

8Hiv & Jiv/Runnymede BC (7612)

SOUTH EAST
REGIONAL SPATIAL STRATEGY EIP

Addendum Response to Sub-matter 8Hiv & Jiv -Thames
Basin Heaths SPA joint session following publication of the
Assessor's Report

Runnymede Borough Council

March 2007

1. Introduction

- 1.1 The following is Runnymede Borough Council's officer response to the 'REPORT TO THE PANEL FOR THE DRAFT SOUTH EAST PLAN EXAMINATION IN PUBLIC ON THE THAMES BASIN HEATHS SPECIAL PROTECTION AREA AND NATURAL ENGLAND'S DRAFT DELIVERY PLAN' (the Assessors Report) published on the 19 February 2007.
- 1.2 This response concentrates in essence to the risk misapplication of the provisions set out in Article 6(2) and Article 6(3) of the Directive on the Conservation of natural habitats and species 92/43/EEC (Habitats Directive) to the protection of Natura 2000 (N2K) sites in consideration of the soundness of the South East Plan. The risk to the soundness of plan is particularly evident in respect of the Thames Basin Heaths Special Protected Area (TBHSPA).
- 1.3 It is intended to assist the SEP EIP Panel in its consideration of the implications of and the conclusions and recommendations contained within the Assessors Report. The Assessors Report relates specifically to the TBHSPA and the need to consider the use of non-assessed mitigation in order to avoid the need to carry out an appropriate assessment of a plan pursuant to Article 6(3). However, notwithstanding its specific nature and that of its conclusions in respect of TBHSPA, it is clear and important that the key issues identified within the Assessors Report are fully considered by the examining Panel. This consideration is paramount, and needs to fully inform the advice the Panel intends to give the Secretary of State (SoS) on the implications of likely significant effects that the adoption of the SEP will have on the TBHSPA including other N2K sites within the UK.

2 Main response

- 2.1 The assumption is that the Panel are minded to recommend to the SoS adoption of the SEP broadly in line with its current form. The Panel is aware therefore of the fact that the draft appropriate assessment (AA) of the SEP has determined it as having likely significant effects on a number of N2K sites, the TBHSPA being one example. Some will suggest that the documents referred to as 'AA of the SEP' is not actually an AA, as it is only the SoS acting as competent authority (CA) who can carryout such an assessment, and therefore little weight can be afforded to their conclusions. Whilst this is the case, it is equally fair to suggest that these documents should be read as an indication of a screening opinion and therefore of the need to carryout an AA pursuant to Article 6(3).
- 2.2 In the unlikely event that the SoS fails to screen the impacts the plan will have on the N2K Network of sites or arguably gets such a screening opinion wrong, and as a result does not carryout an AA the legal context is clear. Where no AA has or can be carried out it would be unlawful for any CA to adopt a plan that is likely to have a significant effect, without first ascertaining 'no adverse affect on integrity' of those sites. This principle has been the subject of the European Court of Justice ruling in *Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw* Case C-127/02 [2005] ("*Waddenzee*"). Within Waddenzee, the limits of discretion set by the Article 6(3) of the Habitats Directive within which the CA is to operate was clearly and unambiguously established. The Court held at paragraph 33:

“Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site.”

2.3 Natural England (NE) and others argue that Article 6(3) is not applicable in the case of the SEP, as the avoidance measures required in principal under Article 6(2) can be used to avoid likely significant effects. This position appears to be based on the premise that the provisions of the Article 6(3) are never invoked as the adherence to the requirements of NE’s Draft Delivery Plan (DDP) which effectively meets the general rule of protection laid down in Article 6(2) for existing impacts, thus rendering unnecessary the procedures of Article 6(3) intended to ensure that no plan or project likely to result in an adverse affect is authorised. Waddenzee again ruled on use of Article 6(2) and its relationship with Article 6(3). On the use of Article 6(2) the Court held at paragraph 37:

“Nevertheless, it cannot be precluded that such a plan or project [taken to have been subjected to the procedure in Article 6(3)] subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.”

On the relationship between Articles 6(2) and (3) the Court held at paragraph 38:

“...that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the Directive’s objectives, and cannot be applicable concomitantly with Article 6(3).”

2.4 The specific issue the Assessors Report addressed related to the misuse of Article 6(2) and Article 6(3), and concluded inter alia that the NE's Draft Delivery Plan (DDP) failed to ensure that CAs could act within the limits of discretion set by both EU and UK legislation [Assessor’s Report para. 4.1.43]. These ‘limits of discretion’ have been set and are enforced under the legislation in order to fully protect biodiversity for the purposes of sustainable development. It follows that it would be wholly wrong to replace one failed avoidance DDP with a similarly flawed avoidance DDP that is based on a similar set of equally flawed conclusions.

2.5 The Assessors Report is considered for the most part as being a report of two halves. On the one hand it correctly establishes the legislative regime required to be followed when considering the implications of plans on a N2K site [Assessor’s Report para. 4.1.1 – 4.1.6]. It concludes that there was an ineffectiveness of the DDP to discharge a CAs duty under that legislative regime, citing incorrect

interpretation of the legislation, lack of data and absence of conservation objectives as being chief [Assessor's Report para. 8.1].

