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Case No: (1) CO/6059/2013
(2) CO/6180/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2014

Before :

MR JUSTICE OUSELEY

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Between :

(1) THE ROYAL SOCIETY FOR THE PROTECTION OF BIRDS	**Claimant in CO/6059/2013**
(2) LYDD AIRPORT ACTION GROUP	**Claimant in CO/6180/2013**
- and -	
THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
SECRETARY OF STATE FOR TRANSPORT	**Second Defendant**
LONDON ASHFORD AIRPORT LIMITED	**Fourth Defendant and First Interested Party**
SHEPWAY DISTRICT COUNCIL	**Third Defendant and Second Interested Party**

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(1) Mr Timothy Mould QC and Mr Richard Moules (instructed by **The RSPB Solicitor** for the **Claimant in CO/6059/2013**

(2) Mr Matthew Horton QC (instructed by **LSR Solicitors and Planning Consultants)** on behalf of **Lydd Airport Action Group** for the **Claimant in CO/6180/2013**

Mr Jonathan Swift QC and Ms Lisa Busch (instructed by **Treasury Solicitors)** for the **First Two Defendants**
Mr Peter Village QC and Mr James Strachan QC (instructed by **Pinsent Masons Solicitors)** for **London Ashford Airport Limited**

Shepway District Council did not appear

Hearing dates: 21st, 22nd, 23rd & 24th January 2014

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Approved Judgment

MR JUSTICE OUSELEY :

1. There are two separate applications under s288 of the Town and Country Planning Act 1990, each challenging the decision of 10 April 2013 by the Secretary of State for Communities and Local Government and the Secretary of State for Transport to grant permission for the extension of the north/south runway at London Ashford Airport at Lydd, Kent, with a limit by condition on annual aeroplane movements of 40000, and for a passenger terminal with a capacity limited by condition to handling 500,000 passengers per annum. In doing so, the Secretaries of State accepted the recommendations of the Inspector who had held a 42 day Public Inquiry in 2011 at which the two Claimants before this Court had appeared. Both challenge the grant of permission for the runway extension. Their grounds are essentially unconnected.

2. As there is no real overlap between the two applications, I shall consider them separately after setting the scene.

Background

3. Lydd Airport has been operational since the 1950s. Its north/south runway can be used for landings and take-offs in each direction, though not by all aircraft. The 1954 terminal building accommodated over 250,000 passengers per annum, ppa, in the 1960s, and has the capacity to handle 300,000. It is licensed by the CAA, and can operate 7 days a week for 24 hours a day, although at present the actual operation involves few flights at or around dawn or dusk, limiting the need for on-site bird control activity. Flight numbers have fluctuated over time. The airport still operates a scheduled passenger service to Le Touquet, though the numbers of passengers had dropped to a few hundred by 2009. It is used by business jets, general aviation, helicopters and a flying school. There are now some 22000 aircraft movements a year, mostly general aviation; 99% were by aircraft lighter than 5,700kg. Fewer than 2 a day involve heavier aircraft, and many of those are empty positioning flights.

4. The Inspector described the site as in a sensitive location. It is the only airport in the UK within 5km of a nuclear power station, and within 2.5km of a military danger area. The relationship to the nuclear power stations and other hazards and to the Special Areas of Conservation and Special Protection Areas is set out in paragraphs 2.3 and 2.4 of his report, IR:

> "Dungeness Nuclear Power Stations A and B lie some 5km to the south of the Airport. Dungeness A was closed in December 2006 and is being decommissioned whilst Dungeness B is scheduled to begin decommissioning in 2018. A restricted flying area, extending to a height of 2,000 feet (ft), restricts all aerial activities for a 2 nautical mile (nm) radius around the power stations. Traffic arriving and departing from the Airport has an exemption reducing the restricted area to a 1.5nm radius. In addition, Lydd military firing range danger area is located approximately 2.3km to the west, extending to a height of 4,000ft, and the Hythe military firing range danger area lies some 10km to the north, extending to a height of 3,200ft.

> The Dungeness SAC lies to the east of the existing runway and the paved area of the proposed runway extension would include 0.23 hectare, some 0.007%, of the overall SAC. The Dungeness to Pett Level SPA is located approximately 750m east and 500m south of the existing runway. An extension to the SPA is proposed which would result in the boundary of the SPA being closer to the Airport but the proposals would not use any land within the SPA or the pSPA. Natural England (NE) is consulting on a proposed Ramsar site but again the applications would not use any land within the pRamsar. The Dungeness SSSI lies to the east of the existing runway and the proposed runway extension would include 1.62 hectares around 0.018%, of the whole SSSI. The Dungeness National Nature Reserve (NNR), including an RSPB Reserve that falls within the SPA, pSPA (in part), SAC, pRamsar, SSSI and NNR, lies around 2m from the south-eastern boundary of the Airport. The RSPB Reserve is in the region of 320m from the existing runway at its nearest point".

5. Planning permission had been granted in 1992, following an Inquiry in 1988, for a runway extension similar in direction and dimension to the one currently proposed, with a cap of 56000 on movements rather than the 40000 suggested in this application, and with generally slightly longer early morning operating hours than now proposed. The Inspector contrasted the position accepted in 1992 with that now proposed in paragraph 14.6.10:

> "14.6.10 …Indeed, modern aircraft are quieter than those considered then. The exclusion zone around the power stations, with the exception of direct overflying at less than 2,000ft, was not introduced until 2001 and aircraft could take off and turn left over the Reserve, the pSPA and the pRamsar. Indeed, in 1992 6,000 movements by aircraft over 5,700kg could use FP D4 over the Reserve. This contrasts with the current proposals where only some 3,600 movements of larger aircraft are now contemplated and most would fly north over Lydd due to the Ranges being in use. Moreover, LAA is prepared to accept a condition preventing any jets taking off and flying south over the Reserve and designated sites even when the Range is closed if it is considered necessary".

6. At the time of that Inquiry, the airport had operated at higher levels than now: 38900 aircraft movements in 1978, 60900 in 1979, and 19400 in 1987. Passenger numbers had fallen away over the years as well.

7. The RSPB and Natural England, NE, had objected, pursuing what the Inspector described as an objection "similar to that made now"; IR 14.6.12. It was made on "scientific evidence not materially different to that relied on now"; IR 14.6.12. Bird scaring would have been then and would continue to be part of the operations at the airport; 14.6.13. The pRamsar site existed, the SPA was then a pSPA treated as if a designated SPA. The SSSI and RSPB Reserve existed in 1988.

8. In 1997, the permission was renewed. Neither NE nor the RSPB objected, a stance not adopted because the application was for a renewal of the earlier permission; London Ashford Airport Limited, LAA, in return did not pursue its safeguarding objection to the proposed SPA. The SAC, SPA, pSPA and pRamsar designations were in place by then.

9. The current proposal envisaged around 18 scheduled movements by larger aircraft, over 5700kg, a day, compared to one every three days experienced in 2009. Normal operating hours would be between 7am and 11pm.

10. The 274 page report by the Inspector indicates the range of issues covered during the Inquiry in 2011 to consider the application which was called-in for determination by the Secretaries of State, before Shepway District Council could grant the permissions, as it was minded to do.

The RSPB challenge

11. The Royal Society for the Protection of Birds, RSPB, a charity incorporated by Royal Charter, contends that the decision is unlawful because the evidence before the Inspector could not lawfully have satisfied him that no appropriate assessment was needed of the effect of the runway extension on various sites protected under the Habitats Directive; as the Inspector's conclusions were accepted by the Secretaries of State, their decision was flawed. Natural England, the statutory body with primary responsibility for giving advice to Government about these sites and species, and which gave evidence with the RSPB at the Inquiry in opposition to the proposals, is not party to the challenge.

12. The RSPB raised two issues at the Inquiry: disturbance to birds from aviation activity, that is essentially disturbance caused by the noise from aircraft flying over the areas protected for their significance for birds, and disturbance to birds off the airport from bird control measures to be undertaken both on and off the airport. The RSPB was unsuccessful in its arguments on both points. However, it is to the latter point, disturbance from bird control measures, that the challenge is directed, although the Inspector's conclusions on the former cannot be wholly ignored. The concern is not with the marginal extension of the runway into the SAC.

13. In judging whether or not to grant planning permission, the impact of the disturbance which bird control measures may have on the RSPB Reserve, the SSSI and the NNR, and on the birds that frequent them, is a material consideration. It is to be weighed in the light of the evidence, any relevant policies, and other material considerations as part of the overall planning judgment.

14. These sites overlap to a considerable extent with the SPA, proposed extension to the SPA, (pSPA), SAC and proposed Ramsar, (pRamsar), sites as paragraph 2.4 IR states. However, in judging the effect on the SPA and SAC, a different approach is required, since they are European sites subject to the requirements of the European Council Directive on Wild Birds, 79/409/EEC and the Habitats Directive 92/43/EEC which amended it. These Directives have been transposed into domestic law by the Conservation of Habitats and Species Regulations 2010 SI No. 490, CHSR. As there

is no dispute but that the Directives have been correctly transposed, I shall refer to the Regulations. The Regulations do not apply to pSPAs or to pRamsar sites. The Government's policy, however, is to treat such sites as if they were already designated and to apply to them the same legal framework as to a designated SAC or SPA.

15. There is a further area of land of some considerable extent, but never defined on a map at the Inquiry, known to the Inquiry, at least, as Functionally Linked Land, FLL. The Inspector described it in this way at paragraph 14.6.4 IR, accepting the evidence of Natural England and the RSPB:

> **"**The SPA and pSPA consist largely of waterbodies used for roosting and so land outside, but functionally linked to, the designated sites is also important. Arable and grassland fields adjacent to the Airport, to the north-west, west and south-west of it, and to the west and north-west of Lydd provide feeding areas for concentrations of designated species. Without this land outside the designated sites the range of species and assemblages for which the sites are designated might not be there".

16. As the RSPB's case evolved before me, it was the effect on the FLL from measures taken within the airport site, and thus indirectly the effect on the protected sites, their bird population and its well being, which lay at the heart of the dispute about the effect of bird control measures. The RSPB was also concerned about off-site measures, which could also take place in the FLL.

The Conservation of Habitats and Species Regulations

17. Regulation 3 defines "European sites". Regulation 61 is the most important as it sets out the process whereby the effect of projects on designated sites is to be assessed:

> "61. **Assessment of implications for European sites and European offshore marine sites**
>
> (1) A competent authority before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> (2) A person applying for such consent, permission or other authorisation must provide such information as the

> competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by the body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)".

18. The question before the Inquiry was whether the plan or project was "likely to have a significant effect" on a European site so that an appropriate assessment was necessary. LAA did not contend that permission could be granted on the basis of "imperative reasons of overriding public interest", IROPI, its given acronym, if the outcome of an appropriate assessment was that the plan or project would adversely affect the integrity of a European site.

19. The Birds Directive 2009/147/EC Article 4 requires special conservation measures to be taken concerning habitats to ensure the survival and reproduction of species of birds; and outside those areas, States should strive to avoid deterioration of habitats.

20. CJEU jurisprudence on the transposed Directives is relevant to the construction of the Regulations. A broad and purposive interpretation is called for. More specifically, in *Landelijke Vereniging tot Behoud van de Waddenzee and Another v Staatssecretaris van Landbouw* [2004] ECR I-7405 *"Waddenzee"*, it enunciated its precautionary interpretation of what made a plan or project "likely to have a significant effect" in this way in paragraph 44:

> "…such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] ECR 1-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised".

21. Its most recent decision is its Third Chamber decision in *Sweetman v An Bord Pleanala* Case C 258/11, 11 April 2013. A project would be likely to have a significant effect if it is "likely to undermine the site's conservation objectives"; paragraph 30. That reflects the language of Regulation 61(1). The procedures are designed to maintain designated habitats and species "at a favourable conservation status"; paragraph 36.

22. A risk of lasting harm to the ecological characteristics of sites cannot be authorised; paragraph 43. An appropriate assessment, paragraph 44, "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site…It is for the national court to establish whether the assessment of the implications for the site meets these requirements". It is sufficient if the national court does that on conventional judicial review grounds, including rationality. The UK Courts have also commented on the nature of what must be shown for an appropriate assessment to be required. "Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient"; Sullivan J in *R(Hart DC) v SSCLG* [2008] EWHC 1204 (Admin),paragraph 81. There must be "credible evidence" of a "real, rather than a hypothetical, risk"; *R (Boggis) v Waveney DC* [2009] EWCA Civ 1061; Sullivan LJ, paragraph 37. Moore-Bick LJ at paragraph 17 of *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 commented obiter, but in the same vein, that what was probably required was more than a "bare possibility" though any "serious possibility" would suffice.

23. Regulation 61(6) recognises that planning conditions can play a part in defining the plan or project, limiting its effects. They are relevant to the judgment of whether an appropriate assessment is required. The same applies to the provisions of a s106 agreement; *Feeney v Secretary of State for Transport* [2013] EWHC 1238(Admin) [2013] Env LR 34 illustrates this at paragraphs 44-47.

24. There is no particular format or procedure required for the undertaking of an appropriate assessment.

25. Authorisation can only be given by a competent authority, here the Secretary of State, if the authorities:

> "Once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 99, and Case C-182/10 *Solvay and Others*, paragraph 67)".

26. A project could adversely affect the integrity of a site, if it were "liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site…in accordance with the [Habitats] directive;"

"*Sweetman*, paragraph 48". The conservation objectives for the European sites here were to maintain in favourable condition certain habitats, and habitats for the populations of certain species of bird. A conservation status is "favourable" when the natural range and area covered by a habitat is stable or increasing and the specific functions and structure necessary for its long term maintenance exist and are likely to exist for the foreseeable future. "Maintain" meant "restore" if the condition was not favourable. The table of targets for bird species of European importance here uses phrases such as "No significant displacement" due to human disturbance in roosting and feeding areas.

27. There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice.

The Issue at the Inquiry

28. There was no issue before the Inspector as to the approach required in relation to the effect on the protected sites. There was no real issue about it before me, although there were degrees of emphasis and nuance. There is no issue but that the Inspector applied or attempted to apply the right approach. The RSPB contend that his factual conclusions and the state of knowledge of effects of the project should have led him to conclude that an appropriate assessment was required. The Secretaries of State and LAA contend that he had sufficient evidence, and there was a great deal of evidence about the effect of the proposals on birds, to reach the conclusion that no appropriate assessment was required and that the points raised by the RSPB in the light of the evidence were no more than a "mere bare possibility". If that is a lawful conclusion, the challenge must fail.

