS DIRECTIVE IN THE UNITED KINGDOM

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I General Background of UK Experience

Legislative and Executive competencies:

The terms of the Directive were implemented for Great Britain (England, Scotland and Wales) under the Conservation (Natural Habitats etc.) Regulations 1994 (SI 1994/2716) (as amended), and for Northern Ireland by the Conservation (Natural Habitats etc.) Regulations (Northern Ireland) 1995 (as amended). These Regulations are informally known as the 'Habitats Regulations' and apply to the UK land area and its territorial sea up to 12 nautical miles from the coast. The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (SI 2001/1754 extend the application of the Directive from 12-200 nautical miles following the UK High Court decision in *Ex Parte Greenpeace (No.2)* discussed below. The Regulations are supported by Government policy advice statements concerning the practical application of the legislation published separately by each of the devolved administrations.

Since UK devolution in 1999, responsibility for legislative implementation of the Habitats Directive has become a devolved matter. Although UK negotiations with the EU remain with central government (DEFRA), responsibility for legislative implementation rests with each of the UK's three administrations (DEFRA, the Scottish Executive and the Northern Ireland administration – despite the suspension of devolution in NI). As a result – any amending legislation concerning the Habitats Regulations will be adopted separately by DEFRA, the Scottish Executive and the Department of the Environment in Northern Ireland.

Practical implementation is also a devolved matter. Advice to the devolved administrations concerning the selection and designation of Natura 2000 sites is provided by the statutory conservation agencies within each of the three jurisdictions within the UK. In England this advice is provided by English Nature; in Wales by the Countryside Council for Wales; in Scotland by Scottish Natural Heritage and in Northern Ireland by the Environment and Heritage Service. These agencies are also responsible for site monitoring, the negotiation of management agreements and enforcement. The work of the UK agencies is coordinated by the Joint Nature Conservation Committee to ensure that common standards for site selection are maintained throughout the UK.

Characteristics of UK natural resources

The UK falls entirely within the Atlantic Biogeographical Region recognized by the Directive. More specifically the UK has accepted that 76 of the habitat types listed in Annex 1 occur in the UK. Of the 76 Annex 1 habitat types known to occur in the UK, 23 are defined as priority habitat types within the terms of the Directive.

Major threats:

Development and agriculture are widely considered to be the major threats to nature conservation in the UK.

II Natura 2000

1. Identification and notification of SACs and SPA in the UK

(a) How were the areas identified which went into the national list of candidate areas for SACs (Article 4(1))? Which criteria were used if any?

The work to select the UK's cSACs has included several organisations, including government departments, statutory conservation organisations and the NGOs. This work has been co-ordinated by the JNCC who has sought to ensure that a consistent approach has been taken across the UK. Overall NGOs have been satisfied that a consistent approach has been taken within Great Britain (England, Wales and Scotland) to the application of the criteria; however WWF have raised serious concerns about inconsistencies in relation to Northern Ireland.

The UK has sent its selected sites in tranches to the Commission over a period of years – but the process has taken much longer than the timetable set down in the Directive.

As is required by Article 4 of the Directive, the UK has engaged with the two stage process of cSAC site selection. Stage 1 requires the UK to evaluate sites holding Annex I habitats and Annex II species and to submit a list of cSACs to the Commission. The UK's approach to site identification and selection of cSACs is set out in JNCC, *The Habitats Directive: Selection of SACs in the UK*, at www.jncc.gov.uk/SACselection.

The JNCC report states that this process was based on:

- Available scientific information
- Site assessment criteria set out in Annex III Stage 1 (as required by Article 4)
- The aims of the Directive.

For Annex 1 habitats, the site assessment criteria used by the UK were:

(a) *Representativity* – assessed by reference to the Interpretation Manual of EU Habitats (EU Commission, 1996) which is the standard reference source for A.I habitats.

(b) *Relative surface area of habitat* – preference given to selecting the largest examples of each A.I habitat type

(c) *Conservation of habitat structure and function* – particular emphasis on identifying sites with good conservation of structure and function, however the potential for restoration has not been ignored. In exceptional cases, sites requiring significant restoration have been selected – notably to represent degraded raised bogs.

(d) *Global assessment* -

For Annex II species the UK used:

(a) population size
(b) conservation of the habitat features important for the survival of the species
(c) isolation of the population
(d) Global assessment

In addition, following Stage 2 moderation meetings, the UK also relied on the following principles to guide the site selection process:

- Priority/non-priority status – MS required to give special attention to priority status habitats/species
- Geographical range
- Special UK responsibilities – certain habitats and species in the Annexes are more common in the UK than in other MS and therefore the UK has special responsibility for conserving these habitats and species (eg: Caledonian forests, grey seal and blanket bogs)
- Multiple interests – special emphasis placed on selecting sites in which several high quality interests form an ecologically functional unit – these are considered to be of high conservation value. Although there has been a high level of consistency in the application of the criteria across the UK, WWF maintain that multiple interests have not been applied by the Northern Ireland administration in identifying sites.
- Rarity

Criteria for SPA identification

The Birds Directive provides no formal criteria for selecting SPAs. In the absence of agreed European guidelines, the JNCC, on behalf of the statutory conservation agencies and the UK government, published SPA Selection Guidelines for use in the UK. These guidelines were also produced in consultation with NGOs.

Following the publication of a range of new ornithological surveys undertaken in the UK, the Government requested the JNCC and statutory agencies to review the SPA network in the mid 1990s with a view to recommending a definitive list of sites identified against explicit selection criteria. The Review focused largely on terrestrial SPAs but also recognised the need for a review of UK marine SPAs – which is now underway.

The process by which SPAS are identified in the UK follows two stages: The first
Stage is intended to identify areas which are likely to qualify for SPA status under the following 4 criteria:

1. An area is used regularly by 1% or more of the Great Britain (or in Northern Ireland, the all-Ireland) population of a species listed in Annex I of the Birds Directive (79/409/EEC as amended) in any season.

2. An area is used regularly by 1% or more of the biogeographical population of a regularly occurring migratory species (other than those listed in Annex I) in any season.

3. An area is used regularly by over 20,000 waterfowl (waterfowl as defined by the Ramsar Convention) or 20,000 seabirds in any season.

