

# Biodiversity Gain and Habitats Update

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Episode 8

# Programme

- **Stephen Tromans QC – Introduction – 10.30-10.35**
- **Ruth Keating – Overview of the Environment Bill's provisions – 10.35-10.50**
- **Rose Grogan – Reminder of Case Law on Habitats – 10.50-11.05**
- **Stephen Tromans QC – Summary, Practical issues, Questions – 11.05-11.15**

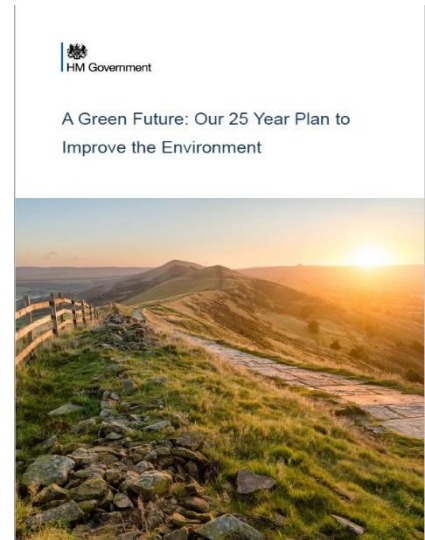
# Introduction

- Major distinction between European Sites and sites of national or local importance
- Strict protection of European Sites remains post-Brexit: but for how long?
- Environment Bill provides major reform for biodiversity and conservation law with great potential for benefit



# Conflict

- Green Future: 25 Year Plan, vs ...
- Inconvenient “newt-counting delays”



# The Environment Bill and Biodiversity

# Objectives

- A key objective of the Bill is that it will contribute to the recovery of our natural environment.



# Objectives

- Much of our wildlife-rich habitat has been lost and many species are in long term decline.
- Improving biodiversity and protecting urban street trees, in line with the ambitions set out in the 25 Year Environment Plan.
- Making biodiversity gain a condition of planning permission – making biodiversity a priority.
- Conservation covenants – securing long term benefits.

# Key features

- A 10% biodiversity net gain requirement on new development.
- A strengthened biodiversity duty on public authorities.
- Conservation covenants.



# Key provisions

- These are covered in Part 6 ‘Nature and Biodiversity’ and Part 7 ‘Conservation Covenants’ of the Bill, as currently drafted

# Biometric net gain

- Clauses 92-103.
- How it will be calculated.
- A habitat's full biodiversity – increasing over the years.
- Off-site options.

# Conservation covenants

- Clauses 93-128.
- Conservation covenant agreements.
- A “qualifying estate”.
- A conservation purpose.
- Enforcement.
- Defences.
- Discharge or modification of obligation by agreement.
- The Upper Tribunal and courts.

# Habitats Case Law

# Overview of Habitats Assessment Process

- Duty to avoid in SAC the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.
- Habitats Regulation Assessment required where plan or project is likely to have a significant effect on European site or European offshore marine site in Great Britain.
- Restrictions on plans and projects that are likely to have a significant effect.

# Overview of Habitats Assessment Process

Four stage process:

- Screening
- Appropriate Assessment
- Consideration of Alternatives
- Imperative Reasons of Overriding Public Interest and compensatory measures

# Screening

- Whether the plan or project is likely to undermine the conservation objectives of the site concerned. Threshold is low in light of precautionary principle (*United Kingdom v Commission* C-180/96 and *Waddenvereniging and Vogelbeschermingsvereniging* C-127/02).
- E.g.s of “significant effect”: *Commission v Spain* 17.92 hectares/43 000 hectare site; *Commission v Italy* [2007] ECR I-7495 one ski run that only operated in winter sufficient to give rise to significant effect.

# Screening & Mitigation Measures

- *People Over Wind and another v Coillte Teoranta (Case C-323/17)*
  - Prior to this case there was long line of E&W authority that mitigation measures could be taken into account.
  - CJEU ruled that article 6(3) should be interpreted to mean that mitigation measures should not be considered at the screening stage when determining if appropriate assessment is necessary.
  - Followed in *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211. Mitigation measures were disregarded.
  
- *R (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin), where outline permission granted before ECJ judgment in *People Over Wind* assessment should be carried out at reserved matters stage.



# Screening & “Integral features”

- *R (oao Langton) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190: conditions on badger cull licences were not mitigation measures and so could be taken into account for the purposes of screening. Question of whether “integral” to the plan/project or avoiding harmful effects.
- Compare with *Heather Hill Management Company CLG v An Bord Pleanala* [2019] IEHC 450 where “best practice measures” were mitigation.
- *R (Preston) v Cumbria CC* [2019] EWHC 1362 court rejected argument that no need for habitats assessment because outfall discharge would be regulated by EA.

# Appropriate Assessment

- Can you be certain that a plan or project will not have adverse effects on the integrity of the site concerned?
- Two examples :
  - *RSPB v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWCA Civ 227
  - *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4
- *Holohan and others v. An Bord Pleanála* Case C-461/17: scope of assessment and whether permissible to grant consent where some effects unknown.
- *Edel Grace and Sweetman v An Bord Pleanala* (C-164/17): compensation for loss v. mitigation.

# Alternatives

- Happens after appropriate assessment.
- Alternatives need to achieve same objectives.
- “Do nothing” approach is not an alternative because does not achieve same objective.
- Other considerations do not take priority over conservation considerations (e.g if alternative is more expensive).

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- Not exclusively defined by Directive (examples are given e.g. human health, public safety).
- Different approach for priority species.
- Require consideration of compensatory measures.

# Questions?



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