29. An appropriate assessment had been undertaken on behalf of Shepway DC, when it was the competent authority for deciding the planning applications, but that was not presented to the Inspector by LAA as sufficient for this purpose. Nor did LAA contend that the evidence which it had provided, extensive as it was, itself amounted to such an assessment. Its case was rather that the evidence which it had presented showed, to the required standard, that no appropriate assessment was required. That is the argument which the Inspector and Secretaries of State accepted.

30. The issue related to the basis for and content of the Bird Control Management Plan, BCMP, to be produced by LAA for implementation in the event of planning permission being granted. It was in evidence before the Inspector as a draft. The BCMP was based on the conclusions of a Bird Strike Risk Assessment produced by LAA to Shepway DC and available at the Inquiry.

31. The draft BCMP included separate provision for on-airport measures and off-airport measures. The RSPB concern was not with the effect on birds on the airport but with the effect of on and off-airport measures on the land, principally FLL, and to a small extent designated sites, outside the airport boundaries.

32. There is a very high number of birds in the area hazardous to aircraft. The BCMP's stated purpose was to reduce bird strike risk to acceptable levels, whilst "minimising disturbance to protected bird habitat near to the airport wherever possible". The seven elements of the draft BCMP, essentially on-site measures, included on-airport habitat management, continuous surveillance of the airfield and airspace above and immediately around it for hazardous concentrations of birds during operational hours, and active dispersal of birds from the airfield and its immediate environs by mobile patrols, broadcasting species-targeted distress calls or firing bird scaring cartridges to scare them away– this active dispersal was the controversial part, not as to the need for it but for the effect on-airport measures might have on birds off-airport.

33. Paragraphs 12.4.1 and 12.4.2 of the draft BCMP explained this. LAA intended to create a 0.5km buffer zone around the airport perimeter, though the effects which would create the buffer would extend up to a distance of 1km from the perimeter.

> "Bird detection and dispersal by mobile patrols is intended to prevent incursions of certain species into locations where they constitute a bird strike risk. The priority areas are the runway, its immediate environs and the approach and climb-out areas at either end of the runway.
>
> In the context of current best practice, this will mean that day-to-day patrols and bird dispersal efforts will be prioritised within the airport boundary and the approach and climb-out areas (to ranges normally within 0.5 km of the perimeter fence), and, where possible, fields immediately adjacent to the airport perimeter fence. Action beyond the airport is normally only required when significant flocks of starlings or larger species are detected and there is a risk of incursions on to, or overflights of, the airport. Apart from starlings and occasional migrant or feeding flocks, small passerines are neither regarded as significantly hazardous nor controllable".

34. Measures to deal with crossing waterfowl, principally swans and ducks, would be supported by visiting sites beyond the airport boundary to determine roosting and feeding sites and how they related to the use of the land. There might be some bird scaring at feeding sites away from the conservation sites, for example, on stubble fields north of the airport.

35. Aerodrome safeguarding under statutory direction would aim to guard against new or increased hazards through increased numbers of waterfowl crossing over the airport, or the number of gulls settling on or in the immediate vicinity of the airport, or a new starling roost.

36. Chapter 13 of the draft BCMP dealt with off-airfield bird control measures in this way at section 12.5.1:

> "With the exception of the limited critical areas around the airport perimeter described above, no disturbance measures will routinely be carried out on sites beyond the airport boundary. However, there are possible exceptions if new large roosts of the following species – starling, rook, jackdaw or gulls (all spp.) become established and the behaviour of these birds brings them into regular conflict with aircraft movements at Lydd Airport. Similarly, if large numbers of hazardous birds are observed to be overflying the airport to concentrate at feeding sites nearby then disturbance or habitat management measures will be considered. These measures will not involve lethal control, and will only take place after negotiation and agreement with the relevant landowner or tenant".

37. The draft BCMP contained a note on the SPA, in chapter 14. Whilst all larger and flocking species should be deterred from the airfield, the BCMP was aimed at "minimising disturbance to these birds at their habitats". The summary said:

> "**15. Summary**
>
> The bird control programme at LAA Lydd Airport is designed to have a localised effect on certain key bird species - primarily gulls, grassland plovers, pigeons, corvids and starlings. This effect will be confined to the airport and a few hundred metres beyond the airport perimeter except in a few exceptional circumstances (as outlined above). We believe that the requirements of the airport to mitigate the birdstrike hazard can be handled with sensitivity to conservation concerns and will have no negative effect on bird populations in the wider area or species of conservation concern. In addition, the airport will provide enhanced habitat for a range of non-hazardous bird species (along with other fauna and flora) of conservation concern".

38. Condition 2 on the runway extension permission required the development to be carried out in accordance with an approved BCMP. Clause 10 of the agreement between LAA and Shepway DC under s106 TCPA 1990 dated 26 September 2011, (but available and discussed during the Inquiry in its draft versions) dealt with the BCMP. It required LAA to submit the BCMP for approval to Shepway DC in consultation with Natural England and the RSPB before the runway extension was brought into operation. The BCMP had to contain details of the on-site measures essentially as already described above; paragraph 32. It had to submit details of any proposed off-site measures, with details as to the measures likely to be deployed, their duration, and their likely scope and location. Before any measures were put into effect, details of the actual as opposed to likely measures had to be provided to the Shepway DC and approved by it, again after consultation with Natural England and the RSPB. If a change in land use were proposed off-site, it had to be consistent with local agricultural practices or it had to have a conservation benefit to flora and fauna without increasing the risk of bird strike. The line between on and off-site is delineated on a plan which is part of the agreement. The line is not that of a 0.5km buffer, but is the application site red line plan plus certain other land as well, and

reflects or is much closer to the airport operational land. A bird control measure undertaken in that land is an on-site measure even if it produces effects off-site.

39. It was not at issue before the Inspector or before me but that the BCMP was part of the "plan or project" for the purposes of Regulation 61 CHSR, and so had to be taken into account in considering whether an "appropriate assessment" was required. It could be relevant as a means of reducing adverse effects or as a cause of adverse effects, or even both.

40. There was an issue about the actual level of bird-scaring measures currently undertaken, and more so over what should be undertaken. The RSPB and Natural England contended that there was a low level of bird control, of no significance for the favourable condition of the designated sites but adequate for the level of aviation activity, whereas LAA contended that it ought to have been doing more and would do so. That was an issue for the Inspector.

The Inspector's Report

41. Mr Mould referred to the expert evidence of RSPB as recorded by the Inspector at paragraph 8.3.38:

> "8.3.38 Bird scaring can affect both target and non target species. It can reduce food intake as birds stop feeding and show alert behaviour or move away from feeding areas. Interruptions to feeding rates in hard weather, when moulting, or when feeding young can lead to weight loss, abandonment of breeding attempts or breeding failure. Birds would also expend more energy through disruption. The creation of a buffer zone would sterilise an area used by SPA species for feeding and roosting".

42. The Inspector summarised its case at paragraph 8.3.46 and 8.3.55:

> "8.3.46 These proposals would necessitate bird control measures of unspecified intensity, frequency, nature and scope over an undefined area with no upper limit on what may be done. That the measures have to be in "substantial compliance" with the draft BCMP tells us nothing. This is why the SoS cannot properly assess impacts on the information available and on the legal structure proposed and therefore cannot lawfully grant permission. Once permission is granted, a major new factor enters the planning equation, the safety of 500,000 air passengers. That is one reason why the assessment has to be done in advance".
>
> "8.3.55 It goes without saying that habitat management, buffer zones, bird scaring, and disruption of flight lines have the potential to adversely affect populations across the SPA/pSPA. The purpose of such measures would be to stop birds doing what they do now where they now do it. The extent of such

> adverse effect will depend on the detail which the SOS does not have".

43. The Inspector's conclusions are set out in section 14.6 of his report, with a further summary in section 15. The first 16 paragraphs are applicable to both disturbance by aviation and by bird control measures. Having described the nature and significance of the designated sites, he passed comment critical of NE's evidence as statutory consultee on the Habitats Regulations. The objections it pursued were similar to those rejected at the Inquiry in 1988 leading to the 1992 permission, and those pursued to a nearby wind farm, which were also rejected. NE was dependant on the RSPB's evidence, had taken no steps to find out the current position at the airport, and its only known expert view was that there had been no objection to the 1997 renewal permissions since it was not considered to have any material adverse effect on ornithological interests. The Inspector's clear point is that the statutory consultee therefore had nothing of value to say about whether there was a risk requiring appropriate assessment.

44. The Inspector then set out in summary the legal submissions, and although not directly referring to the CJEU jurisprudence with which all parties provided him, clearly directed himself by reference to it in the first sentence of paragraph 14.6.8 and then expressed his conclusions about it in the rest of that paragraph. It reads:

> "The stringency of the test in the *Regulations* is acknowledged but it is not a test of absolute certainty. In this case RSPB does not say that any significant effects would be likely, which is the threshold under the *Regulations* before requiring an AA, or that there would be harm to the integrity of the SPA, only that all the ingredients are present to varying degrees and that there is no evidence to demonstrate that there would not be any effects. This is mere bare possibility".

He continued, saying that even if it were necessary to carry out an appropriate assessment, the test is:

> "whether the proposals would have a significant adverse effect on the integrity of the site." "Integrity" meant "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 species for which it was classified"; IR14.6.9.

45. The 1992 decision led to the following conclusion in paragraph 14.6.12 which is not affected either by changes in approach nor, as I read it, confined to noise disturbance from aeroplanes, which the Inspector dealt with in the next section of his Report:

> "… The scientific evidence relied on then by NE/RSPB is not materially different to that relied on now and the main development, the recognition that an effect does not necessarily constitute an impact, only weakens their case. The range of birds breeding, feeding and wintering in the area was generally similar to those found today and it is difficult to see why

> species that were not identified as a concern then, when there was experience of frequent noisy movements, should now be thought to be at risk".

46. He also pointed out that in 1997, and after consulting with the RSPB, Natural England did not object to the renewal of the 1992 permission as it was unaware of any further evidence regarding the impact of aviation on birds or any material change in circumstances. It was not affected by the fact that the application was for a renewal permission.

47. He rejected the Natural England/RSPB contentions that there would be unacceptable disturbance from the noise of aircraft. He found that the proposals would not disturb or fragment the habitats such as to have an adverse impact on a species as a whole. There would be fewer movements and by quieter aircraft than the levels found acceptable in 1992. There was no further evidence of likely significant effects. At paragraph 14.6.24 the Inspector concluded:

> "14.6.24 The conservation objectives require there to be no significant decrease in extent of habitat or displacement of birds by disturbance and the maintenance of areas of open water and food. No habitat would be lost and the areas of habitats within the contours that could possibly be affected would be small. They could be used by birds highly tolerant of noise such as those that breed within the 88dB contour. If birds were disturbed they would lose feeding time and have to expend energy flying but species disturbed by aviation could exploit the land for feeding at night when there would be no flights. Species do move elsewhere as indicated by the terns that relocated within the SPA from Dungeness to Rye Harbour. There is little evidence that there would be significant declines in the size, distribution and functioning of the populations of any species within the designated areas. Indeed, the Airport has functioned at a more intense level than now proposed and there is no evidence that it had such an effect at that time".

48. Mr Mould put reliance on the next part of the paragraph in which the Inspector concluded that the proposals "would not disturb and fragment the habitats of the SPA, pSPA and pRamsar birds such as to adversely impact on a species as a whole. Nor would they have any adverse effect on the integrity of the site as a whole, or that part of it in the vicinity of the Airport, as there are other areas in the vicinity that could be used".

49. The context of that paragraph is not bird control measures but disturbance by aviation activity, which is not the subject of challenge. However, the two areas of concern overlapped, I accept, at least at the point of the response of birds to disturbance while feeding on the FLL.

50. The Inspector then turned to bird control, the specific area of controversy for this challenge. He noted that despite its location, LAA had a low incidence of recorded birdstrike, and that the CAA was satisfied that the Airport operated safely. The RSPB agreed that there could be some increase in business jet movements without change in

the bird control regime; but the airport already operated scheduled flights and had an existing obligation to manage the risk of bird strike, reducing the risk to as low as reasonably possible, ALARP, albeit that the number of movements currently was lower than proposed. The difference between the parties was as to the intensity, scope and area of the measures required to manage the risk of birdstrike at the airport; IR 14.6.36.

51. Natural England and the RSPB had identified two parts to the bird strike problem referred to in 14.6.38:

> "… The first are flocks of lapwing, golden plover, corvids, pigeons, starlings and mute swans in the vicinity, and the second is longer distance overflights by Bewick's swans, mute swans, greylag geese, Canada geese and cormorants. They fan out from roosts to feed on arable fields and grassland with many crossing the airfield".

52. There had been an issue over the quality of the data about birds and their movements. The Inspector rejected the suggestion that a particular form of survey should have been used, given the information that was available. No species had been missed. The numbers fluctuated significantly year on year for reasons other than the operation of the airport. The Bird Hazard Risk Assessment, BHRA, was not criticised in terms of pattern of birds around the airport. The fluctuating locations of the birds indicated to him that "further survey work would have little benefit in terms of possible off-site measures for an Airport operating some years into the future when birds may be in different locations"; 14.16.39. No one had identified any substantive errors in the BHRA. The data from different surveys by Natural England, the RSPB, and LAA all came to the same conclusions in terms of species present, overflights, potential flightlines and potential roosting and feeding areas; 14.6.40.

53. While Natural England and the RSPB accepted that the data enabled an assessment to be made that there were no likely significant effects for the purposes of assessment under the Environmental Impact Assessment Regulations 1999, it was insufficient, they said, for the stricter purposes of the CHSR, (as explained, I add, in the CJEU jurisprudence). This was because it did not provide the "sufficient degree of certainty"; to leave an issue over until after permission had been granted for an assessment of its effects, would be impermissible "salami-slicing", and would change the basis upon which any future decision would be made. However, the Inspector pointed out that a Statement of Common Ground on the risk of birdstrike confirmed the appropriateness of the BHRA methodology. The bird management techniques proposed in the BCMP were accepted as appropriate.