4. An area which meets the requirements of one or more of the Stage 2 guidelines in any season, where the application of Stage 1 guidelines 1, 2 or 3 for a species does not identify an adequate suite of most suitable sites for the conservation of that species.

These areas are then considered further using one or more of the judgements in Stage 2 to select the most suitable areas in number and size. They are:

- Population size and density
- Species range
- Breeding success
- History of occupancy
- Multi-species areas
- Naturalness

- Severe weather refuges

Stage 1's fourth guideline gives consideration, using the Stage 2 judgements, to cases where a species' population status, ecology or movement patterns may mean that an adequate number of areas cannot be identified from Stage 1's first three guidelines alone.

In addition, these Stage 2 judgements are particularly important for selecting and determining the boundaries of SPAs for thinly dispersed and wide-ranging species.

JNCC guidelines state that the UK implementation of the Natura 2000 network and other special conservation measures need to be co-ordinated at a European Union level to ensure the survival and reproduction in the areas of distribution of each Annex I or migratory bird species. In the light of this objective, selection of SPAs in the UK has regard to conservation measures being taken for each species by other European Union Member States.

Public consultation for SACs & SPAs

Site selection for cSACs and proposed SPAs has been an iterative process in the UK during which the relevant statutory agencies have conducted extensive consultation processes with site owners, managers, user groups and other interested parties (principally NGOs). In some cases this has been a protracted process – particularly in Northern Ireland with very high numbers of land owners, which has delayed the identification process. However, the World Wildlife Fund (WWF) maintain that consultation with general public has been poor and is not seen as a high priority – as a result general public understanding of the Natura 2000 process is limited. In addition WWF argue that the different administrations across the UK have involved the NGOs to different degrees – Wales is the most transparent and Northern Ireland the least.

Main obstacles to site identification

JNCC reported that while the UK has a long history of the approach to site selection set out in the Directive, identifying a national list of SACs in terms of Article 4 and annex III posed a number of significant practical difficulties.

- Difficulty in applying the Annex I definitions: The UK report on the implementation of the Habitats Directive points out that there has been considerable difficulty in interpreting the habitat types llisted in Annex I of the Directive. Where possible, these definitions were interpreted in terms of the standard UK vegetation classifications – however, in many cases there was no straightforward correspondence between AI types and the habitat types recognised in the UK.

- Diverse distribution patters: Site selection is also reported to have been complicated by the diverse nature of habitats and species listed in Annex I and II. Some features are restricted to a very small number of sites in the UK while others are very widely distributed. This diversity means that it is impossible to apply the site selection criteria in exactly the same way for each interest feature.

- Widespread species and extensive habitats: Identification of cSACs for widespread species has been problematic that are thinly distributed over a wide geographical area but with few marked population concentrations. Site selection has endeavoured to reflect the range of geographical areas and ecological conditions in which the species is found. Similar difficulties have been encountered when identifying cSACs for certain habitats – in particular those which are extensive components of upland landscapes such as dry heaths and blanket bogs.

- Data gaps: JNCC reports that the UK (like other MS) has experienced gaps in data concerning the distribution and abundance of some Annex I habitat types – particularly plant

habitat. As a result some habitat designation was delayed due to insufficient information. In addition JNCC stated that the timetable for the Directive precluded the commissioning of significant amounts of additional survey work to complement existing knowledge. In the UK a "best assessment" has been made concerning the obligation contained in Article 3(2); namely that MS should contribute to the creation of Natura 2000 in proportion to the representation within its territory of Annex I habitat types.

- Use of expert opinion: Some of the Annex III criteria could be easily quantified – such as habitat extent; however, others were more qualitative and therefore their application relies heavily on the use of best scientific judgement. Although the use of artificial scoring systems or other rule-based approaches to identify conservation sites has received considerable attention in scientific literature in the past decade, the UK Government report on the implementation of the Directive states that these methods inevitably involve subjective assessments to weigh criteria or evaluate qualitative attributes. Informed expert opinion has therefore necessarily played a key role in identifying "best" sites for each habitat and species.

- At a regional level, the Department of the Environment (NI) reported that the large numbers of land owners have posed a significant barrier to progress with site identification. In contrast to GB, Northern Ireland is characterised by very small farms – consequently each cSAC could involve consultation with 100s of individual land owners.

Have sufficient sites been designated by the UK?

World Wildlife Fund (WWF) has consistently argued that the UK has not identified sufficient numbers of cSACs and has maintained a "shadow" list of sites that it considers should be identified by the UK Government. At the time of the Moderation meeting between MS and the Commission in 1999, the UK had proposed 344 sites. By mid 1999 the list had increased to 576 sites. In 2002, WWF published a detailed analysis of the UK's position which remained critical of the UK's proposals concerning the identification of SACs. In particular the report noted that certain habitat were under-represented; notably, active and raised bogs, woodland habitat and marine habitat. By June 2005, the UK list contained a total of 608 cSACs (2,504,356 hectares – 6.54% of total land area & 5.63% of UK territorial waters). However, the EU Commission's table of Sites of Community Importance lists 610 SACs for the UK.

Subject to the need to expand the application of the Directive to the UK offshore area, WWF now accept that the list of sites for England, Scotland and Wales is probably complete. However, they consider that 4 further sites should be listed for Northern Ireland. Following the *ex parte Greenpeace (No.2)* case and the expansion of the Directive to the UK offshore area – the UK is expected to identify further cSACs in the marine context. However, the NI adminstration continues to resist pressure to extend its list of cSACs.

By June 2005, 257 SPAs have been designated in the UK (14,909 km²; 5.8% of total land area and 0.2% of UK territorial waters). According to the Royal Society for the Protection of Birds (ENGO), the terrestrial SPA network is not complete in the UK with key species (chough and corncrake) being under-represented. In addition, RSPB maintain that the UK's implementation of the Wild Birds Directive in relation to marine SPA is very poor with only one marine SPA designated and that only in response to ECJ action. RSPB argue that there are important differences between the UK's SPA network at the Important Bird Areas identified by Birdlife International – which should be included in the SPA network.

However, JNCC maintains that there are only minor differences between the UK SPA list and Birdlife International's Important Bird Areas Inventory. This difference stems from the use of different criteria, priorities and site selection guidelines. JNCC maintains that the UK SPA list more accurately reflects the scope of the UK's obligations under the Wild Birds and Habitats Directives.