- 2.6 On the other hand, it appears to recommend the adoption of a similar approach to the issue of likely significant effects on this N2K site [Assessor's Report para. 10 Aii], citing the transferability of the requirement to carryout the AA to lower tier authorities [Assessor's Report para. 4.1.22].
- 2.7 If this responsibility transfers to lower tier authorities recommendation is accepted, it effectively sets up the prospect of a 'multi stage' plan adoption processes. Where the obvious question is, at which level the likely significant effects of the plan on the environment are assessed. If regionally it is determined that they are best assessed locally and based on the AA's of early Local Development Documents, locally it is being determined that they are best assessed regionally?
- 2.8 This problem is compounded by the fact that it has been pointed out that whilst the UK Nature Conservation Bodies are responsible for the agreement of the conservation objective's (CO's) and the production of the favourable condition status (FCS) reports for each of the 1009 Natura 2000 sites including the TBHSPA, to date this would not appear to have been done [Assessor's Report para. 4.2.7]. Thus, it will clearly not be possible for any CA to carryout an AA of any likely significant effects due to the lack of this information.
- 2.9 In such instances where the absence of information is an issue, it is prudent to consider invocation of the precautionary principle as the NE DDP claims to have done. The Assessor Report correctly points out however that NE failed to have regard to the EU guidance on invoking the precautionary principle [Assessor's Report para. 4.1.33 – 4.1.43]. The principle is designed to reduce risk to a protected feature to an acceptable level. It advocates the specific use of a scientific environmental risk assessment in order to set the correct level of protection. Given the apparent acceptance of the use of the precautionary principal [Assessor's Report para. 4.3.38], it is however unclear where this advice is taken by the Assessor in reaching the conclusions, other than referring to its required use.
- 2.10 Therefore two questions remain to be answered by the SoS as directed by the Panel;
- 2.10.1 Do the Panel consider that the SoS acting as competent authority (CA) would be acting within the limitations of her discretion as directed by Article 6(3) of the Habitats Directive by agreeing to adopt a plan which it considered likely to have significant effects on a number of Natura 2000 sites without having ascertained by way of an appropriate assessment that it will not adversely affect the integrity of the Natura 2000 sites? and,
- 2.10.2 Do the Panel consider that in the absence of the detailed information required to carryout an appropriate assessment of the likely significant effects that the precautionary principle should be invoked, and if so has the SoS sufficient information to carry out a scientific environmental risk assessment in order to inform the setting of the level of protection?

3.0 Conclusion

- 3.1 The importance the EU places on the protection regime laid down in the Habitats Directive is encompassed in the fact that prior to authorising any project that is considered likely to have a significant effect on a Natura 2000 site, a CA may only do so following consideration of an AA.

- 3.2 Article 6(3) of the Directive on the Conservation of natural habitats and species 92/43/EEC (Habitats Directive) captures this duty and provides inter alia that a plan or project likely to have a significant effect on any Natura 2000 site cannot be authorised without a prior assessment of its effects (See para 22 Waddenzee).
- 3.3 Having considered that the SEP would result in a likely significant effect on the TBHSPA, will the SoS be acting outside the limits of CAs discretion if she adopts the SEP without first carrying out an appropriate assessment in order to ascertain no adverse affect on the integrity of the TBHSPA?
- 3.4 Assuming that the SoS decided to carry out an AA of the likely significant effects arising from the adoption of the SEP, she could not execute this duty on account of the lack of information on conservation objectives and what constitutes favourable condition status.
- 3.5 Given this lack of available data, it is possible that the CA could invoke the precautionary principle. If this were to be the case, one would expect the CA to refer to the scientific environmental risk assessment that concluded that the threat level to the Natura 2000 site feature(s) was not sufficiently high to warrant a disproportionate response of subjecting the project to the rigor of an AA. To date, this does not appear to have been done.
- 3.6 Assuming that the Panel are minded to advise the SoS to accept the recommendations within the Assessors Report, that the SEP will have no adverse affect on the integrity of the TBHSPA, which has been based on the requirement of sole requirement of having all lower tier authorities to have to carryout an AA of effects can not be either legally correct.
- 3.7 The impact of such a decision by the SoS would without doubt have major ramifications on the ability of lower tier authorities to act within the limits of their discretion as set by legislation and thus would be responsible for lower tier unsound planning. This would be as a result of CAs responsible for adopting lower tier plans and projects by virtue of having to act outside the limits of their discretion as set by the legislation in order to remain compliant with the SEP.
- 3.8 It therefore remains that following the conclusion of likely significant effects on a Natura 2000 sites such as TBHSPA, the EIP Panel can only recommend the SEP for adoption only after have ascertained that it will not adversely affect the integrity of the site by way of an appropriate assessment pursuant to Article 6 (3) of the Habitats Directive.
- 3.9 In order to carryout the appropriate assessment of the likely significant effects, the Panel will have regard to the fact that neither the conservation objectives nor what constitutes favourable conservations status for affected Natura 2000 sites has yet been set. This requirement must be in place to ensure that mechanisms for effect (MfE) originating from the adoption of the SEP by the SoS and acting in combination with other plans and projects can be effectively assessed by way of an appropriate assessment in order to ascertain no adverse affect on the integrity of any affected Natura 2000 site.