54. Natural England considered, though the RSPB urged a more flexible approach, that passenger jets required continuous bird control, including off-site measures, and there were already scheduled commercial flights from the Airport.

55. The RSPB accepted that there was nothing in terms of on–airport management which should not already be taking place:

> "14.6.44 RSPB accepts that in terms of Airport management there is nothing that would need to be done if planning permission were

> granted that it is not already recommended should happen now. An AA in June 2009, and a revised AA in February 2010, by consultants for SDC address the four main measures in the BCMP, habitat management, off-site land management agreements, safeguarding, and bird scaring. They note that there do not appear to be any reasonable grounds for concern about the first two. Grass management and some scrub clearance already take place but more is desirable and there is a need to net ponds and watercourses where reasonably practicable. There is no reason why these measures within the Airport site would have any likely significant effect on the designated sites as indicated by SDC's consultants".

56. At paragraphs 14.6.45-14.6.47, the Inspector continued:

> "14.6.45 In terms of off-site measures, NE and RSPB disagree with SDC's consultants about impact. Although options are identified in the BCMP, it states that no disturbance measures would routinely be carried out on sites beyond the airport boundary. There is a mechanism, involving SDC, NE and RSPB, for this to be reviewed but NE referred to the difficulties airports have in securing off-site agreements and, notwithstanding what witnesses might have said, it would be inappropriate to rely on such measures when there is no evidence that such an agreement could be secured.
>
> 14.6.46. Examples of reasons for off-site measures, such as stubble left in a field proving an attractant to geese, would best be dealt with by the farmer ploughing it in or placing some sort of bird scaring device in the field. These measures would require the consent of the landowner and cannot be assumed. Moreover, there is little point in speculating, if, when, where and to what extent such a situation might arise in the future as it would be likely to vary year on year.
>
> 14.6.47. NE acknowledges that the Airport would be unlikely to be able to take action in the SPA itself but refers to off-site measures at Derry, Heathrow and Wharton. Before any off-site bird control could be carried out the S106 Agreement would require details to be submitted for assessment. This would include the measures to be deployed, their duration, scope and location. Any change to land use would have to be consistent with local agricultural practices in terms of crop rotations, and timing of cultivation, and designed to have a conservation benefit, including to birds, without increasing the risk of bird strike. This would not be salami slicing but reacting to changing circumstances. These transitory measures, if any were ever approved, would not be likely to have any significant effect on the designated areas and, despite their concerns, none are alleged by RSPB. In any event, NE and RSPB would be able to make their views known to SDC. Unacceptable changes could not be approved unless LAA was able to demonstrate

> IROPI. The Airport does not rely on IROPI now, and there is no reason to believe that it would in the future. Indeed, the existence of Manston would make it difficult to do so".

57. In paragraph 14.6.48 the Inspector set out his conclusions on emergency measures, also part of Mr Mould's challenge. The Inspector acknowledged that in the future, as now, genuine emergency measures would not be affected by the s106 agreement, and emergencies would not be the basis for taking any of the off-site measures in the BCMP either. But if taken they would be reviewed, in part with a view to seeing if pre-emptive measures could avoid the emergency measures in the future.

58. The Inspector's approach to safeguarding the aerodrome, also challenged by Mr Mould, is at paragraph 14 .6.49. He said:

> "Safeguarding is an essential part of the Airport Safety Management System. Its purpose is to allow LAA to object to development that has not yet taken place. SDC's consultants had concerns over safeguarding but note that they could have been overcome by a condition or Agreement. However, the test under the *Regulations* relates to the integrity of the SPA as it currently exists and comments on future development would not have any effect on the integrity of the site as it exists today, and so could not conflict with the *Regulations*. In any event, it is accepted that a compromise between air safety and conservation interests is sometimes achievable and that some positive conservation measures would have no impact on birdstrike risk".

59. The Inspector then examined the effect of bird-scaring. At paragraph 14.6.50, he noted that it was agreed that LAA should already be seeking to disrupt flightlines across the airport. A buffer around the perimeter would push birds back, and killing birds in key species beyond the Airport boundary was already licensed by Natural England. If off-site measures or increasing bird control measures took place now, NE/RSPB thought that that would amount to a plan or project engaging the Habitats Regulations. The programme of improvements on which LAA had already embarked to bring the existing practices into line with what was required had brought "little evidence of any significant ramping–up of bird-control activities", though movements were still relatively low-key. The greater the number of movements, the lesser might be the requirement for deterrent measures.

60. The Inspector pointed out that bird-scaring "could and should take place now when necessary". He continued, and I add that the buffer zone he refers to is an off-site buffer created by bird-control activities on-site including scaring:

> "14.6.54 Bird scaring could, and should, take place now when necessary. The operation of a buffer zone for which the use of audio and pyrotechnics are the best option, is good practice and virtually continuous patrolling of the airport should be carried out, rather than short bird scaring runs. Although the frequency of patrols might alter to a continuous level should the proposals be implemented, the methods would be the same and the range

> of any disturbance would be the same as now. Scaring trials were carried out in the summer of 2008 and winter of 2009, albeit that RSPB considers them inadequate due to the wide number of variables. These trials indicate scaring might have some effects up to 0.6-1km away but there is no indication that there would be any impacts. No off-site bird scaring takes place other than once or twice from one field immediately to the west but a gamebird shoot takes place on land surrounding the Airport. The range and intensity of activity is, therefore, known and can be assessed".

61. The RSPB objection that there should be compensatory habitat met this response from the Inspector in paragraph 14.6.55:

> "14.6.55 RSPB maintains that others would have to demonstrate damage, that there is little mitigation proposed, and that there should be replacement for sterilized areas and compensatory habitat for land on the SPA that would suffer adverse effects. However, no habitat on the SPA would be lost and although the use of some functionally linked land might change, there is nothing to suggest that it would be 'sterilized'. Even if birds were scared off a feeding area during the day they would be able to exploit it at night. This would be aided by the restriction on night time flying. The bird control management measures that would be necessary if permission were granted would be no different to what NE accepts the Airport is, or should, be doing already.
>
> 14.6.56. A precautionary approach should be taken such that the combined effects of bird control and aviation activity are assessed. The two things would happen at a similar time and measures aimed at one species could also affect other species using the same habitat. However, there is no evidence from other locations of any reinforcement of effects. The protection conferred by the designations is not limited to the area within the boundaries. Notwithstanding NE's view, there is little evidence that there would be likely to be a significant effect, such as a significant decline in the size, distribution, structure or function of the population that would require an AA. Even if an AA were required, the area of the SPA that would be affected would be small and there is no evidence that there would be an adverse effect on the integrity of the designated sites".

62. The objectors' criticism of the BCMP was considered in 14.14.10:

> "It is claimed that the nature, intensity and extent of any measures is not known but the BCMP sets out the measures that could be used. Studies to investigate the effect of distress calls and cartridge pyrotechnics were carried out in August 2008 and winter 2009. The BCMP states that bird control

> patrols would be continuous when movements were more than one an hour, but that no disturbance would routinely be carried out on sites beyond the Airport boundary. Exceptionally measures may be needed in fields immediately adjacent to the boundary but this would only follow agreement of the details by SDC in consultation with NE/RSPB. The effect of possible measures can, therefore, be assessed".

63. Finally, in this chapter, the Inspector set out his overall conclusion relevant to ornithology generally in paragraph 15.1.6:

> "In terms of ornithology, proposals should be considered in the light of the best scientific knowledge but the tests in the *Regulations* do not require absolute certainty about effects. In this case RSPB do not say that there would be likely significant effects or that there would be harm to the integrity of the SPA, only that all the ingredients are present to varying degrees and that there is no evidence to demonstrate that there would not be any effects. That is 'mere bare possibility'".

64. As for bird-control, the data provided by NE, RSPB and LAA came to the same conclusion. Fluctuating annual numbers of birds made further survey work of limited value, and it was accepted that the environmental information sufficed for an assessment of environmental effects.

65. The Inspector continued in 15.1.10-15.1.13:

> "Nothing more would need to be done, if planning permission were granted, than it is recommended should happen now. More on-site habitat management is desirable but would have little effect on the designated sites and their populations. The BCMP indicates that no disturbance measures would be carried out beyond the airport boundary. Indeed, it would be inappropriate to rely on measures that would require the consent of a landowner when there is no evidence that such an agreement could be secured. If such a situation arose in the future, off-site measures could not be carried out without assessment and approval and NE and RSPB would be able to make their views known to SDC. The Airport does not rely on IROPI now, and the existence of Manston would make it difficult to do so in the future. Moreover, the Agreement would introduce a procedure for review of any emergency measures taken, including an assessment of any pre-emptive measures to reduce the likelihood of the need arising again.
>
> 15.1.11. The test under the *Regulations* relates to the integrity of the SPA as it currently exists and safeguarding comments on future development would not have any effect on the integrity of the site as it exists today, and so could not conflict with the *Regulations*.

> 15.1.12. In terms of bird scaring, this takes place now when necessary using techniques listed in the BCMP although the frequency would increase with the development and could be continuous. Trials indicate scaring might have some effects up to 0.6-1km away depending on conditions but there is no indication that there would be any significant adverse impacts. Indeed, game shooting already takes place close to the Airport. No habitat would be lost on the SPA/pSPA and although the use of some functionally linked land might change, there is nothing to suggest that it would be sterilized. Even if birds were scared off a feeding area during the day they would be able to exploit it at night due to the restriction on night time flying.
>
> 15.1.13. Considering the combined effects of bird control and aviation activity, measures aimed at one species could affect others using the same habitat. However, there is little evidence from other locations of any reinforcement of effects. There is little evidence that there would be any, never mind a significant, decline in the size, distribution, structure or function of the population such as to require an AA. Even if an AA were required, the area of the SPA that would be affected would be small and there is no evidence that there would be an adverse effect on the integrity of the designated sites as a whole."

66. The Secretaries of State accepted these conclusions at paragraph 23 of the Decision Letter:

> "The Secretaries of State agree with the Inspector's reasoning and conclusions on ornithology at IR14.6.1-14.6.57 and IR15.1.9-15.1.13. They have carefully considered the formal advice of the NE and the case made by the RSPB to the Inquiry, but the Secretaries of State share the Inspector's conclusion (IR15.1.13) that there is little evidence that there would be any, never mind a significant, decline in size, distribution, structure or function of the population such as to require an appropriate assessment (AA). Overall, having regard to the requirements on them as the competent authority in respect of the Conservation (Natural Habitats) Regulations 2010, the Secretaries of State are satisfied that they can proceed to grant permission for the applications before them without first being required to carry out an AA".

67. In their overall conclusions at paragraph 42, the Secretaries of State said that they were "satisfied that there would be no likely significant effects on any designated conservation sites…."

Discussion and Conclusions

68. I start with the observation that the Inspector was not faced with a dispute of law as to the right approach to the question of whether an appropriate assessment was required.

There was no issue of principle. Nor did he describe the approach he adopted in a way which revealed an error of law. It is clear that he endeavoured to apply the correct precautionary test in paragraphs 14.6.7-8 and 14.6.56, although there is a different criticism of the last sentence of that paragraph, and in 15.1.6. The Decision Letter separately expressed the test and did so correctly.

69. It follows that the real issue is whether he reached a conclusion which was not open to him in law, one which was irrational, on the considerable amount of evidence in this case on ornithological issues, particularly from LAA. Mr Swift QC for the Secretaries of State was right to highlight the difference between evidence and assertion, to which the Inspector was very much alive. As Mr Mould recognised, it is very difficult to show that the evaluation of disputed evidence about birds in a planning context, applying the test for whether an appropriate assessment is required, is irrational.

70. The two principal issues concerned the Inspector's approach to the off-site effect of bird scaring measures taking place on-site, and then to the off-site effect of off-site measures. I take the former first: the only controversial on-site measure was bird-scaring and its impact largely but not wholly on the FLL; 14.6.44.

71. Mr Mould summarised the RSPB case at the Inquiry as follows. LAA's data on birds was insufficient for ascertaining the bird strike control measures required. The scaring trials had not been adequate for an assessment in view of the variables left unassessed. The evidence that birds used the FLL around the airport and used the fringes of the pSPA and SPA around the airport was clear. Birds traversed flight lines at night and in the hour either side of dusk and dawn, with constant, unpredictable and at times large scale movements. There was an "astoundingly high" mass of bird activity close to the airport. Disturbance to feeding would not be solved by the return of birds to feed at night. An impact on the use of FLL would have an adverse impact on the integrity of the designated sites and proposed designated sites.

72. Mr Mould submitted that the Inspector had erred in failing to treat the expert evidence of the RSPB, particularly in paragraph 8.3.38, as evidence. The Inspector had also misunderstood the RSPB case, since it had *not* accepted that significant effects would be unlikely. It was implicit in the Inspector's conclusions in paragraphs 14.6.55-56 that he accepted that there could be an adverse impact, as was also inherent in the notion of bird-scaring; and the site description in paragraph 2.4 showed that north western parts of the SPA and pSPA were within 1km from the airport, into which bird-scaring effects would spread.

73. Mr Swift QC for the Secretaries of State and Mr Village QC for LAA submitted that there was a proper evidential basis, reading the Report as a whole, upon which the Inspector could conclude that there was no reasonable scientific doubt about the effect of the proposals on the designated sites, such as would require an appropriate assessment. The major ornithological issue had been disturbance by aviation activity and noise, which was not being pursued. Paragraph 8.3.38 showed that the RSPB's contentions were no more than general assertions, which the Inspector was entitled to reject in the light of LAA's witnesses' evidence.

74. In my judgment, the Inspector considered and accepted LAA's case on the quality and extent of the ornithological survey data, as he was entitled to, rejecting the criticisms made by RSPB; IR 14.6.39-41. No one identified any substantive errors in the Bird

Hazard Risk Assessment; 14.6.40. The bird control measures were not merely agreed to be appropriate, they were all, to some degree, being carried out already. I accept the submission of Mr Swift and Mr Village that the Inspector was entitled to conclude, on his reasonable appraisal of all the material, that there was no need for an appropriate assessment, correctly applying the *Wadenzee* test. I accept that the Inspector had a very considerable amount of evidence largely from LAA adduced to show that there was no reasonable scientific doubt about the effects of the proposals on designated sites, so that no appropriate assessment was required. Mr Village is also right to emphasise that evaluation, which is for the Inspector, is undertaken by someone who has heard and read all the evidence, and there was a great deal of it including oral evidence, and not just those parts with which a court may be favoured.