Core zones and buffer zones

The 2002 WWF report states that the many of the UK sites have boundaries that are too tightly drawn around the features of qualifying interest. WWF also point out that the UK has been very reluctant to consider buffer zones or corridors.

To some extent this approach is explained by the fact that the UK's SAC network is based considerably on the national network of SSSIs. Although the UK's Natura 2000 network does not coincide exactly with the national network, it is UK policy that all EU sites should first be an SSSI – with the exception of marine sites. The national network is based on different criteria to the Natura 2000 process and is not complemented by buffer zones or corridors.

(b) Article 4(2) and Article 5 Directive 92/43 – Is the Commission's decision final

Article 4(2) provides that the draft list of SCIs must be developed by the Commission in agreement with the MS – hence the Commission does not appear to have the power of final decision concerning site designation. All cSACs proposed by the UK have been accepted (retained) by the Commission as SCIs. Number and surface area provided above.

(c) Status of UK decision making under Article 4(4)

There are no designated SACs in the UK as yet; however in law, all sites identified as cSACs are extended the full protection of the Habitats Directive.

(d) Are Natura 2000 sites protected through a genuine category of area protection, or are the existing categories of protected areas used for Natura 2000 areas?

The UK Habitats Regulations (which implement the Habitats Directive) apply to "European Sites" – which are a separate category of designation to the principal site designation in the UK, known as 'Sites of Special Scientific Interest' (SSSIs) designated under the Countryside and Rights of Way Act 2000.

Under UK law the term "European Site" includes:

- Special area of conservation (once designated by the UK Government)
- A site adopted by the Commission as a site of Community importance (Article 4(2))
- SPAs designated under the Wild Birds Directive
- A site containing a priority habitat or species subject to a consultation exercise initiated by the Commission under Article 5 of the Habitats Directive (although with less protection – discussed below).
- Candidate SACs

Although proposed SPAs are not included in this definition, the UK Government has accepted as a matter of planning policy that all sites that meet the criteria for SPA designation (potential SPAs) should be treated as though they have been formally designated (Planning Policy Guidance Note 9).

It should however be noted that while the Habitats Regulations create a separate tier of designation for the purposes of N2000, it is UK Government policy that all terrestrial SPAs and SACs should first be designated as an SSSI under national law. In law the protection afforded to SSSIs and EU sites are closely inter-related – discussed below.

(e) National Court decisions concerning identification and notification

UK courts have addressed the issue of designation under the HD on three key occasions:

R v Secretary of State for Transport, ex parte Berkshire, Buckinghamshire and Oxfordshire Naturalists Trusts [1997] Env LR 80: This case involved a judicial review to challenge a decision to proceed with the building of the Newbury bypass (motorway). It was argued that the construction of the motorway would frustrate the subsequent identification of the site as a cSAC due to the presence of terrestrial pulmonate snails. One of the reasons why the site had not been identified as a cSAC was UK policy that all terrestrial SACs must first be SSSIs – which has no basis in the Directive or in law. The UK court could find no basis for striking down this aspect of UK designation policy – however, this was partly based on the efforts by English Nature (the statutory conservation agency in England) to move the snail population off the site. The judge did comment that this decision was made with regret and noted that "one can appreciate the force of the view that if the protection of the natural environment keeps coming second we shall end up by destroying our own habitat".

WWF-UK and RSPB v Secretary of State for Scotland and others [1999] Env 632: The WWF and RSPB sought judicial review of decision to exlude areas from a cSAC. The area to be excluded was a railway line to take skiers to slopes in Scotland and had already been developed. It was decided that although choosing sites and drawing boundaries was all part of one exercise, there was room for discretion in the drawing of boundaries so long as the discretion was exercised only on ornithological grounds. The Court stated that the devolved administration in Scotland and its advisers had decided to exclude the area, while NGOs had come to another conclusion. However, the court decided that it was not for the judge to say that the Government's approach was wrong. An interesting issue that arose from this case was the extent to which the presence of existing development could be a justification for excluding areas from otherwise important sites. This case also indicates that the UK courts are unlikely to strike down tightly defined boundaries unless they are wholly irrational.

R v Secretary of State for Trade & Industry, ex parte Greenpeace (No. 2) [2000] Env LR 221: Prior to the decision of the UK High Court in 1999, the UK Government considered that the Habitats Directive did not apply in the off-shore area (beyond 12 nautical miles). However, the UK courts ruled that the Directive "applies to the UK continental shelf and to the "superadjacent waters" up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured." The UK Government is now implementing the Directive in the UK off shore area (including SPA and SACs).

(f) Obligations to improve the UK list; powers to reduce or abolish designated sites

The UK Regulations make no reference to an obligation to improve the list and only refer to a power to declassify designated sites in so far as it is permitted under Articles 9 and 11 of the Directive.

2. Management of Natura 2000 sites

(a) Article 6(1)

Does UK law require management plans for N2000 sites?

Although the UK's Article 17 report to the Commission (period 1994-2000) notes that the preparation of management plans for N2000 sites is a priority for the UK's statutory conservation

agencies, there is no over-arching obligation under UK law to enter into management plans for N2000 sites. Indeed, in relation to the terrestrial EU sites, the UK Regulations make no reference at all to the concept of a 'management plan'. The management requirements for UK sites are defined through other means outlined below.

Which conservation measures – statutory, administrative or contractual measures – were chosen in the UK and which is the main form?

The UK has introduced various conservation measures in relation to EU sites spanning contractual, statutory and administrative processes.

- *General Duties:* The UK Regulations impose a general duty on the UK Government department responsible for environment and agriculture (DEFRA) and the UK conservation agencies to exercise their powers so as to secure compliance with the Habitats Directive. In addition, any competent authority conferred with powers relevant to marine conservation is required to exercise their powers so as to secure compliance with the Habitats Directive. More generally, all other competent authorities are subjected to a lesser obligation to have regard to the Habitats Directive in so far as it may affect the exercise their powers. This latter category applies to government departments, public bodies, statutory undertakers etc.
- *Nature Conservation Orders (NCO)*: One of the major innovations of the Habitats Regulations was the conferral of powers to the statutory agencies to prevent an owner or occupier of an EU site from carrying out a "potentially damaging operation" on the site. A list of PDOs has been developed for each terrestrial site due to its status as an SSSI (below) which also operates in relation to its EU status. PDOs cannot be lawfully carried out unless with the consent of the conservation agency in question; or under a management agreement (below); or four months have expired since the conservation agency was informed of the intention to conduct the operation. Where it appears to the conservation agencies that there is a risk that an operation will be carried out without consent, it must notify the Secretary of State, who has the power to issue a "special Nature Conservation Order" – which can provide permanent protection to the site. It is a criminal offence to act in breach of an NCO. In practice very few NCOs have been made by the Secretary of State – in effect they have become mechanisms of last resort only.
- *Review of existing consents*: All competent authorities are required to review existing consents and licences so as to ensure compliance with the Habitats Directive – this means subjecting the licence/consent to an appropriate assessment etc, which could lead to the amendment or revocation of the consent. This extends, for example, to planning consents and environmental licenses – IPPC, waste, water etc.
- *Management agreements*: In addition to the NCO and review of consents, the principle conservation measure for EU sites in the UK is the management agreement (MA). MA are contractual arrangements entered into by the relevant conservation agency and the owner, lessee or occupier of the land within an EU site for the management, conservation, restoration or protection of the land. MA can also be entered into in relation to land adjacent to the site – so land outside the boundaries of the EU site can also be affected. This is considered to be essential where water flow or drainage is important to the condition of the protected site. MA may require specific work to be carried out; can provide for payment for the costs of work or compensation for restrictions imposed by the agreement. In effect, MA are intended to ensure the long term condition of the site.
- *Management schemes (marine)*: The Habitats Regulations empower statutory agencies to develop management schemes for marine sites
- *Power of compulsory purchase:* The UK Regulations also give the statutory conservation agencies the power of compulsory purchase to ensure that a site does not suffer deterioration or damage. A site may be subject to compulsory purchase where a conservation agency is satisfied that it is impossible to reach a MA on reasonable terms, or a MA has been broken in a way that prevents or impairs the management of the site. If a MA has been breached, CP is only possible where there has been a failure to remedy the breach within a reasonable time

period and the breach can be repaired. In practice, due to the costs involved and the general UK policy of working in partnership with landowners/occupiers – CP is rarely used. The new powers of management notices for SSSIs (discussed below) will also provide a means of compelling landowners/ occupiers to manage land in a manner consistent with its identification as a EU site.

- *Indirect protection via provisions concerning SSSIs*: Whereas EU sites traditionally enjoyed greater protection under UK law than national sites, this balance has been reversed by the introduction of the Countryside & Rights of Way Act 2000 (CROW Act) which gives greater protection to national sites. However, because UK Government policy requires prior designation of all EU terrestrial sites as SSSIs, the protection in the CROW Act will extend to EU sites. One of the major criticisms of the management agreement was that it relied on co-operation by landowners to enter into the contract. The CROW Act represents an important move away from the UK's heavy emphasis on voluntarism. Under CROW Act, the conservation agencies must adopt a management statement for all SSSIs setting out the conservation objectives for the site. In addition to their powers to enter into management agreements, the agencies may adopt Management Schemes for SSSIs designed to ensure conservation or restoration of a site. MS can only be issued after prior consultation with landowners/occupiers, but owners/occupiers cannot prevent the MS being issued except by means of a successful appeal. The conservation agencies can also issue a Management Notice to any landowner/occupier who appears to be in breach of a MS (via inadequate restoration or action likely to damage the site). A MN can require the owner/occupier to take reasonable steps to ensure protection of the conservation interest; it is a criminal offence to breach a MN without reasonable excuse. There are now proposals to bring the Habitats Regulations into line with the CROW Act.
- *Controls on statutory undertakers and third parties:* The CROW Act also introduces new controls on activities by statutory undertakers (eg: utility companies carrying out construction and repair work) and visitors to sites (recreational biking etc) whose activities can damage the site. These controls do not extend directly to EU sites, but they will benefit from the protection indirectly due to overlapping UK/EU designations.

It should also be noted that a recent report published by the RSPB states that much of the UK SPA network is in poor conservation status. Only England has information concerning site condition – which is absent in Scotland, Wales and Northern Ireland and thereby considerably weakens remediation efforts.

(b) Who administers/supervises N2000 sites?

This responsibility falls primarily to UK central Government (DEFRA), the devolved administrations (Scottish Executive and Department of the Environment (NI)) and the statutory conservation agencies (English Nature, Scottish Natural Heritage, Countryside Council for Wales and Environment and Heritage Service) – co-ordinated by JNCC.

Role of the ENGOs in supervision

WWF and RSPB have played a significant role in the UK in monitoring and influencing the protection afforded to N2000 sites. More specifically they have supported species surveys to identify potential sites for designation; assisted the UK government, devolved administrations and statutory agencies in the development and application of site selection guidelines (particularly in relation to SPAs); they are regulator respondents to planning applications and have actively sought to influence planning policy documents. In addition they have acted as a watchdog – highlighting insufficient identification of sites and planning applications likely to damage sites. For example, RSPB makes representations in relation to approximately 500 projects per year.

In addition RSPB and National Trust are major land owners. Much of the RSPB's land (over 134,000 ha) has been designated as SPAs - this means that RSPB assists in protecting 5.5% of the total SPA area in the UK.

(c) GMOs and nature conservation

The release of GM seeds in the UK is regulated in England and Wales under the Environment Act 1990 as amended; separate legislation is introduced for Scotland an NI. GM seeds could only be sown in England and Wales with central Government's consent (DEFRA), however while consent could be refused on the grounds of damage to nature, the Government is not required to do so. Government guidance notes state that consent can be granted subject to conditions – which could include controls designed to protect nature. The regulatory process is underpinned by a requirement on the part of the applicant to produce a detailed environmental risk assessment. Scientists within DEFRA (Joint Regulatory Authority) subject this to scrutiny and consult with the statutory conservation agency (English Nature). DEFRA's Guidance states that consent would only be granted for the release of GM material where the environmental risks were deemed to be very low.

However, where it was proposed to sow GM seeds in or near an EU site, DEFRA's power to grant consent would be additionally controlled by the Habitats Regulations – which impose the obligation to conduct an AA etc. These controls do not apply to releases in or near sites designated exclusively as SSSIs.