75. The Inspector was entitled to be critical in paragraph 14.6.13 of the evidence or lack of it from NE, which is of some importance given its role as the statutory advisor to the government on nature issues. The Inspector's comments on the evidence reflected the way in which the development of the RSPB case at the Inquiry had led to further evidence from LAA on a species by species basis to cover the effects on them. Mr Village is right that the Inspector accepted the evidence of LAA, including the first and rebuttal evidence of Mr Deacon, and LAA's submissions. In effect, LAA's evidence and submissions contended that neither NE nor RSPB had pointed to any evidence that the population levels of any species with which they were concerned would be affected, even if the effects which they said were a possibility in fact occurred. The Inspector was entitled to and did accept that position.

76. The crucial issue on the off-site effects of on-site bird-scaring measures was the RSPB's contention, at paragraph 8.3.38, that birds would be affected by disturbance in feeding from the FLL, and that it would sterilise an area of SPA used for feeding and roosting. But this possibility depended on the strength of LAA's response which was that birds, scared-off from the FLL, and from the small amount of SPA which could be affected by bird control measures during airport operational hours, would return to feed and roost on the FLL or the affected part of the SPA at night. The issue was principally feeding. (There does not appear to have been an issue about whether other land would become FLL in its stead.)

77. The Inspector dealt with this in paragraphs 14.6.8,14.6.24, 14.6.54-56, 15.1.6 and 15.1.12. He understood the cases made before him. The evaluation of the competing cases was one he was entitled to reach. Of course, while the aim of bird-scaring was to control birds in the buffer zone up to 0.5km from the airport, the effects of bird-scaring measures on-site might be felt in reducing degrees beyond that and up to 1km away. But without adverse effect on safety, birds might not routinely be scared off the FLL or SPA beyond 0.5km during operational hours. But the scientific literature showed that even if birds were scared off an area by day, they were able fully to exploit that area for feeding by night.

78. Mr Village pointed out that paragraph 14.6.55 IR is cross-referenced to paragraph 16.38 in his closing submissions. I accept that the passage of his submissions in question, although in the section dealing with off-site effects, clearly in the relevant paragraph also deals with the off-site effect of on-site bird-scaring measures. There is no basis in the passage dealing with Dr Armstrong's evidence and scientific literature on behalf of LAA for treating the precise location of the scaring act as relevant to the

submission about the effect on the willingness and ability of birds to return at night to feed when there was a significant disturbance free period.

79. Whether paragraph 8.3.38 in the Inspector's summary of the RSPB was evidence or assertion or question, the Inspector was entitled to reject it, in the light of the evidence he had, as raising a reasonable scientific doubt about the effect of the bird-scaring measures on-site on the feeding of birds on the FLL and designated sites. There was no or at best no adequate contrary evidence from NE/RSPB to show that there might be any material effect on any species of concern.

80. Mr Mould submitted that the Inspector had put the issue the wrong way round in paragraphs 14.6.8 and 14.6.55: it was not for the RSPB to produce positive evidence that significant effects were likely; it was for the developer to exclude it on the basis of objective material. The Inspector did not conclude that birds would not leave the SPA, or not do so because there was other FLL to which they would go. He did not say that they would feed somewhere else. But this, in my judgment, is to ignore the Inspector's evaluation of the evidence as to whether birds would return and feed during non-operational hours. It is a misreading of what the Inspector meant, for example in 15.1.6, to suggest that he thought that it was for the RSPB or NE to produce positive evidence of possible harm before an appropriate assessment was required. He meant, as Mr Village submitted, that the RSPB and Natural England had produced no positive evidence of the likelihood of harm, but were instead raising questions about whether possible effects which it raised had been disproved. This was a common point made by the Inspector. In the context of feeding, they had produced no evidence to rebut the extensive scientific evidence from LAA about the return to feed outside operational hours, or to show that that could lead to a significant adverse effect.

81. I do not accept Mr Mould's submission that the Inspector's conclusion on bird-scaring showed a gap in the Inspector's reasoning, or an internal inconsistency. It was said that once the Inspector had accepted that bird-scaring would produce disturbance, he could not conclude that significant effects could be ruled out from the increased frequency of bird-scaring measures. This ignores the Inspector's evaluation of the evidence. Nor had the Inspector ignored the RSPB predictions of the effect disturbance from feeding in habitual feeding areas could have on birds. Again this ignores the evidence which the Inspector was entitled to accept about the return of birds to feed outside operational hours, and the legitimacy of his evaluation of what RSPB produced as showing no more than a mere possibility.

82. Mr Mould submitted that there was a further contradiction inherent in the evidence accepted by the Inspector and the conclusion he drew from it as to the need for an appropriate assessment. The BCMP was a primary source of objective information about the effects of the proposals on the designated sites. Its terms showed that significant effects could not be ruled out, since they acknowledged that birds would need to be disturbed from FLL. That is not so, in my judgment. The answer again comes back to the evidence he had from LAA about the lack of effect of bird-scaring on FLL and adjacent designated sites on the use of that land during non-operational hours. RSPB may not like the rejection of their points, but the Inspector was entitled to consider the scientific evidence produced by LAA on this aspect and to accept it as having the force which he concluded it did.

83. Mr Mould submitted that the BCMP provided no clear understanding of the nature, intensity, frequency and location of bird control measures. It was not therefore possible to define the level of bird control which would be required to achieve the buffer zone, and LAA was not prepared to rule anything out, as RSPB had contended before the Inspector; paragraph 8.3.35IR. At paragraph 14.14.10, the Inspector rejected RSPB's case that the BCMP did not permit him to know the intensity, nature and extent of any bird scaring measures: patrols would be continuous when movements were more than one per hour; he knew that they would involve distress calls and pyrotechnics; they would not be routine outside the airport but exceptional. He was entitled to reject the views of the RSPB as to the inadequacy of the information; the fact that such a body regards the knowledge as inadequate does not mean that that has to be accepted as creating such uncertainty that an appropriate assessment is required. Although there was some debate at the Inquiry about the extent to which bird control measures should be increased anyway, the crucial one for this purpose was bird-scaring on-site. The Inspector accepted that that would increase, although the range of the effects would not increase over that experienced when bird-scaring was now employed using the same techniques as would be employed in the future. That was a view he was entitled to reach and to conclude that any greater effect would be no more than a mere possibility. The Inspector did not treat the on-site BCMP measures as if they were not part of the project to be considered at this stage, whether for impact or benefit. That was what his consideration of the bird control issue was about.

84. The Inspector at paragraph 14.6.54 commented on the knowledge gained through the bird-scaring trials in Shepway DC's appropriate assessment. Mr Mould pointed out that that assessment had concluded that there would be no impact if a condition controlled the extent of use of cartridges and distress calls to acceptable levels, but, said Mr Mould, no such limits were proposed. However, the Inspector was not bound to accept that such a condition was necessary; after all the question of whether an appropriate assessment was required was before him, and the parties were not relying on Shepway DC's assessment as sufficient for the debate to be closed off. It is clear that the Inspector did not accept controls were necessary beyond what was in the BCMP in view of what he knew about the measures proposed, none of which were new to the site, and their effects. The Inspector was entitled to conclude, in my judgment, that sufficient was known about the effect of bird-scaring on-airport, and through non-aviation activities for the purposes of his judgment on the need for an appropriate assessment; 14.6.54.

85. Mr Mould next submitted that the Inspector had concluded that there would be a higher level of bird control than currently anyway, and so had appraised the degree of adverse effects from the proposal against a baseline which was higher than warranted on the evidence. There had been a very low level of bird control measures which had been thought adequate. There was no evidence of substantial bird-scaring at the airport's southern boundary. If those measures were in fact now necessary, there was no evidence that such a change had already occurred. If there were to be a ramping-up of such measures that would constitute a plan or project requiring appropriate assessment. They could not therefore be part of the baseline, and had to be treated as part of the project.

86. This point is not, in my judgment, based on a proper reading of the Report. The Inspector accepted that existing practices needed to be brought in to line with what was required, but that there was little evidence of any significant ramping up of bird control measures; 14.6.52. He accepted that operations were still relatively low key. He also accepted that the measures would be the same as were presently used and the range of effects would be the same; 14.6.54. However, the important conclusion on this point is in 14.6.54, and 15.1.10-12, namely that, with the expansion, there would be an increase in the frequency with which on-site bird scaring measures would be deployed, and could become continuous. He considered the buffer zone, the effect on the possible area affected beyond the buffer zone; he also considered the effects of bird-scaring should it occur off-site. He concluded, reading the Report as a whole, that there was no reasonable scientific doubt about the absence of adverse effects if the measures became continuous, because there would be no adverse effects; and not because he concluded that there would be adverse effects but that they could or would happen anyway.

87. The comment in the last sentence of paragraph 14.6.53, to the effect that the greater the frequency of aircraft movements, the lower the frequency with which birdstrike deterrence measures might be needed, is a comment on a possible limit to the degree of change required to bird control measures with greater numbers of aircraft movements because the measures would not necessarily be proportionately increased. But again, the real conclusion is in 14.6.56, which deals with reinforcement of disturbance effects as between aircraft movements and bird control measures. He does not discount the effect of the increase in numbers of aircraft on bird control measures, and so find there to be no possible adverse effect from the bird control measures; rather he applies the required precautionary approach. And though feeding in the buffer zone would be disturbed as necessary to accommodate the aircraft, and could be disturbed beyond that, the Inspector accepted that LAA had shown that there was no basis for reasonable scientific doubt about the birds' return to feed undisturbed during non-operational hours. That was not an irrational conclusion or evaluation on the material he had from all parties.

88. I accept Mr Mould's argument that an appropriate assessment might have provided further information: modelling different bird control measures, further trials of the effect on birds which feed in the FLL in the buffer zone by routine bird-scaring, further study of the possible effect of that on the conservation value of the SPA, further scientific study of the prospect of night feeding and its value to them. The relationship between the FLL and the SPA could have been examined further. But I do not accept this as supporting a case that the Inspector was bound to conclude that a reasonable scientific doubt existed, nor do I accept that any or all of those studies would have been a necessary part of a proper appropriate assessment. I do not accept Mr Mould's assertion that there would have been a better defined regime of control over birds. On an issue of this sort, the amount of study and research which experts can suggest might yield possibly useful information and the need for yet further research seems to me to be probably limitless. The Inspector was not merely the person best placed to judge the sufficiency of what he had; I am not persuaded that the possibility of further research shows that his judgment on the sufficiency of what he had is irrational. Rather, Mr Mould's submissions on this score reinforced to my mind the very considerable extent of evidence which he had, a very long way indeed from a developer saying that it was for objectors to show that there was a reasonable

scientific doubt. The Inspector's approach meant that the significant matters were investigated, including the impact of disturbance from feeding areas, where the RSPB's doubts about the possibility of return at night to feed were rejected on the basis of evidence. The off-site measures were dealt with differently.

89. Mr Mould contended that the approach to safeguarding in paragraph 14.6.49 and 15.1.11, focusing on the current state of the sites, was unlawful. The RSPB was concerned that the project might lead to successful objections by LAA to as yet unspecified future improvements to protected sites. The proposed development might in the future prevent improvements which were necessary to maintain the achievement of the conservation objectives. Natural England had given evidence that landowners might be discouraged from measures which improved their land for various species; agricultural practices might change to accommodate the needs of the airport; the restoration of mineral workings for nature conservation purposes might be affected. This should have been seen as relevant to whether an appropriate assessment was necessary.

90. I do not accept that there is practical substance in that submission in this case. The Inspector was right first to consider the integrity of the protected sites as they currently existed already in a favourable status. He did not ignore some specific proposal for future implementation necessary for the maintenance or improvement of the favourable conservation status of a designated site. Consistency with maintaining or restoring favourable conservation status did not require future changes, unspecified and speculative, to be imagined and then considered. Paragraph 50 of Advocate-General Sharpston's Opinion in *Sweetman*, above, does not require that either. There is always a risk that at some point in the future a proposal for maintenance or improvement, as yet unformed, will emerge; but that cannot be a basis for requiring an appropriate assessment. An appropriate assessment would then always be required, but without anything to focus on. This would amount to a mere possibility of effect, which is the general way in which the Inspector saw the level of evidence led by the RSPB in its case for an appropriate assessment.

91. Mr Mould made much the same point about emergency measures: the Inspector did not know what, where, when and how often they would occur. But I see nothing unlawful in his approach to such measures: the limits of knowledge do not legitimise speculation about possible scenarios as the basis for requiring a speculative appropriate assessment of that which of its nature is wholly unpredictable as to what, when, where and with what consequences, or turn the raising of questions into something beyond a mere possibility of effect. Neither 14.6.48 nor 15.1.10 requires the conclusion that there was a significant effect which could not be ruled out.

92. I turn to off-site measures. Mr Mould contended first that the Inspector unlawfully approached off-site measures as if they were not part of the LAA's proposed operations. He referred to the last sentence of paragraph 14.6.45. This meant that off-site measures would in the future not be considered against whether the project complied with the CHSR, but against the effect on the airport as permitted to be enlarged and passenger safety. The Inspector and Secretaries of State therefore failed to ask themselves whether they had sufficient objective information to rule out the risk of significant harm from off-site measures. The BCMP was an integral part of the proposals. Paragraph 12.5.1 of the draft BCMP, above, dealing with off-site measures, and paragraph 7.7 dealing with waterfowl over-flying the airport and its

immediate airspace showed the problems. The latter would not be dispersed in flight, but records would be kept, and off site roosts and feeding areas visited, to see if a pattern or trend emerged which could lead to better forecasting, or mitigation off-site. Bird scaring might be used off-site away from conservation sites. The Inspector's acceptance of the draft BCMP showed acceptance that there could be adverse effects, and so an appropriate assessment was required.

93. Mr Mould also submitted that the nature of the off-site works was seen by the Inspector as too uncertain to enable an assessment of effects to be made; for this he relied on paragraph 14.6.47. Uncertainty of that nature was a matter for caution since there was again a risk that it would change the baseline against which such measures were later assessed. It might be difficult to undertake the task, given the uncertainties, but a reasonable worst case scenario was required, and it was not lawful to use the difficulty of the task as a reason for not undertaking it all. The s106 agreement, in Schedule 1 section 10 paragraph 10.1.7, requires details of any proposed off-site bird strike control measures *before* the runway extension becomes operational. Part of the LAA case was that these measures could be the subject of an appropriate assessment at that stage as a project in their own right. But, submitted Mr Mould, if details were to be produced then, why not now? Or there could be a condition prohibiting off-site measures.