3. Appropriate Assessment & the Authorisation of Plans & Projects

(a) UK transposition of A.6(3) & (4)

The obligation to conduct a prior appropriate assessment and the controls on the authorisation of plans and projects is transposed in the UK via the Habitats Regulations. In effect, the Regulations incorporate the controls imposed by Article 6(3) and (4) into pre-existing consent regimes. However, the Regulations transpose the obligation for a prior appropriate assessment in the following two ways:

- The principal transposition of the Article 6(3) and (4) obligations in the UK requires any "competent authority" who is deciding whether to undertake, or give consent, permission or other authorisation for a plan or project that is likely to have a significant effect on the site (either alone or in combination with other plans/projects) and is not directly connected with or necessary to the management of the site, to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. This rule applies not only to plan/projects on the site itself, but also any plan/project that may have a significant effect on it. In addition the AA must be undertaken when the competent authority is reviewing existing consents affecting cSACs – which is required by the UK Regulations. A "competent authority" in this context is defined as any Minister, government department, public or statutory undertaker, or public body of any description or person holding public office. Competent authorities are only allowed to grant consent to damaging plans/projects where there are imperative reasons of overriding public importance (discussed below). In addition to integrating this basic obligation into existing consent regimes for all competent authorities, the Habitats Regulations make more specific provision for the integration of this rule into planning controls, road and highway construction controls, IPPC consent applications, waste management licensing and water consents, electricity works and pipelines.

- In addition to the AA obligation imposed on competent authorities, the UK Habitats Regulations also require the UK's statutory conservation agencies to conduct an "AA" of the implications for the site in view of its conservation objectives when deciding whether or not to give consent to a "potentially damaging operation" in or near an EU site. Consent can only be granted where the AA concludes that the plan or project will not adversely affect the integrity of the site. Although A.6 of the Habitats Directive allows consents for damaging plans and projects to be given where there are imperative reasons of overriding public interest – the agencies in GB do not have this power in relation to PDOs. The UK Regulations make no attempt to distinguish an AA in this context from the AA conducted by competent authorities above. It is interesting to note that the conservation agency in Northern Ireland does have this power under the separate implementing Regulations for this part of the UK. The concept of PDOs is discussed in the context of plans/projects triggering AA below; however, they are essentially operations listed in the underlying SSSI designation but which also apply to the EU site under the UK Habitats Regulations. PDOs include a very wide category of activities.

The Regulations also provide that all existing consents, permissions and authorisations must be reviewed as soon as is reasonably practicable. These reviews can lead to the revocation of an existing consent and to the payment of compensation for loss of consent. The Environment Agency (responsible for the regulation of pollution controls in England & Wales) has stated that the review of existing pollution consents will be complete by 2010 – but there will be a prioritisation within this process.The Agency has also issued detailed guidance on the operation of these provisions www.environment-agency.gov.uk/business.

Application of Article 6 to pSCI and npSCI

Under UK law the requirement to conduct an AA extends to cSAC – which I understand to be the equivalent of a pSCI. This is regarded as being a requirement of EU law.

However, the UK Habitats Regulations explicitly exclude the obligation to conduct an AA in relation to sites that fall within the definition of EU site under Article 5(4) of the Directive – ie, a npSCI or a site containing a priority habitat or species in respect of which a consultation has been initiated by the Commission concerning its potential inclusion in the UK list.

Factual information on plans/projects affecting N2000 sites

The UK Regulations do not provide a definition of the term 'plan/project' not does UK government policy elaborate on this definition. Further discussion as to the definition of this concept is provided below.

Relationship between AA under A.6 to EIA conducted under EIA & SEA Directives

Although many of the plans and projects that would trigger an AA under Article 6 would also trigger the requirement for an EIA under the EIA Directive, under UK law an appropriate assessment for the purposes of A.6 is not an EIA under the EIA or SEA Directives. Where both an AA under the Habitats Directive is triggered and an EIA under EIA Directive, English Nature's Guidance Note states that the habitats AA may be addressed by the competent authority alongside or as part of the wider EIA.

An appropriate assessment for the purposes of the Habitats Regulations focuses on the implications of the proposed plan/project for the site's conservation objectives – ie, the integrity of the site. Although an EIA under the EIA Directive requires an assessment of the direct and indirect effects of a proposed project on fauna and flora, it also requires an assessment of all significant environmental impacts spanning the impacts on human beings, the environment and

material assets and cultural heritage. In effect, an EIA under EIA Directive is a much wider process. The following is an outline of the form, content and procedure of an AA for the habitats Directive purposes:

(i) Timing of AA
An AA for the purposes of the Habitats Regulations is required *before* any competent authority decides to undertake a plan or project or consents to one or reviews a decision to consent to a plan/project or decides whether to approve an application for development that would otherwise be deemed permitted development under UK planning law (ie, not require development consent).

(ii) Determination of likely significant effect
Discussed below – but decision-making falls to the competent authority.

(iii) Who undertakes the AA
An AA is undertaken by the competent authority. Most competent authorities will not have the in-house technical expertise to assess the effects of the plan/project and will therefore have to rely heavily on the advice provided by the relevant statutory conservation agency – including guidance on the scope and content of the assessment, the site's conservation objectives, the type of information that should be requested from the developer/proposer of the project and the effects on the integrity of the site. The UK Regulations require competent authorities to consult with the relevant conservation agency. The competent authority would be expected to follow their advice and if they did not – should be expected to provide reasons. Where an authority intends to consent to a plan/project which attracts a negative assessment – it must notify the Secretary of State in advance of the decision.

Although the UK Regulations impose obligations that support the gathering of environmental information to enable the competent authority to make an appropriate assessment, they are not as detailed or elaborate as those imposed for the purposes of an EIA under EIA & SEA Directives. The UK Habitats Regulations simply require that persons applying for consent to carry out a plan/project must provide any information as is reasonably required by the competent authority for the purposes of the assessment. There is no equivalent in the context of habitats AA to a requirement to produce specific forms of environmental information, an environmental statement or a non-technical summary.

(iv) Nature of the AA.
The UK Habitats Regulations do not specify how the assessment should be undertaken but simply describe it as an AA. English Nature's Guidance Note 1 states that an AA in this context must be based only on scientific considerations and should be appropriate to its purpose under the Regulations – namely to assess the implications of the proposal in respect of the site's conservation objectives. PPG9 states that these are "the reasons for which the site was classified or designated". The assessment should enable the competent authority to ascertain whether the proposal would adversely affect the integrity of the site.

Planning Policy Guidance Note 9 states that the scope and content to the AA will depend on the location, size and significance of the proposed plan or project. The statutory conservation agencies will advise on a case by case basis what issues should be addressed by the assessment – but examples given are hydrology, disturbance, land take.

PPG9 and English Nature's Guidance Notes on the AA process state that an adverse effect on integrity is likely to be one which prevents the site from making the same contribution to favourable conservation status for the relevant feature as it did at the time of its designation. In addition, the Guidance Note states that a precautionary approach should be taken in considering effects on integrity in line with the UK Government's principles for sustainable development.

Public Participation

Another major difference between an AA for the purposes of the Habitats Regulations and an EIA under the EIA and SEA Directive concerns the issue of public participation. An AA under the Habitats Regulations is a technocratic exercise conducted by the relevant competent authority. The UK Habitats Regulations give the competent authority a discretion as to whether or not the public should be consulted concerning the assessment process. In contrast the UK provisions concerning the transposition of the EIA/SEA Directives, and more specifically the UK courts, place a heavy emphasis on the essentially democratic nature of the EIA process in this context. The UK provisions concerning the EIA and SEA Directives impose mandatory public consultation procedures designed to ensure that the public have an opportunity to consider the information contained in the environmental statement and the statement itself and submit additional information to the decision-making body concerning potential environmental impacts. This information must be taken into account in the assessment process; failure to do so would invalidate, for example, development consent.

In 2001 the House of Lords delivered what is widely regarded as a seminal ruling concerning the fundamentally democratic and participative nature of the EIA process required by the EIA Directive. In *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] Env LR 16 planning permission had been granted for the redevelopment of football grounds (which involved encroachment into the Thames mudflats and the building of apartments over a riverside walkway) without an EIA under the EIA Directive. Although the decision-maker had access to information concerning the potential environmental impact of the project, the developer had not prepared an Environmental Statement and non-technical summary. The House of Lords ruled that the EIA process is not just an information gathering exercise. Although the objectors had an opportunity to comment on the environmental information before the planning inquiry and could submit additional information, the court ruled that the available information simply amounted to a 'paper chase' which fell short of what was required by the formal ES process. The House of Lords ruled that the EIA Directive conferred not only a right on citizens to have a fully informed decision made on the substantive issue, but also that the decision is adopted on an appropriate basis which requires the inclusive and democratic procedure set out in the Directive. Although the public had the right to trace all the documentation before the inquiry, the court noted that it would require a lot of energy and persistent to do so. The court ruled that the public must be given an opportunity to express their opinion on the environmental issues no matter how ill-directed their views.

Compensatory Measures

Although the AA is carried out by competent authorities, the UK Regulations place the obligation to ensure compensatory measures on the Secretary of State (central Government). Where a competent authority intends to grant consent for a plan/project notwithstanding a negative assessment, they must notify the Secretary of State beforehand. The consent cannot be granted until 21 days has expired following notification. The Secretary of State has the power to direct a competent authority not to grant consent for a damaging plan/project.

Is the A.6 AA confined only to the Annex I & II projects contained in the EIA Directive or does it also include other projects?

The UK Habitats Regulations require competent authorities to make an AA of "any plan or project which is likely to have a significant effect on a European site, either alone or in combination with other plans or projects and which is not directly connected with or necessary to the management of the site".

In addition the UK Regulations require the statutory conservation agencies to conduct an AA when they receive an application for a potentially damaging operation as listed in the underlying SSSI designation – which also applies to the EU site.

The UK Habitats Regulations do not define the concept of a plan or project, nor do they set out a specific list of plans/projects that would trigger the requirement for an AA. In addition the UK Habitat Regulations do not link or limit the AA requirement to Annex I or II projects as defined for the purposes of EIA and SEA Directives.

However, the meaning of plan/project in this context was first considered by the UK courts in *RSPB v Secretary of State for Scotland* [2000] Scottish Law Times 22, in which a broad definition including all decisions which would lead to some activity on the site – was rejected. The term was seen as referring to what is normally regarded as development or land use proposals extraneous to the management of the site.

However, as already explained, the GB statutory conservation agencies are also obligated to conduct a prior AA before consenting to a "PDO" in an EU site. The UK Regulations make no distinction between an AA conducted in this context and one conducted by "competent authorities". PDOs have been very broadly defined by the UK courts in the context of UK SSSI designations – which will also extend to EU sites. As already stated, it is UK policy that all terrestrial EU sites must first be designated as an SSSI. When an SSSI is declared – the site designation will set out a list of PDOs which must not be carried out on the site without the consent of the relevant statutory conservation agency. The UK Habitats Regulations provide that all designations and declarations made in relation to an SSSI will apply as though it was also made in respect of the EU site. In *Sweet v Secretary of State and the Nature Conservancy Council* [1989] Journal of Environmental Law 245 the court held that a PDO is not limited to the concept of development and can include virtually anything that has an impact on the site, specifically:

> "Cultivation, including ploughing, rotavation, harrowing and reseeding; grazing; mowing or other methods of cutting vegetation; application of fertiliser; burning; the release of any wild or domestic animal, reptile, amphibian, bird, fish or invertebrate, or any plant or seed; the storage or use of materials; the use of vehicles or craft likely to damage or disturb features of interest."

Academic opinion on this case also argues that drainage, building operations and the application of pesticides would also be covered by the definition of a PDO. However, it should be noted that neglect is not covered in the definition of a PDO.

Is the AA obligation limited only to 'development consent' under EIA Directive or does it also extend to other permits?

The obligation to conduct an AA for the purposes of A.6 of the Habitats Directive is not confined to development consent; it also applies to applications for IPPC permits, water discharge consents, waste management licenses etc… In effect the AA obligation applies very widely in the UK. If the concept of the "potentially damaging operation" is also considered to be part of the AA obligation – then the category of projects is considerably expanded as outlined above.