94. I accept Mr Swift's and Mr Village's submission that there was no error of law in relation to the off-site measures in paragraphs 14.6.45-47. LAA's case at the Inquiry was that these measures were not required to manage bird strike risk; LAA had pointed out that it could not permit the safe operation of the airport to depend on the agreement of landowners off-site, who could refuse all co-operation. Off-site measures were not required or authorised by the BCMP. Paragraph 14.6.45 cross-refers to paragraph 5.6.50 in Mr Village's submissions where those points are made. Mr Mould's contention that if off-site measures could be ruled out in that way, they could be ruled out by condition, which LAA had refused, does not contradict that. LAA might find off-site measures achievable and useful; a change in agricultural regime off-site could avoid bird-scaring on-site; they might have a conservation and airport-related benefit and there is no reason why they should be ruled out regardless. But they were not necessary. As Mr Village pointed out such measures would and could not be routine, as the BCMP said, because the operation of the airport could not depend routinely on such measures, as carrying them out was not within the power of the LAA. So the Inspector approached the decision on the basis that it would not be appropriate for LAA to rely on such measures. That is a lawful first step.

95. Second, although the Inspector, as he was entitled to, accepted LAA's contention that it would not have been possible to identify when, where and the degree to which a situation might arise in which the consent of off-site landowners would be sought, for measures to be taken to deal with unknown sporadic problems, the Inspector knew the type of measures which on an unpredictable basis might be sought off-site; paragraphs 14.6.46-47, and referring back to paragraph 5.6.51.

96. Paragraph 10.1.7 in section 10 of Schedule 1 to the s106 agreement dealing with the BCMP does require details to be provided of any proposed off-site bird strike control measures, including details as to likely measures, their likely duration, scope and location, before the runway extension becomes operational. They could have been produced before the Inquiry, so far as I can see, though it is inevitable that the "detail"

would have been quite general in the light of the unpredictability of what might be sought and what might be permitted by landowners. However, paragraph 10.3 of the BCMP requires that, before any off-site measures approved as part of the BCMP are carried out, details are to be submitted to Shepway DC of the actual measures to be deployed, their duration, scope and location; any change in land use proposed has to be consistent with local agricultural practices or designed to have a conservation benefit without increasing the risks of bird strike. The DC has to consult with NE and the RSPB before agreeing to the details.

97. This has significance in two respects. First it reinforces the fact that what would have been provided at the first stage under the BCMP before the runway extension became operational, if provided to the Inquiry, would have been at a fairly general level, in view of the second stage. Second, before such measures are carried out, it was accepted by the Inspector that they would amount to a plan or project; 14.6.47, since he accepted that they could not be carried out if adverse in effect in the absence of IROPI. This would require consideration of an appropriate assessment, and then an actual assessment to be carried out, if the legal test for one were satisfied.

98. By this later stage, whatever might have been produced at the Inquiry, equivalent to the first stage under the BCMP, there would be sufficient detail to enable the need for such an assessment, and any assessment itself, to be considered on an informed rather than speculative basis. Save for one point, I can see no legal objection to such an approach. The Inspector's approach in 14.6.46-47, how to handle changes in unpredictable circumstances, is clearly that that is preferable to considering or to carrying out a speculative assessment of what may never be suggested, when the issue can be dealt with later on a more certain basis.

99. That one point is the concern that the baseline would change, and so the appropriate assessment, or consideration of the need for one, would be undertaken on a different basis from that on which it would have been undertaken at what the RSPB says was the appropriate time, at or before the Inquiry, and using whatever information LAA would have had to provide under the s106 agreement before the runway extension became operational, or on some hypothetical reasonable worst case scenario derived on some other basis. If the Inspector's approach meant that the later consideration of an appropriate assessment in respect of off-site measures would be undertaken on a prejudicially changed baseline, that could involve an error of law in his conclusion that no appropriate assessment was required, including of off-site measures; see ***R (Buckinghamshire County Council and Others v Secretary of State for Transport*** [2013] EWHC 481(Admin) at paragraphs 282-4. The RSPB's concern is that the runway extension, permitted and operational, would become a factor in judging the significance of the off-site effects remaining to be assessed.

100. However, I do not see that the Inspector erred in effect in holding that the assessment of off-site measures under the BCMP would not be carried out on a changed baseline in that way, when he rejected the notion that this would be "salami-slicing"; 14.6.47 and 15.1.10. First, LAA made it perfectly clear that it did not require any off-site measures in order to operate, let alone to operate safely. I cannot see that the baseline could be different from that which would exist if there had been a condition forbidding off-site measures, a condition acceptable to the RSPB but equally capable of alteration or removal.

101. Second, the off-site measures, before being carried out, have to go through an approval process. It was not in issue but that the off-site measures proposed under the BCMP at the second stage would constitute a "plan or project". LAA, and others, would have to consider whether an appropriate assessment was required. If it concluded that one was required, and the upshot was that a significant adverse effect was likely, the Inspector was entitled to conclude that IROPI now and in the future would not be relied on, reinforced by the existence of Manston airfield.

102. Mr Village pointed out that, in relation to off-site measures, the fact that LAA was a statutory undertaker for the purposes of the Town and Country Planning Act 1990, by virtue of the Airports Act 1989, meant that it was a "competent authority" for the purposes of the CHSR, under paragraphs 3 and 7, and directly under a duty to comply with them before permitting any plan or project to proceed. This statutory position was not challenged.

103. The existence of an emergency would not lead to the off-site measures being introduced since there would not be time for that, and it is not their purpose to deal with emergencies. If the review of emergency measures showed that an off-site measure were desired, it would still have to go through the BCMP approval process.

104. In those circumstances, if the Inspector had had or ought to have had the first stage details of off-site measures or some other hypothetical description of reasonable worst case possibilities, I cannot see that he would have reached any different decision on how to approach their assessment. Moreover, the s106 agreement laid down a limit on the changes of agricultural practice off-site, and his knowledge of the non-routine and controllable nature of the measures entitled him to come to the view that there was no evidence on which "these transitory measures" would be likely to have any significant effect; 14.6.47. The Inspector had a proper evidential basis for coming to the conclusions he did about the future impact of off-site measures, that nothing showed the need now for an appropriate assessment, and what at present would be possible but wholly speculative measures and impacts would be subject to the same procedural requirements on an unchanged baseline.

105. The Inspector may have treated the off-site measures in the BCMP as part of the project, but as ones which could not sensibly be assessed and which, on the extensive knowledge he had about the sort of measures and effects, could not now be said to require appropriate assessment, knowing that they would be subject to an appropriate assessment if required. He may have treated the off-site measures as not part of the project because, if they came about they would be assessed as a project in their own right on an unchanged baseline. Either way, the approach is lawful in this case, and if in error could give rise to no difference in outcome.

106. The final group of points concerned the Inspector's approach to the "integrity" of the sites, although this was not an issue which arose directly at the stage of considering whether an appropriate assessment was necessary. Mr Mould was critical of the last sentence of IR 14.6.56, in which the Inspector concluded that an appropriate assessment would not lead to a finding of an adverse effect, since the area of SPA affected would be small and there would be no adverse effect on the integrity of the site. Mr Mould was also critical of the reference in paragraph 15.1.13 to the need to consider the effect of a project on the "integrity of the designated sites as a whole". It was wrong to ask whether the proportion of the site affected by the development was

so great that the whole was affected; the right approach was to focus on the essential unity of the site, to avoid "death by a thousand cuts". Disturbance of a small proportion of the species or habitat could affect the integrity of a designated site, the objective for which it was designated or the species for which it was classified. The question was the effect on the species in the SPA, and not the effect on the species over its natural range; *RSPB v Secretary of State for Scotland* [2000] SLT 1272, First Division. The Directive was not concerned with protecting individual specimens of the species as such; whether activities amounted to disturbance of a species would depend on when the activities occurred, the rarity of specimens of the species, its conservation status and prospects in the location in question; *R(Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268.

107. I do not disagree with the way in which Mr Mould sets out the approach to "integrity", although I emphasise that the statutory focus of "adverse effects" is on the integrity of the site, not on an adverse effect in some lesser sense. But I do disagree with his contention that the Inspector erred in the way alleged, either in paragraph 14.6.56 in the reference to a small area only of the SPA being affected, or elsewhere. That contention is quite contrary to the overall tenor of the Inspector's conclusions, which is that there was no evidence of any adverse effect on the integrity of the site. He is right not to treat any effect as an effect on integrity; but he does not commit the error of thinking that it is merely because the affected area is small, that there can be no effect on integrity. In reality, whether an adverse effect on a small proportion of a site would amount to an adverse effect on its integrity depends on the particular circumstances. The Inspector made no judgment that an adverse effect required a significant proportion of the site to be affected adversely. I also accept Mr Swift's submission that paragraph 14.6.24, 14.6.56, as with paragraph 15.1.13, is dealing with the way in which NE put its case at paragraphs 7.5.75-77, to the effect that there would be a significant decline in the size, distribution, structure or function of the population and so a significant effect within the designated site.

108. Mr Mould took issue with the use of the adjective "significant" by the Inspector to qualify "adverse effect on the integrity of the site" in paragraph 14.6.9. That criticism cannot be made of the Decision Letter itself, which is the decision under challenge. But the criticism seems to me to be devoid of substance anyway. True it is that Regulation 61(1)(a) requires the competent authority to focus on the likelihood of "significant effects" in deciding whether an appropriate assessment is called for, and by Regulation 61(5) if the plan or project would "adversely affect" the integrity of the European site consent must be refused in the absence of IROPI. Paragraph 14.6.9 deals with the latter and the interpolation of "significant" to qualify the effect required could suggest that a higher test was applied than warranted. However, first, the issue which was for the Inspector's consideration was whether an appropriate assessment was required, and what he said about the way in which consent would have been approached after an appropriate assessment is not necessary for his conclusions. Second, it is difficult to see that the CJEU jurisprudence on the test to be applied under Regulation 61(1)(a) entails a different approach in practice between the degree of possible effect which could necessitate an appropriate assessment and the degree of ascertained effect which could necessitate a refusal of consent. The former would be required and conducted with the next stage in the decision-making process in mind. For that same reason, the fact that in places the Inspector considers how the evidence would fare in showing that, at the second stage, there was no adverse effect does not

show an error of law. The full extent of the evidence which the Inspector had on the issue of disturbance to birds must be borne in mind. The Inspector's approach to the meaning of the integrity of a site in paragraphs 14.6.9 was correct; the definition was taken from an ODPM, Circular 06/2005, which had not been said to be incorrect.

109. I accept that the Inspector has added the words at the end of 15.1.13 "as a whole", when considering the effect of a project on the integrity of a site or sites. Those words do not appear in the Regulations, and certainly not in relation to a group of sites. I see no significance in the plural of "sites", given the reference earlier in the sentence to a singular SPA. I am not sure either what significance can attach to "integrity as a whole", which would not attach to "integrity", of its nature; certainly I can see nothing by way of error of law. I see no error in the conclusion of the Inspector on the question of whether an appropriate assessment was required, which is the first point: there was no likelihood of a significant effect, applying the correct test as set out in *Waddenzee*. It would follow that, if correct, as I conclude that to be, there could be no adverse effect on the integrity of a designated site.

110. The reasons challenge added nothing to the substantive points. The RSPB did not pursue as a separate point the ground related to regulation 9 CHSR as it added nothing to its submission on the other grounds, as Mr Mould explained, and rightly in my judgment.

111. Accordingly, I do not accept Mr Mould's submissions and the RSPB's claim fails.

Reference to the CJEU

112. Mr Mould submitted that, were he unsuccessful, a reference to the CJEU should be considered of questions relating to the point at which bird control measures were defined in relation to what an appropriate assessment should cover; whether "integrity" meant "integrity as a whole", and whether the assessment of effects was confined to the assessment of the effects on sites as they currently were or should include the effect on possible future proposals for the sites. I accept Mr Swift's response submissions. The first two raise no issue of law or EU law; I see no real issue of interpretation about "integrity", and it is on the periphery here. The question of future proposals does not arise on the facts here. Besides, a higher court should make such a reference, once the matter has been fully considered domestically and an issue of interpretation necessary for the resolution of the issues arises.

The Lydd Airport Action Group challenge

113. The Lydd Airport Action Group, LAAG, an unincorporated association, contends that the risk of air crash on the nearby nuclear power station sites of Dungeness A and B was not lawfully assessed. The Inspector had reached an unlawful conclusion in a variety of ways, but essentially he had placed too much reliance on the stance taken by the Office for Nuclear Regulation, ONR; in effect he had delegated his role to the ONR; he should have realised that its position was flawed; he failed to appreciate the significance of the risk levels he found. The Secretaries of State accepted the Inspector's conclusions; and so their decision was unlawful. After the Inspector's report had been sent to the Secretaries of State, LAAG made further written representations, which the Secretaries of State resolved in effect by continuing the delegation of the exercise of their judgment to the ONR. Rationally, they should have

at least deferred the decision until those representations had been considered as ONR accepted they needed to be. A contention that the Secretaries of State had simply accepted an *ipse dixit* from the ONR was abandoned, rightly, as the position became clearer to LAAG.

114. The airport at Lydd was operational well before Dungeness A was built in 1965, at a time when the airport was very busy. Its decommissioning began in 2006. Dungeness B was built in 1983, before the 1988 Inquiry into the expansion approved in 1992, and renewed in 1997. No flying exclusion zone in relation to the power stations was imposed until after 1992; until then a flight path had passed through that zone. Neither the Health and Safety Executive, nor the Nuclear Installations Inspectorate which is part of it, and the precursor to the ONR, had objected to the current proposal when consulted about it by Shepway DC before it was called-in. The Secretaries of State did not call the application in for their own decision because of any nuclear-related issues. The issue was raised by LAAG at the pre-Inquiry meeting and the Inspector decided to hear evidence from it on the topic, to which LAA provided rebuttals.