Scope of the EIA procedure and documentation required for an A.6 AA

Unlike the UK Regulations implementing the EIA Directive, the UK Habitats Regulations do not contain the detailed procedural or information/documentation EIA requirements for an A.6 AA. There are no rules governing the AA conducted by the UK's conservation agencies; and the rules governing an AA by competent authorities are minimal compared to those required in the context

of an EIA under the EIA Directive. Although the person proposing the plan/project can be required to produce any information that may be reasonably required by the competent authority for the purposes of the assessment, the UK Regulations do not set out the detailed rules governing the form of environmental information required for the assessment process under the UK EIA Regulations. In addition the developer or proposer is not required to produce an Environmental Statement or a non-technical summary.

UK discussion of the implications of the Waddenzee and Draggagi cases

- *Case C-127/02 Waddenzee:* A number of comments can be made in relation to the impact of this decision on UK practice. First, the UK had already acknowledged the need to subject mechanical dredging/trawling to Article 6 even though such activity was licensed – one of the most graphic cases occurred in Northern Ireland in the context of Strangford Lough where all such licenses were revoked and an indefinite ban imposed on such activity. Secondly, the UK Guidance Notes on the meaning of 'likely significant effect' and the nature of the appropriate assessment are largely but not entirely consistent with the requirements of the ECJ's ruling.

  The UK Guidance emphasises that likely significant effect is that which may be reasonably predicted as a consequence of a plan or project. In referring to the nature of the information on which likely significant effect is determined – the UK Guidance emphasises that the judgement should be based on "best readily available information". It is worth noting that the UK Guidance on this stage of the process does not explicitly emphasise the scientific nature of the information used for decision-making, nor does it use the term "objective information" as used by the ECJ in this context. Nor does the UK Guidance on this stage explicitly emphasise the precautionary principle as is the case in the ECJ ruling. However, while expressed differently, the UK Guidance appears to be consistent with the ECJ's position concerning instances of doubt. The ECJ ruled (para 44) that where there is doubt as to the absence of significant impact, an AA should be carried out. The UK Guidance states that competent authorities should only conclude that an AA is not needed where it is "beyond doubt" that the site's features would not be directly or indirectly effected. The Guidance also urges competent authorities to seek the assistance of the specialised conservation agencies where there is doubt as to likely significant effect. Like the ECJ ruling the UK Guidance links the decision as to likely significant effect to the site's conservation objectives.

  UK Guidance on the nature of the appropriate assessment stage is more clearly consistent with the ECJ decision. The UK emphasises that an AA can only be based on scientific considerations and emphasises the role of the precautionary principle. Like the ECJ, the UK Guidance emphasises that damaging activity should not be authorised unless the decision-making body has ascertained that it will not adversely affect the integrity of the site – however, the Court's elaboration of the meaning of this concept will be helpful. However, the Court's explanation that this means that "no reasonable scientific doubt should remain" provides a useful elaboration as to the decision-making threshold that is missing from the UK Guidance.

- The *Draggagi* decision did not have a major impact within the UK as it had already extended the protection of Article 6 of the Directive to cSACs through an explicit amendment of the Habitat Regulations. Indeed, in Northern Ireland, protective action was taken under Article 6 to prevent further deterioration to Strangford Lough (a cSAC) even though the regional version of the Habitat Regulations had not at that stage reflected the explicit amendment to include cSACs in EU sites. Northern Ireland has since come into line with GB in this regard.

"Significant effect" & "adversely effect"

UK Guidance states that 'likely significant effect' is any effect that may reasonably be predicted as a consequence of a plan or project that may affect the conservation objectives of the features for which the site was designated - but excluding trivial or inconsequential effects. The Guidance Note and PPG 9 furthermore state that the 'significance test' is a coarse filter intended to identify which proposed plans and projects require an AA. It is deemed to be the first stage in the process and is distinct from the AA of 'adverse effect on integrity'. UK Guidance states that proposals that have no, or a *de minimis* effect can be progressed without further consideration under the Habitats Regulations – although the reasons for reaching this decision must be justified.

UK Guidance highlights the following examples of types of effects that are likely to be significant:

- Causing a reduction in the area of habitat or of the site (however, even in this case the Guidance emphasises that a loss of area could be significant in the context of one site, but not in another)
- Causing change to the coherence of the site or to the N2000 series (ie presenting a barrier between isolated fragments or reducing the ability of the site to act as a source of new colonisers)
- Causing direct or indirect change to the physical quality of the environment or habitat within the site
- Causing ongoing disturbance to species or habitat for which the site is notified
- Altering community structure (species composition)
- Causing direct or indirect damage to the size, characteristics or reproductive ability of populations on the site
- Altering the vulnerability of populations etc to other impacts

In considering whether a plan/project will adversely affect the integrity of the site, the UK Habitats Regulations provide that the competent authority must have regard to the manner in which it is proposed that the plan/project would be carried out, or to any conditions or restrictions subject to which they propose to grant consent.

In *WWF- UK Ltd v Secretary of State for Scotland* [1999] I CMLR 1021 a UK court accepted the definition of "integrity of the site" given in the UK guidance notes for the Habitats Regulation, which states that the "integrity of the site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified." It was also decided that, in practice, it may be impossible to guarantee the absence of adverse effects. Instead the court ruled that the decision-making authority must identify the foreseeable potential risks and to put in place a legally enforceable framework (using conditions attached to the consent) to prevent them materialising.

"Imperative reasons of overriding public interest"

The UK Regulations provide that if, following the assessment, it is concluded that the plan or project would adversely affect the integrity of the site, the competent authority may only grant consent if there are no alternative solutions, and the plan or project must be carried out for imperative reasons of overriding public interest.

The UK Regulations state that imperative reasons of overriding public interest can include reasons of a social or economic nature. However, where a site hosts a priority habitat type or species, the concept of imperative reasons of overriding public interest is defined exclusively in relation to reasons of human health, public safety or beneficial consequences of primary importance to the environment, or other reasons which in the opinion of the Commission, are of imperative reasons of overriding public interest.

Guidance published by UK Government states that the decision as to whether there are imperative reasons of overriding public interest will depend on the following guiding principles:

- A need to address a serious risk to human health and public safety
- The interests of national security and defence
- Provision of a clear and demonstrable direct environmental benefit on a national or international scale
- A vital contribution to strategic economic development or regeneration
- Where failure to proceed would have unacceptable social and/or economic consequences.

It is also stated that issues of scale will be important in any calculation – ie, nationally important projects are more likely to pass the threshold than projects of local significance.

"Alternatives"

In interpreting this concept, academic opinion within the UK on this issue has pointed to the fact that the Directive does not refer to the concept of "reasonable alternatives". Similarly, academic opinion has pointed to the fact that it is not yet clear how radical the consideration of alternatives solutions should be. For example, in the context of a proposal for a power station, Colin Reid asks whether the alternatives simply include different locations or extend to requiring greater energy efficiency so as to avoid the need for a new station? (*Nature Conservation Law,* 2nd ed (Sweet & Maxwell: 2002).

In addition, academic opinion has suggested that UK courts might demand that the person proposing the plan/project must show that the development is the only way to create employment in an area, and that the expansion of other sectors might not achieve equivalent employment levels. However, opinion in the UK suggests that the main issue probably lies in the quality and quantity of evidence that should be submitted to the decision-maker in order to make a decision on alternatives. [S. Bell & D. McGillivray, *Environmental Law* (6th Edition) (Oxford University Press: 2006)].

In 2002, the UK courts considered a challenge to the exclusion of evidence from the consideration of alternatives. An application for planning permission to construct an airplane runway at an SPA in Kent had been made which triggered the application of Article 6(3). In the consideration of alternatives evidence concerning the potential expansion of Gatwick airport had been excluded on the grounds that the Government had decided in 1979 that no further runways would be constructed at Gatwick before 2019. The exclusion of this information was successfully challenged because the effect of this was that it prevented consideration of further expansion of Gatwick as an alternative solution – and therefore whether the runway was needed in Kent because of imperative reaons of overriding public interest. *(R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516)

In the context of a planning application for the building of a deep-water container port at Dibden Bay port the Secretary of State for Transport followed the EU Commission's guidance on alternatives in deciding that these had to go beyond simply considering alternative local sites for the development – and might extend to considering alterative solutions located in other regions or even other countries.

"Compensatory Measures"

UK Government policy concerning compensatory measures states that in cases where the habitat types or species affected are relatively abundant and the Government has designated or is proposing to designate only part of the national resource, it may be possible for an area of similar

quality and character to be identified for designation which could, at least in part, replace the loss to the network. This will become increasingly difficult with the rarer habitat types and species; in the cases of the most rare especially, all suitable sites are already likely to be designated or proposed for designation. In these cases the possibilities for restoration of damaged habitat or creation of replacement habitat will need to be considered. This may be costly and often technically difficult or ecologically untried. In certain cases the habitat affected may be irreplaceable. Wherever possible, the Government would expect the developer, under 'polluter pays' principles, to bear the cost of compensatory measures. If re-creation or restoration is specified as compensatory measures, the Government would expect the area concerned to become, within a clear timescale, of sufficient quality to ensure that the coherence of the Natura 2000 network is protected.

Academic commentary within the UK on this issue points to the fact that there has been little case law on this element of the Directive. However, the approaches to this issue taken in the case of the Cardiff Bay Barrage and Dibden Bay port are widely regarded by commentators within the UK as instructive as to the interpretation of the requirement to provide compensatory measures.

In 1994 the Cardiff Bay Development Company proposed a barrage across the mouth of two rivers to create a large freshwater lake – the result of which would be to destroy inter-tidal mudflats that hosted internationally important numbers of dunlin and redshank (protected bird species). Although the Government had (unlawfully) excluded the area from the neighbouring SPA on economic grounds, it accepted that under the Habitats Directive there was a need for compensatory measures. Following the compulsory purchase of farm land, a new wetlands reserve was created. However, while the new wetlands provided a habitat for certain species of duck, it did not directly compensate for the loss of habitat to the dunlin or redshank. Compensation for these species took the form of general monitoring within the UK of their populations and an undertaking to accelerate a programme of designating large numbers of significant estuarial sites for their conservation. The compensatory measures in this case were not subject to judicial scrutiny although a public inquiry was held concerning the compulsory purchase of the land.

More recently, the Secretary of State considered an application for the construction of a deep-water container port at Dibden Bay, which would have harmed an SPA and two cSACs. At the public inquiry, English Nature advised that the proposed compensatory measures would not be adequate to off-set the damage to these sites. The Secretary of State for Transport agreed and permission was refused.

Commission Opinion

There is no UK Guidance on what would constitute an opinion from the Commission. However, in the context of plans/projects for sites hosting priority species/habitats, the UK Regulations effectively confer power on the Commission to expand the definition of an ‘imperative reason of overriding public interest’ (beyond reasons relating to human health, public safety or beneficial consequences of primary importance to the environment) through giving its opinion. If the Commission provides a negative opinion, then a plan/project likely to have a significant effect on the integrity of a site hosting priority species/habitats could not be consented to for reasons other than those listed above.

Under the UK Regulations only the Secretary of State (ie, central Government) has the power to seek the Commission’s opinion. Where a competent authority other than the SoS wishes to obtain the Commission’s opinion, they must submit a written request to the SoS, who may, if he thinks fit, seek the Commission’s opinion. If the SoS does seek an opinion, he must transmit it back to the competent authority.

Standing to challenge decisions under Article 6(4)

The UK Regulations do not create a right of appeal for developers or those proposing the plan/project, however the incorporation of the ECHR in the UK (which post-dated the 1994 Habitat Regulations) would almost certainly require the creation of a right of appeal for such parties to an independent tribunal.

In addition, the developer/proposer of the plan/project or any other party with 'sufficient interest' could seek to judicially review the decision of a competent authority under Article 6(4). Under UK law it is clear that someone with a private interest in land affected by an Article 6(4) decision, or someone living in close proximity to an area affected by a decision would have standing to take JR. In addition, UK courts have taken an increasingly liberal approach to representational standing under which NGOs have been permitted to challenge decisions via the JR process.

Application of Art 4(4) of Directive 79/409 directly applied as such or in combination with Art 7/Art 4(4) Directive 92/43 if the site not notified?

Under UK law, sites that qualify for notification but which have not been notified by the UK Government only receive protection under the Habitats Regulation where the Commission has triggered the Article 5 consultation process in relation to sites containing priority species or habitats. In this context, the protection is only afforded during the period of the consultation process and does not include the requirement to conduct appropriate assessments for plans/projects likely to have a significant impact on the integrity of the site.

However, as stated above, if the UK has notified a site to the Commission as a cSAC, then it is protected the full protection of the Habitats Directive from that point onwards – assuming it is also adopted by the Commission as a SCI etc.