The Inspector's Report and the Decision Letter

115. The Inspector described the current operations in this way in paragraph 14.3.1, to which Mr Horton QC for LAAG attached some weight:

> "The Airport is the only one in the UK that has a nuclear power station within 5km, a military danger area within 2.5km on the final approach track, a runway width less than 45m, only one runway direction available at times for landing the B737/A319 sized aircraft proposed for commercial operations, and a 5° offset ILS localiser and a 3.5° ILS glideslope."

116. The Inspector recognised of course the potentially catastrophic consequences of a plane crashing into the nuclear power station but accepted that a rational assessment of the chances of that happening was required and of the extent to which the grant of permission would increase that risk.

117. He dealt with the effect of the 1992 permission in paragraph 14.7.2:

> "The SoS considered, and rejected, arguments about the impact of airport expansion on nuclear safety in 1992 and did not identify it as a matter requiring consideration at this Inquiry. LAAG's view is that the manoeuvres posing a threat are due to the proximity of the sites and could not be mitigated as the restricted flying zone would not provide any physical restriction on an aircraft heading towards the power station. However, the effects of these proposals were assessed by expert consultants in the planning process and accepted by SDC after consulting HAS/NII, now ONR. Whilst LAAG considers it unclear why ONR finds the proposals acceptable, the 1992 permission was granted when there was no exclusion zone around the power station, unlike now, and there was a FP for jets in closer proximity to the power station than now proposed.

> Moreover, the current application proposes a lower cap on the number of flights than that which was imposed in 1992, and aircraft safety has improved in the intervening period."

118. The risk of significant damage came not from General Aviation, which made up much of the existing movements, but from larger aircraft such as B737s. The LAA witness evidence stated at paragraph 14.7.3 – 4:

> "… ONR is well aware of the type of nuclear power stations at Dungeness, the potential risks of an accident, and the resultant consequences. It would, therefore, know that a high level of risk would remain after the power stations were closed and be aware of the events in Fukushima.
>
> 14.7.4. Notwithstanding LAA's view that there would only be a residual risk by the time the proposals reach capacity, ONR would know of the possible extension of operation at Dungeness B, the changing pattern of risk and hazard during the lengthy decommissioning period, and the uncertainty over the timing of fuel removal from Dungeness. Whilst it might have altered its view on which of the power stations, A or B, would present the greatest risk, ONR has maintained its original stance of not objecting."

119. The Inspector noted that LAAG challenged the refusal of ONR to object to the Application, its concern that a worst case scenario should be considered, and its view that, if the consequences were too extreme, then it might be necessary to reduce the probability of an accident to zero, which he described as "impractical to achieve in practice". LAAG's concern was that the ONR misunderstood a variety of risks, the scale of increase in risk of a large radiological release because of the proposal, the increase in numbers and weight of aircraft, target size, and skid risks, all despite LAAG's repeated but unsuccessful attempts to persuade ONR of them.

120. The Inspector said at paragraph 14.7.7:

> "The Government recently considered the risk which flights to and from Lydd pose to nuclear safety in its review of the options for future nuclear power stations."

He then pointed out that while Dungeness C had been ruled out for the time being, that was not because of any nuclear safety issues associated with the airport. EDF would have presented evidence against the Airport if it had thought the prospect of such a development could be harmed by this permission. He continued in paragraph 14.7.7:

> "… Although British Energy has objected on the grounds that it is duty bound to resist any increase in risk, however small, it acknowledges that the increase in risk would be very small and would not compromise current or future activities."

121. The Inspector described LAAG's witnesses as considering that a risk based approach involved too great a risk, and this approach would apply to all aircraft overflying any nuclear power station. None of the criticisms made by LAAG witnesses, in a number of cases in which they had been involved for anti-nuclear groups, had been accepted. He described the core of LAAG's case as "an attack on the methodology used by the ONR to assess risk", but it was not for the planning system in this Inquiry to pursue an alternative assessment methodology.

122. The Inspector then dealt carefully with LAAG's case at paragraphs 14.7.9 – 14.7.17:

> "If the established safety procedures are applied the issue reverts to the application of risk assessments. These have been carried out by consultants for ONR using standard methodologies. The Byrne methodology is the standard basis for assessing risk and it was accepted that it had been applied correctly.
>
> 14.7.10. LAAG asserts that the risk would be unacceptable by virtue of being above the level of 1 in 10 million pa (10^{-7} pa) due to known deficiencies in the modelling. However, this is not a limit of tolerability but a screening level below which the potential for aircraft crash need not be considered further. LAA's assessment has been peer reviewed, unlike LAAG's report, which in any event considers 2mppa for which there is no application.
>
> 14.7.11. For aircraft crash ONR's SAPs define the design basis as an event with a frequency of 1 in 100,000pa but the Byrne methodology allows a relaxation to 1 in 10,000pa for events that could not lead to off-site doses over a threshold of 100 milliSieverts. Based on experience, the consultants consider that only crashes on the nuclear island could lead to doses above that threshold. In a 2009 report the consultants estimated the crash frequency as 8.3×10^{-6} for the whole site and 5.6×10^{-7} for the nuclear island, both well below the design basis criteria. LAAG does not dispute the mathematics but does not accept the assumptions.
>
> 14.7.12. Criticism is made of a cut off 3.275km beyond the runway for landings on runway 21 in the Byrne model but this indicates that such large overshoots or overruns are so unlikely that the airport related crash frequency at such locations is indistinguishable from the background level. Similarly, for take offs on runway 03 the equation is not valid for values less than -0.6km indicating that crashes further away in the opposite direction to take off would also be indistinguishable from background levels. The same would apply to 'go-arounds'.
>
> 14.7.13. LAAG claims that there are systematic biases in the Byrne model such that the ratio of airfield to background crash rates are under estimated. It suggests that there are better

> methods than the nuclear industry standard Byrne methodology, which takes no account of the particular circumstances at Lydd. LAAG has carried out its own assessment based on added assumptions including a different runway split and an increased risk of bird strike. Based on a throughput of 500,000ppa LAAG's own calculation, which it is claimed is robust and valid, indicates a frequency of 6.964 x 10^{-6} which is still well within the tolerability criteria.
>
> 14.7.14. LAAG maintains that the integrated risk of a chain of events, such as a failed go-around, a pilot diverting left, bird strike and engine failure, that could lead to an accident have been rationalised away. Whilst it might not be possible to make a numerical assessment of site specific factors, the probability of any of these events in isolation is very low and the probability of a combination of events would be even more remote, although there would always be a chance that a combination of events could occur.
>
> 14.7.15. Turning to overall risk, there would be some increase. There might be less movements by aircraft over 5,700kg in the fall back position than claimed, and an increase in airport activity might trigger AA or a revised safety case. However, ONR has maintained its position of no objection and there is little evidence that would suggest its view should be overturned.
>
> 14.7.16. LAAG's concerns have been set out in correspondence. ONR is aware of the points raised but remains satisfied that it is appropriate to use the Byrne methodology. LAAG does not put forward any alternative methodology that could be used to assess the risk. Even if the Byrne methodology were modified in the way that LAAG suggests to take account of the points of particular concern, the results are still well below the tolerance threshold.
>
> 14.7.17. In any event, the risks to which LAAG refers are not specific to Lydd. They arise wherever aircraft overfly nuclear power stations. Consequently the logical extension of LAAG's argument is that nuclear power stations should be ruled out until they can be proofed against aircraft."

123. The Inspector considered and dismissed each of LAAG's four crash scenarios in paragraphs 14.7.18 – 14.7.22. He summarised his conclusions at paragraph 15.1.14:

> "The SoS considered, and rejected, arguments about the impact of the expansion of the Airport on nuclear safety in 1992. The Government's recent review of the options for nuclear power stations did not rule out Dungeness C on the grounds of safety associated with the Airport. LAAG challenges the Regulator's decision not to oppose the applications, and the methodology used to assess risk. ONR has not altered its position despite the events at Fukushima and repeated attempts by

LAAG to persuade it otherwise. British Energy has objected, as it is duty bound to resist any increase in risk however small, but it acknowledges that the increase in risk would be extremely small and would not compromise current or future activities at the site. LAAG's own calculation of risk for a throughput of 500,000ppa, including site specific assumptions, is still within the tolerability criteria. Crash scenarios suggested by LAAG are based on situations where the sequence of events becomes increasingly improbable. In any event, large aircraft would not be allowed to turn towards the power station, as up to 6,000 could have done in the 1992 decision, and there would be a lower cap on aircraft movements."

124. After the conclusion of the Inquiry, LAAG and others made extensive further written representations. No complaint could be made about the way in which they were handled; it enabled all to consider and respond to them as they wished. The Secretaries of State considered them at paragraphs 24 – 25 of the Decision Letters:

"Nuclear Safety

24. The Secretaries of State have carefully considered the Inspector's analysis on nuclear safety at IR14.7.1- 14.7.22 and IR15.1.14, and the post inquiry representations received on the matter, including those of LAAG and those of Ms Trudy Auty. These representations raised matters that include the appropriateness of the Byrne model, the intention of the ONR to convene a Technical Advisory Panel (TAP) to provide independent advice on developments in methodologies in this area, the size of the target area used in assessments, bird strike, and the status of Dungeness C. The Secretaries of State are satisfied that the ONR, in addition to the Rule 6 parties to the inquiry, has been given all necessary opportunity to consider and comment on the matters raised and the evidence submitted in this respect. Taking into account the ONR's responsibilities as the UK's independent regulator of the nuclear sector, they attach significant weight to its ongoing regulatory position of not objecting to the planning applications, notwithstanding its convening of a TAP. Regarding the status of Dungeness C, the Secretaries of State have had regard to the ONR's view in its representation of 24 October 2012 that the site is currently not on the list of identified sites for future new nuclear build and they consider that the status of Dungeness C merits little weight.

25. Overall the Secretaries of State see no reason to disagree with the Inspector's assessment that there would be some increase in overall risk, but that the ONR has maintained its position of no objection and there is little evidence that would suggest its view should be overturned (IR14.7.15). In reaching this view, the Secretaries of State have taken into account the Inspector's comment that although British Energy has objected to the proposals on the grounds that it is duty bound to resist any increase in risk, however small, it acknowledges that the

> increase in risk would be very small and would not compromise current or future activities."

125. Mr Watson, Head of Planning Casework at the Department for Communities and Local Government, provided a witness statement about the post-Inquiry representations. After the close of the Inquiry, Ms Auty, who gave evidence for LAAG at the Inquiry, contacted officials and a Minister at the Department for Energy and Climate Change. It is that Department, rather than the decision-making Departments in this case, which has responsibility for nuclear energy policy, and it is the Department for Work and Pensions which sponsors the HSE of which the ONR was then an internal agency. She sought to discuss minimum separation distances with them.

126. The decision-making Departments received the Inspector's report on 9 March 2012. Ms Barton for LAAG sent to the Defendant Departments on 2 April 2012 a report from a Dr Trotta of Imperial College entitled "Review of the Byrne model for aircraft crash probability in relation with the planned expansion of London Ashford Airport at Lydd". He concluded that estimates of crash probability using the Byrne model could not be considered robust and accurate, and the model was insufficient as a basis for sound and informed decision making about the increased level of risk of a major radiological release after expansion at Lydd. He criticised the estimation of background crash probability, certain features of the Byrne model, the high level of uncertainty in its application to Lydd, and the way in which factors relevant to increased risk from certain aircraft types and movements were not allowed for. This was circulated to the parties and to the ONR, and the responses were themselves circulated. Ms Auty then sent in further material which was also circulated as were the responses. ONR was sent this further material as well. Yet further material was sent in by Ms Auty on the day before the decision was due to be issued. ONR did see that later material and, as with the earlier material, it did not cause ONR to change its mind, as it had told the Defendants.

The Grounds and Challenges and the relevant ONR documents

127. I can summarise the grounds relied on by Mr Horton in this way, since they are variants of the same complaints. The Secretaries of State unlawfully delegated their judgment in relation to the issue of nuclear power station safety to the ONR, adopting uncritically the ONR's assessments which led it not to object originally and to maintain that stance subsequently. I am not clear how much of that specific variant is left after Mr Horton's acceptance that the Secretaries of State did not in fact simply take the absence of objection from ONR as of itself sufficient and leave it at that. He accepted that the Inspector had evidence, including material from ONR to LAAG, which explained the reasons for its conclusions and stance, and that the Secretaries of State sought and received advice from ONR on the Trotta report and other post Inquiry representations from LAAG.

128. The unlawful delegation point is closely related to the further contention that the Secretaries of State erred in law in relying on ONR's advice since the advice it gave was irrational and flawed in ways which were or should have been apparent to the Secretaries of State. In accepting its view, they adopted its public law flaws, making their own decision unlawful. Further, since ONR's reasons were inadequate, so too were those of the Secretaries of State and the Inspector. Likewise the Inspector's

reasons were inadequate, which infected the reasoning of the Secretaries of State who adopted them. Finally the Secretaries of State should have deferred making a decision on the application, or perhaps refused it, until the uncertainties relating to the Byrne model had been resolved. These grounds require some examination of the technical material in evidence.

129. These grounds require consideration of ONR's thinking as explained in documents presented by LAAG and LAA to the Inquiry and Secretaries of State. Of course, this Inquiry and application were not the first occasion upon which safety at Dungeness had been considered by the HSE and either the NII or the ONR. British Energy, which was the licensed operator of Dungeness B, also dealt with those bodies over safety at Dungeness B.

130. On 28 November 2008, the HSE Nuclear Directorate, of which the NII was the larger part, wrote to Shepway DC to say that it had been reviewing the impact of the proposals for Lydd airport on the risk profiles of the two power stations at Dungeness. Dungeness A was preparing to defuel. Independent consultants reviewed the risk of accidental aircraft impact; levels of risk had been judged against the ND's Safety Assessment Principles, SAPs. "The Inspectorate is satisfied that the risk to the Nuclear Installations at Dungeness in their current plant states is sufficiently remote that we have no grounds for objection to the proposed development on the grounds of Nuclear Safety".

131. The consultants' report, from ESRT, was entitled "Lydd Airport Planning Application: Review of Dungeness B Aircraft Impact Hazard Analysis", and dated July 2007. I set out the Executive Summary:

> "A planning application has been submitted for a runway extension at Lydd Airport that would allow the operation of larger aircraft than currently use the facility, in particular Boeing 737 jet aircraft. The Dungeness B Power Station safety case addressed the external hazard represented by aircraft impact. An assessment of this hazard, taking account of operations at Lydd, as previously envisaged, concluded that the associated risk was acceptable. To take account of the proposed development and change in the nature of operations, the aircraft crash hazard has been re-assessed and it has been concluded that the risk would remain acceptable if the development currently foreseen were to proceed. The Nuclear Installations Inspectorate has requested that ESR Technology undertake a review of this re-assessment of the aircraft crash hazard.
>
> The key findings of the review are as follows:
>
> 1. The primary limitation of the AEA Technology methodology arises from the limited amount of accident data, representative of UK operations, associated with what is a rare hazard event, that forms the basis of the empirical model. Given these limitations, we consider the methodology to be generally reasonable.
>
> 2. Reference to a wider data set from non-UK operations, supports our view that risk estimates derived using the methodology are generally likely to be pessimistic.

3. With one minor exception, the risk estimate that we derive for the Dungeness B site by application of the standard AEA Technology methodology are consistent with those presented by Amec NNC on behalf of British Energy and we confirm that the methodology has been correctly implemented.

4. The risk estimate is comprised of two elements, the background risk from aircraft en-route, not associated with Lydd Airport, and the risk associated with take-off and landing operations at Lydd Airport. The background risk makes the dominant contribution to the total risk of radiological release. The risk associated with Lydd operations in 2014 is estimated to [increase and comprise 12.3% of the total].

5. The risk model employed for determining the crash location relative to the runway threshold and extended centreline is applicable where aircraft employ runway-aligned approach and departure paths. Due to the exclusion zone around the Dungeness nuclear site and the Lydd ranges, a standard runway-aligned approach to Runway 03 is not possible and the standard risk model is therefore not applicable to these operations.

6. Runway 03 landing involved flight initially along the Runway 21 approach path followed by flight over the runway, then a 180 degree turn onto a runway-aligned path. This procedure may lead to a greater likelihood of crash at the Dungeness site than would have been the case if the aircraft was on a runway aligned path throughout.

7. Whereas we can identify qualitative arguments, based on the considerable distance from the Runway 03 approach path and the Dungeness B site, to support the view that the Runway 03 approach procedure is unlikely to lead to a high probability of a crash at the site, developing a quantitative estimates for the probability of a crash at the site associated with Runway 03 approach operations presents significant difficulties. Estimates made using the standard AEA Technology methodology are not reliable.

8. The possibility of a skidding impact at a location some distance from critical targets at the site, followed by a travel along the ground, possibly for several hundred metres, has been identified as having the potential to increase the probability of an impact leading to radiological release. In practice, the extent to which this represents a significant fact will be dependent upon the shielding of sensitive elements of the site by non-critical facilities. Preliminary review of this issue with British Energy indicates that there will be considerable mitigation by shielding. Whereas it will be appropriate for this issue to be formally considered in the aircraft crash hazard element of the plant safety case, in practice it is not expected that this would lead to a significant increase in the estimate risk, when assessed against the 1 in 10 per annum criterion."

132. ESRT reviewed that assessment in November 2007. A number of changes then led HSE's Nuclear Safety Directorate to obtain a further assessment of the risks, which ESRT completed in a report in February 2009. ESRT had completed in 2008 a review of aircraft crash rates for the UK up to 2006 and revised them; crash rates were an

important part of the methodology in calculating aircraft crash risk at specific nuclear sites. In the 2009 report, ESRT concluded:

> "Overall it was found that the revised risk shows only around a 10% change as a result of the revised aircraft crash rates. This is well within the inherent accuracy of the Aircraft Crash Risk methodology and hence it can be asserted that the revised aircraft crash rates do not have a significant impact on the Aircraft Crash Risk at the Dungeness Nuclear Power site.
>
> The Review of Aircraft Crash Rates report also considered other aspects of the established methodology, specifically the crash location model. The AEA crash location model was developed in 1991 and the review considered potential changes to the model coefficients by including the additional 1991-2008 UK crash location data. The review found that there was good agreement between the two datasets and certainly within the overall accuracy of the model. It was therefore concluded that revision to the model to provide a better fit to the increased data would be of relatively limited benefit and that the model in its current form would be acceptable for the intended application. Therefore the results of the existing Dungeness Aircraft Risk Assessment remain unchanged with respect to the crash location model."

133. The ESRT 2009 Report also dealt with risks arising from constrained airfield approaches such as exist in part at Lydd. I set this out more fully since much of LAAG's case revolved around these constraints. The report concluded:

> "… Risk Assessment for Dungeness is robust to the situation at Lydd Airport. Although the research outlined the limitations of the existing crash location model when applied to constrained approaches, it was able to demonstrate that the risks are acceptable. The research also provided guidance on the future treatment of the issue recommending the use of the standard AEA model supplemented by other crash location models, specifically the NLR and DNVT crash location models."

134. At paragraph 3.2.1, it considered the limitation of existing crash models in dealing with constrained approaches. Standard modelling assumed a runway aligned flight path from 10kms out from the runway threshold. A curved path was not so critical during take-off and was quite common for a variety of reasons. The crash risk was very much concentrated towards the runway threshold by which time the approach would have become runway aligned; the runway aligned flight path assumption therefore provided reasonable risk estimates across areas subject to more significant risk. There were instances where that assumption might break down for sites further from the runway threshold and in certain circumstances that applied at Lydd. The report said in section 4 that although it would not be unreasonable to expect that the risk posed to sites, including the Dungeness Nuclear Site, in the vicinity of the currently adopted approach may be greater than if a conventional unconstrained straight–in approach were available, the key question in relation to that site was whether the risk would be significant**:**

> **"…** Careful consideration of this issue, taking account of uncertainties associated with a range of factors, indicates that, within the limits of what might reasonably be expected to be the increased probability of crash on approach due to its specific nature, the risks to the Dungeness Nuclear site posed by approach operations would remain very small indeed."

135. The Report also considered other aspects in which operations at Lydd were unconventional, but not exceptional: lack of ILS for the runway 03 approach, the use of the offset localiser and the 3.5 degree glide slope. These did not give rise to significant or unacceptable risks.

136. On 1 April 2009, ONR affirmed its position to Ms Auty, in response to emails and a letter from her. A "rigorous and systematic review of the nuclear safety considerations" had been completed. Its Annex explained why:

> "Risk Modelling
>
> The risk model used has been identified previously as that laid out in the AEA research report 150/1997. The methodology for the assessment is clearly laid out therein, and will not be repeated here, other than to confirm:
>
> • Allowance for the distribution of take off and landings between 03 and 21 runways in accordance with the prevailing wind has been made.
>
> • The most recent and relevant crash data statistics relevant to the type of operations at Lydd has been used.
>
> The limitations of the risk model in terms of crash location accuracy, deviation from a linear approach path and applicability of the base crash statistics has all been examined in some degree of detail. In addition, the specific nature of the flight operations at Lydd has also been reviewed against practice at other UK and European airports. The use of generalised risk data in specific applications is common in risk assessment and care has been taken to select data which is sufficiently relevant to the situation at Lydd to ensure that the risk model is representative of the actual situation.
>
> Within your letters, there are a number of references to "Error bars". It is unclear exactly what you are referring to, however I will make the assumption that you mean the positional accuracy of the planes arriving and leaving the airport may be lower than at most commercial airports due to the operational arrangements at Lydd. Acceptance of the flight paths and take off and landing procedures is the responsibility of the CAA. In order to operate the airport therefore minimum standards will need to be met. If however you are referring to how uncertainties in the risk model are handled and developed, this is done in a number of ways, firstly through statistical manipulation within the risk model and

secondly through sensitivity studies on the base data. The repeated assertion in your letters that integration of the error bars has not been undertaken and indeed cannot be undertaken is incorrect in the context of our risk modelling. We have not used a multivariate model with either direct integration or monte carlo simulation to calculate the risk; a situation where "error bar" integration would be a relevant issue to be examined in detail.

A considerable amount of effort has been expended in the development and refinement of the risk models over a significant period of time. The models have been subjected to extensive peer review. Their potential limitations are well understood and have been taken into account in the assessment of the risks to the Dungeness Nuclear Site from operations at Lydd. It should be further recognised that the aircraft crash risk modelling and the interpretation of the modelling results draws on much wider experience in risk assessment that goes back further than the 1980s. Use is made of sound general practices in risk assessment, such as sensitivity analysis and the use of pessimistic or cautious estimates in the face of uncertainty.

Local Operations

It should be re-iterated that the restrictions and conditions imposed on operations at Lydd are fully understood and reflected in the risk assessment undertaken. Whilst there are aspects of the operations at Lydd airport that differ from the most common practice at other commercial airports in the UK, these aspects should not be considered to be in any way exceptional and they should not be considered to lead to an exceptionally high level of risk. From the perspective of risk to the Dungeness Nuclear Site the key question to be addressed when determining the acceptability of the proposed expansion at Lydd is whether any increased risk associated with the expansion would be significant. Careful consideration of this issue, taking account of uncertainties associated with a range of factors, indicates that, within the limits of what might reasonably be expected to be the increased probability of crash on approach due to its specific nature, the risks to the Dungeness Nuclear site posed by approach operations would remain very small indeed.

Background Risk

One issue where there appears to be confusion relates to what is referred to as background risk. This is the risk that is present anywhere in the UK of a plane crashing from activities unrelated to take off and landing and is associated with the total loss of control of a plane and its subsequent descent to ground. This risk cannot be removed from consideration unless all flying activities cease and from a public perception must be considered as acceptable. It is therefore a useful baseline against which to judge

> the effects of other directed activities such as airport related movements to gain an appreciation of the net change from what are clearly accepted levels of risk. Your statements that these risks cannot be compared as they are "not comparable" is incorrect. We are concerned with aircraft impact, regardless of its origin."

137. The Annex also pointed out the role of the concept of reducing risk to a level "As Low As Reasonably Practical", ALARP. The "Tolerability of Risk", TOR, philosophy had translated in certain cases into numerical targets: the "Basic Safety Objective", BSO, and the "Basic Safety Level", BSL. The former represented the level below which regulatory resources would generally not be used to seek further improvements. In this case "The levels of risk calculated are little changed between current operations and those proposed, and in addition fall below the BSO levels. Further detailed consideration is therefore seen as unnecessary". Both Mr Swift QC for the Secretaries of State and Mr Village QC for LAA emphasised the importance to ONR and to the decision-makers of the risk being below the BSO, and the absence of significant change in risk from the expansion.

138. The HSE "Safety Assessment Principles for Nuclear Facilities" of 2006 explained some of these concepts more fully. Their purpose was to guide regulatory decisions in the nuclear commissioning process, as part of giving effect to the legal requirement on nuclear site licensees to reduce risks so far as reasonably practicable. For a severe accident such as could occur in the event of a larger aircraft crashing on to a nuclear power station, the design base analysis should ensure that such an accident was highly unlikely, but analysis was still required to ensure that the risk was ALARP. The BSL was the risk level which a new facility should meet, at least, though the application of ALARP may lower risks further. The BSO was a benchmark reflecting "modern nuclear safety standards and expectations". It also represented the level of risk below which further consideration of the case would not be a reasonable use of NII resources, and further improvements need not be sought from the dutyholder. The latter however did not have the option of stopping at this level. ALARP may mean that he was justified in stopping before risk levels were as low as the BSO, but if it were still reasonably practical to provide a higher safety standard, the duty holder should do so, even below the BSO.

139. The relevant levels for the sort of accident being considered in this case, radioactive release from a major accident risking 100 or more fatalities from exposure to radiation were a BSL of 1:100,000 pa (1 in 100000 years) and a BSO of 1:10,000,000. In a letter of October 2008, this level was described as a "high level screen to remove from detailed consideration those hazards which are clearly extremely remote, rather than limit of acceptability. However, for the hazard posed by aircraft crash, it is not clear that this criterion can be met, and hence a more detailed evaluation of the likelihood and consequences of aircraft crash is required." It then explained how the British Energy safety case, with an assumed 2mppa throughput, had been assessed originally and reviewed at the time of the earlier airport expansion proposal. I emphasise that this claim is not about the dutyholder's task but about the role of the NII/ONR.

140. The NII sent to the Department of Energy and Climate Change in May 2009 a paper entitled "Lydd Airport Briefing Note", produced in December 2008, which reiterated the rigorous review carried out of the proposed changes to Lydd Airport, concluding that the overall risk for the two power stations still fulfilled the ALARP requirement.

British Energy had undertaken a risk assessment in relation to Dungeness B, which made it:

> "not inclined to support the development, on the basis that it increases the overall risk, albeit by a very small amount. BE's objection is therefore based on the principle of avoiding any increase in risk, however small, where that is reasonably practicable. Clearly, BE's effort involved in posting an objection to the external development is minimal and, if successful, would prevent a small predicted increase in risk *(whether it is real or not could not be substantiated at these levels).* This is consistent with BE's legal duty to ensure that the risk due to its own operations is reduced as far as reasonably practicable." Magnox had not objected as the licence holder for Dungeness A: the overlap between the presence of fuel and the increased risk due to airport operations "is likely to be negligible"".

141. The Note described the process whereby NII had come to its view:

> " • Review by NII specialists of the basis and assumptions of the case and applicability of the risk assessment methodology adopted by British Energy. This methodology is based on recognised best practice and uses the appropriate target area for an aircraft crash together with the relevant historical data whilst addressing any uncertainties.
>
> • Independent risk studies by an external consultant with considerable experience in the field of analysing and/or assessing aircraft impact studies. These studies have demonstrated the robustness of the methodology used.
>
> • Consultant with relevant statutory bodies, including Department for Transport, Civil Aviation Authority, (in respect of flight paths), Office for Civil Nuclear Security (OCNS) and the local authority Emergency Planning Office.
>
> These studies have shown that the risk level imposed by the proposed airport operations is a small increase on that extant from current operations and postulated background crash rate (without the present of an airport). The calculated risk of a significant radiological release (per annum) are as follows."

142. The background risks were the same with the current and future proposed operations at 1: 18,000,000 because the background risk is not the risk from current operations but the random risk from over flying aircraft, which are not landing at or taking off from Lydd. The risk from future proposed airport operations was marginally higher than at present: 1:66,000,000 at present compared to 1:62,000,000. The combined background and operational risks at Lydd were 1:14,500,000 at present, compared to 1: 14,300,000 in the future. (At that time the NII work assumed a 2mppa throughput for the future). The larger aircraft, though increasing in number and in risk potential if crashing on the site, would be more reliable than helicopters and light aircraft, which

would reduce in number. Hence the overall risk was "more or less unchanged and still dominated by the background risk".

143. Mr Horton contrasted these figures with those of both LAA and LAAG presented to the Inquiry both using the Byrne methodology, but with adjustments in LAAG's case. These are the figures at paragraph 14.7.11 in LAA's case, which presented in the same format are 1:120,000 for the whole site and 1: 1,800,000 for the nuclear island, which it said was the only location where a crash would lead to the radiological release qualifying as a Target 9 incident. LAAG's figure is at 14.7.13 and again altered in format, but based on a 500,000 mppa throughput, produced 1:144,000 to compare with 1:120,000. As Mr Horton said, these two are quite close.

144. ESRT also produced in October 2010 a Technical Note entitled "Potential risk factors associated with site-specific aspects of Lydd operations". It dealt with "non-standard" aspects of operations at Lydd. These were within the spectrum of what might be considered normal operations, but might create specific operational risks. This Note makes the same points as the 2009 Report. Quantitative risk assessment was not "viable" because of a want of reliable statistics, and generic statistics would have to be adjusted for, e.g. off-set approaches different from Lydd. So these operations were assessed on "broader qualitative considerations". Whether the steeper 3.5 degree glide slope in the later stages of approach led to an aborted landing or to a crash landing at the airfield, there would be no risk at Lydd to the nuclear site. An aircraft on the offset approach on runway 03 would have passed the point of closest approach to the nuclear site before the increased complexity of approach would have any significant effect on operational safety so the safety implications were expected to be negligible. It explained why there was negligible risk to the nuclear site from the use of runways 03 and 21 when one of the ranges was active.

145. All of the documents I have referred to above were before the Inspector at the Inquiry. I have already mentioned the Trotta Report and other material submitted by LAAG to the Secretaries of State after the Inquiry, material which was provided to ONR. In an email of 9 May 2012, responding only a month or so after receipt of material submitted in April 2012, and sent to the parties, ONR said that it had not assessed the material and "our current regulatory position with regard to the planning application remains the same". There had been a number of pieces of technical work in this area, including that from LAAG, which suggested emerging information which might warrant ONR's consideration. ONR therefore intended to convene a Technical Advisory Panel, TAP, to provide objective, scientific and technical based advice on aircraft crash hazards in relation to nuclear safety assurance and improvement. The deliberations would be made public. It reminded the Departments that it had the power to demand reasonable practicable improvements or to curtail or stop licensed operations as need be.

146. ONR responded about further post Inquiry representations to the Departments in an email dated 24 October 2012, also sent to the parties. It identified the "key areas of concern in the emails requiring a response" as including the use of the Byrne methodology. By this time ONR had clearly read and reached some view about what it should do in respect of the material. The email said:

> "ONR has provided evidence to the planning enquiry for Lydd airport expansion and judges the Byrne methodology as fit for the purpose of supporting its

decision. It should be noted that the Chief Inspector has convened a Technical Advisory Panel to provide independent advice on the developments in methodology in this area, which is holding its first meeting in November."

The submissions and conclusions

147. Before turning to the submissions, it is in my judgment worth pointing out that the Inspector had significant evidence from LAA and LAAG. He accepted the Byrne methodology, as he was entitled to do. He accepted the BSL as an appropriate standard for the assessment of risk. Both sides said that the risks were below the BSL. He considered the application of the Byrne methodology to the specific characteristics of Lydd. He was entitled to reject the contention from LAAG that the BSO represented the level above which permission should be refused. He considered the work done by ONR and its consultants. He was entitled to give the weight he did to the views, explained as they were, of that expert body. On the face of it, that is a perfectly sensible conclusion which the Secretaries of State were entitled to accept as they did.

148. I turn to the submissions. Mr Horton was right to abandon the suggestion that the Inspector and Secretaries of State had acted on a mere say so from ONR. The material emanating from the ONR, which the Inspector had, relating to the way in which it reached its conclusions, and there is much more which underlies the summaries and conclusions to which I have referred, explains the original safety assessment for Dungeness B's commissioning at a time when the Airport was already operational, the review at the time of the earlier expansion proposal, the knowledge which it had acquired of the operation of the airport, the work which it had undertaken itself, and through external consultants, expert in the assessment of aircraft crash risk, and explained adequately the basis for its decision not to object.

149. I can see no basis either for holding that Inspector delegated the decision on the risk to nuclear safety to ONR. The Inspector considered the basis for the stance adopted by ONR. He was entitled to give it the very considerable weight he did. There was nothing unlawful about his giving to those views the weight he did. The weight he gave them was entirely a matter for his reasonable judgment. The NII/ONR was an expert body, with a particular function in this area. The conclusions of NII/ONR were reasoned, supported by external consultants, expert and considered over time. Unless there was something irrational about the ONR's views which called for their rejection or further investigation before rational reliance could be placed on them, that is the end of the matter so far as the Inspector's report and acceptance of it by the Secretaries of State is concerned. A fair reading of the report shows that the views of ONR were an important part of the Inspector's reasoning, but he had other evidence as well, notably the expert evidence from LAA and LAAG. The latter was of value to him to the extent that, in applying the Byrne methodology, critical of it though some of its witnesses were, the numerical outcome was very similar to that obtained by LAA, and both were below the BSL. But none of that is equivalent to delegating the decision to the ONR.

150. The Secretaries of State were entitled to accept the Inspector's conclusions. That alone would make the argument that they delegated the decision to ONR unsustainable. The post Inquiry representations did not support the contention that there was a delegation of the decision at that stage but not earlier. ONR maintained its

position, having read LAAG's material, although it thought that some further consideration of aspects via a TAP would be useful. There is a separate challenge to their decision not to defer the decision pending the outcome of the TAP's deliberations, whenever that might have been. But that is not the same as the delegation issue. I see nothing to support the contention either in the way in which the representations were handled, or in the acceptance that the ONR saw nothing in them to warrant a change in its position. ONR was not answerable to or sponsored by the decision-making Departments, and they were entitled to give to this conclusion the weight they did.

151. The next ground concerns the extent to which the acceptance of the ONR view involved the acceptance of an irrational view, as the Secretaries of State ought to have realised. Mr Horton made a number of points under this head, none of which I accept.

152. First he argued that there is a contradiction between two strands of evidence which the Inspector did not resolve or deal with, or perhaps even recognise. The ONR calculations of risk produced an outcome which was below the BSO, and hence no further work was required. I accept that the ONR calculations showed the risk to be below that level. The Inspector also accepted that the LAA and LAAG figures, applying the Byrne model, showed a risk level between the BSO and BSL.

153. Mr Horton contended that such varying results showed the poor quality of the model, or of ONR's use of it albeit that LAA and LAAG were quite close together. This should have been explored, or the decision should have awaited the post Inquiry TAP report. Mr Swift suggested that there was a good reason for the differences: ONR had greater knowledge of the inputs relevant to the nuclear site than did LAA and LAAG and, for security reasons, not all of that information would have been available to the parties. It is reasonable in my judgment to infer that ONR/ESRT have a greater awareness of what is the size of the relevant area where the impact of an aircraft would lead to the radiological release the risk of which was being assessed, and not everything relevant to the safe design and protection of a specific nuclear site would be public. There is some support for that in redactions in the documents. That is a plausible basis for the differences in outcomes from the various model runs.

154. But there is a stronger point, although it shows that Mr Swift is right as well. It relates to the effect of a smaller target size on the level of risk calculated. LAAG raised at the Inquiry the smaller target size which ONR/ESRT had used, compared to other contributors, and which LAAG said had a huge impact on predicted crash rates; IR 9.5.27. The LAA/LAAG figures were only "quite close" taking those which related to the whole site. The LAA consultants had also examined the nuclear island alone, though not necessarily on the same basis as ONR looked at it. But on that smaller target size, the risk level calculated by LAA was 1:1,800,000, still above the BSO, but much further below the BSL.

155. I am not persuaded that the differences in outcome between the applications of the model to this issue have been shown by Mr Horton to make acceptance of the model or its conclusions irrational, or to require further reasoning.

156. Mr Horton's next point was that the Inspector, faced with two model outcomes which were between the BSO and BSL risk levels, ought not to have recommended approval

without going through the ALARP process, or requiring ONR or the parties to do so. This was what the SAP envisaged where the levels were between the BSO and BSL.

157. I am not persuaded that there is an error of law in what the Inspector concluded over this. First, he had two groups of model output; and that of the ONR, which was the expert and independent responsible body, showed that the result was below the BSO, so no ALARP test was required from the ONR on any footing. Second, the Inspector clearly also measured safety against the conclusion that the levels were above BSO but below BSL. Risks at or above the BSL are at the level at which the HSE SAP holds that licensing a nuclear site should be refused, as Mr Horton accepts. Having regard to what the BSL represents in relation to the design basis for the power stations, the Inspector was entitled to adopt that level as the level at which he would recommend refusal of permission for the airport expansion, since the power stations would not have been permitted at such risk levels.

158. Mr Horton submits that ALARP should have been applied, but the Inspector wrongly ignored it. I disagree. ALARP is not a principle or policy for application in deciding planning applications for external proposals which may have an effect on nuclear safety; the SAP does not so suggest. ALARP, as the SAP makes clear, is the approach to be adopted by the HSE in licensing nuclear sites, and, then, whatever the risk level below BSL, the duty applies to the dutyholder. ALARP governs the relationship between the ONR and the licence holder. The Planning Inspectorate is neither the regulator nor the dutyholder. ALARP was reflected in British Energy's objection, understood and rejected at paragraph 14.7.7. Mr Horton's case would impermissibly elevate ALARP to a planning policy, and on his application of it, would require refusal of permission for an external development even where the risk level was below that at which, on any view, the nuclear site would have been refused a licence. It was not LAAG's case that the nuclear site should be redesigned or re-located; it was that the airport expansion should not proceed, as the result of giving effect to ALARP. It was difficult to see what else the application of ALARP could be on its case; and it was not for the Inspector to recommend changes to the design or operation of the power stations, nor was he obliged to perform some calculation as to the possible number of deaths in the event of a Target 9 crash.

159. Mr Horton's point also rather ignores what the Inspector said in paragraph 14.7.17. In effect the background risk would have meant on LAAG's case that aircraft should not overfly nuclear power stations. I reject the suggestion that that mischaracterised LAAG's case or showed bias. The Inspector also dealt with the important question of the increase in risk which expansion would bring in rejecting LAAG's case in paragraph 14.7.15. He accepted that there would be some increase in risk, but relied on ONR, whose figures showed how small an increase with expansion there would be over the existing airport level plus background, the dominant contributor to risk.

160. I am not persuaded that Mr Horton is remotely right to suggest that the difference between the ONR results and the LAA/LAAG results of applying the Byrne model shows that there was a very large increase in risk. That was not how the LAA/LAAG figures were arrived at; they did not take the ONR model output for background and existing risk as the starting point and apply new fleet mix and movement inputs to that modelled outcome. They did not model changes in risk from background and existing to future. The change in risk on the Byrne model was only in the ONR figures, and they provided the only modelled measure of change, and it was also therefore

internally consistent. There is no evidence of internal consistency between the ONR inputs and those of LAA/LAAG. Mr Horton was wrong to suggest that the ONR work had failed to take account of the change in the aircraft mix at Lydd with expansion, leading to a significant increase in flights by aircraft over 5700kg. The ONR fleet mix assumptions do not show that at all.

161. The Inspector was not obliged to ask whether ONR would have objected if it had come up with the results which LAA and LAAG did from their application of the Byrne model: that is no more than a permissible question for an advocate in cross-examination. The Secretaries of State were not obliged either to seek an answer to that question in order to reach a lawful decision.

162. The Inspector was entitled to rely on the Byrne model, and treat the LAAG challenge to it as not for him to resolve. ONR itself pointed to the limitations of that model for application at Lydd, and described how those limitations should be assessed. He was entitled to rely on its work. There was no error of law in his acceptance of the safety evidence on either sets of figures, and certainly nothing irrational in giving weight to the considered, reasoned, explained and continuing absence of objection from ONR, in view of the material he had from it and the way the cases were presented to him. None of the points reformulated as a want of legally sufficient reasoning of one form or another can succeed, for the reasons which I have given in dealing with the challenge substantively. The conclusions are amply explained, and deal with the principal issues in controversy on this topic.

163. The Secretaries of States' decision therefore cannot be flawed by reliance on the reasoning and conclusions of the Inspector. The particular point directed at them but inapplicable to the Inspector is the conclusion they adopted as a result of the Trotta report and the ONR response to it, particularly in setting up a TAP to consider key issues which included the use of the Byrne methodology. Mr Horton submitted that their continued reliance on ONR was irrational since ONR had refused to reconsider its position after receipt of the Trotta Report. The Secretaries of State should have required ONR to consider the report and refused permission, or at least deferred a decision on permission, until ONR had done so, after the TAP reported; their failure so to react was irrational.

164. I am unable to accept that argument. Clearly ONR had considered the Trotta Report, and decided to maintain its position of not objecting. The Secretaries of State knew that it maintained that position although it had set up a TAP to examine the use of the Byrne model. The limitations of the Byrne model both generally and in its specific application to Lydd had been considered, explained and allowed for by ONR in its work produced to the Inquiry. The ONR had not approached its risk assessment on some simplistic basis that the Byrne model should be applied uncritically and unthinkingly. The Inspector had been able to judge the extent to which allowances had been made for those factors in a way which he found sufficient. It is not as though the Trotta Report was the first time that the problems of using Byrne were raised and dealt with. The ONR was still entitled to conclude that it was not persuaded to change its position in the light of the Trotta Report, and the Secretaries of State were still entitled to attach weight to that stance. There is no inconsistency such as to make the decision irrational between ONR saying that it had considered the Trotta Report on the problems of Byrne which were not exclusive to Lydd and had not changed its mind on Lydd, and saying that a TAP should consider the use of the Byrne model,

expressed in a very general way. It is obvious that there might, or might not, be scope for some improvements in the model, or reservations as to its use in certain circumstances, but that a willingness to consider that would not mean that decision-making in a specifically considered case had to be halted in the light of how the ONR understood the model, its limitations and had made qualitative assessments to deal with them.

Conclusion

165. None of the grounds succeed. This claim is also dismissed.