

SURREY WASTE PLAN EiP

INFORMATIVE PROVIDED IN RESPONSE TO A
REQUEST BY INSPECTOR Mr. SIMS TO PROVIDE HIM
WITH ADDITIONAL INFORMATION ON THE
APPLICATION AND APPLICABILITY OF ARTICLE 6 (2), (3)
AND (4) OF THE HABITATS DIRECTIVE TO HIS
CONSIDERATION OF THE DRAFT SURREY WASTE
PLAN

Runnymede Borough Council

March 2007

**INFORMATIVE ON THE OPERATIONAL CONSIDERATIONS OF THE DUTIES SET BY
ARTICLE 6 (2), (3) AND (4) OF THE DIRECTIVE ON THE CONSERVATION OF NATURAL
HABITATS AND SPECIES 92/43/EEC (HABITATS DIRECTIVE)**

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1. Introduction

- 1.1. Runnymede Borough Council was requested by the Inspector considering the Draft Surrey Waste Plan at EiP to provide him with an informative on the application and applicability of Article 6 (2), (3) and (4) of the Habitats Directive to those considerations.
- 1.2. The following informative has been produced by John Willmott-French who holds a First-Class Honours degree in Architecture. He also holds Affiliate Membership with the Institute of Environmental Management and Assessment (IEMA). He is employed by Runnymede Borough Council in the capacity of a Senior Impact Assessment Officer within its Policy and Implementation Section. He specialises in advising the Council on all aspects of practice and procedure in respect of impact assessment and has worked in this capacity for over three and a half years.
- 1.3. Mr Willmott-French has particular experience in dealing with the subject matter associated with the application and implication of the *Directive on the Conservation of Wild Birds 79/409/EEC (Birds Directive)*, the *Directive on the Conservation of natural habitats and species 92/43/EEC (Habitats Directive)*, and the *Conservation (Natural Habitats &c.) Regulations 1994* as amended (the Regulations) in respect of Policy planning and Development Control functions.
- 1.4. Mr Willmott-French is also closely involved with the application and incorporation of environmental regulations and legislation in respect of general Council functions. This involvement is particular with regards to planning policy development, monitoring and data collection. In addition he advises the Council specifically on its duties in respect of Environmental Impact Assessments (“EIA”), Sustainability Appraisals (“SA”), Strategic Environmental Assessments (“SEA”) and Appropriate Assessments relating to major and or complex planning applications.
- 1.5. By invitation, he has addressed a number of conferences, workshops and seminars on the application of impact assessment regulations and development of emerging statutory guidance on Sustainability Appraisals, Strategic Environmental Assessments and Appropriate Assessments.
- 1.6. Since 2004, he has participated as the Council’s representative in the joint local planning authority group interfacing with Natural England (NE) formally English Nature, GOSE, SEERA and other government departments working on what EN refers to as its ‘Draft Delivery Plan’. Recently, he has participated in the capacity of Runnymede Borough Council’s technical representative at the SEP EIP Technical Sessions held over seven days at Woking dealing with the impacts the Thames Basin Heaths SPA (TBH SPA) is having on the SEP.

2. Scope of this document

- 2.1. The scope of this informative is confined to the limitations on the discretion of a competent authority (CA) as set by Article 6 (3) and (4) of the Habitats Directive in consideration of plans resulting in likely significant effects on any of the 1009 Natura 2000 site (N2K) within the UK. A Natura 2000 site in this context can be a Special Protected Area (SPA), Special Areas of Conservation (SAC) or RAMSAR site or a combination, otherwise known as a multi-designated site. Generally within the UK Natura 2000 sites tend to be formed of a number of Sites of Special Scientific Interest (SSSI) component sites. These SSSI components can in themselves be ‘multi designated’, as for example is the case with Chobham Common, being a component within the TBH SPA and within the Thursley, Ash, Pirbright and Chobham SAC (TAPC SAC) and it is also a National Nature Reserve (NNR).
- 2.2. Given the fact that only recently plans¹ have been considered in relation to the requirements of the Habitats Directive, it is not surprising therefore that domestic legislation, guidance and expertise in applying duties in respect of policy planning is relatively undeveloped. This experience is not replicated for the consideration of projects. Within this area a raft of procedures and guidance have been developed to meet the requirements of the Habitats Directive inter alia with other conservation and protection legislative instruments. However, there is a number key legislative instruments in place that in addition to the Habitats Directive make explicit the duty on decision makers to consider the impact of their decisions have on receiving environments in advance of the decisions being made. These include:
- *Sustainability Appraisal* pursuant to s.39(2) of the *Planning and Compulsory Purchase Act 2004*; incorporating the requirements of
 - *EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment* (SEA Directive)
 - *Council Directive 85/337/EEC – Assessment of the effects of certain projects on the environment*, as amended:
 - the *Wildlife and Countryside Act 1981* as amended;
 - the *Conservation (Natural Habitats &c.) Regulations 1994* as amended (the Regulations);
 - Planning Policy Statement 9 – Biodiversity and Geological Conservation and to the joint ODPM and DEFRA Circular 06/2005.
- 2.3. As the duties under the Habitats Directive apply to both plans and projects and given the fluidity within this field and the lack of consistent advice and guidance, it is considered prudent that the content of this document draw upon the above legislation, expert legal advice, European Union (EU), and UK guidance and case law and experience in the field of impact assessment.

¹ In Case C-6/04 in which the ECJ determined that the UK failed to adopt, the measures necessary in order to implement completely and correctly the requirements of the Habitats Directive in particular the provision of – Article 6(3) and (4), as regards water abstraction plans and projects and land use plans.

3. The Habitats Directive – Applicability

- 3.1. Article 6 of the Habitats Directive attached at *Appendix 1 – Habitats Directive (Consolidated TEXT)*, requires Member States to take appropriate steps to avoid, in Special Areas of Conservation the deterioration of natural habitats and the habitats of species and disturbance of species for which sites have been designated in respect of consideration of new plans or projects. This article is considered by the Commission as being one of the most important of the 24 articles of the Habitats Directive. It states that it is this article “*which determines the relationship between conservation and land use.*”²
- 3.2. The “conservation and protection’ objectives of the Habitats Directive are achieved through a framework of ‘proactive, preventive and procedural requirements of and as arranged in Articles 6 (2) to (4). The Habitats Directive is seen as being directly relevant to the requirements of the earlier Birds Directive 79/409/EEC (*See Appendix 8 – Government Circular 06/2005*) and provides protection to all sites and species within the Natura 2000 network. The Commission sees comments relating to the Habitats Directive applying ‘*mutatis mutandis*’ to sites classified under the earlier Birds Directive.
- 3.3. In respect of plans, the provisions of the Habitats Directive were determined by the European Court of Justice in Case C-6/04 not to have been correctly transposed into UK law. The government intends to correct this omission by an amendment to the Conservation (Natural Habitat &c.) Regulations 1994 (No. 2716) (*see Appendix 2 – Habitats Regulations*). This amendment is currently believed to be working its way through the parliamentary system. As both the consideration and duty set by Article 6(3) and (4) relate in the main to the procedure captured by the existing Regulations which is not in dispute, in the interests of clarity and until the amended regulations are in place further reference will relate to the existing Regulations.
- 3.4. Both Directive and Regulations place a positive statutory duty on all Competent Authorities (“CA”)³ not to agree to or issue a consent, permission or other authorisation for a plan or project not directly connected with or necessary to the management of a Natura 2000 site, where the CA is unable to conclude that its issue will not adversely effect the integrity of a Natura 2000 site⁴ within the UK. Neither Directive nor Regulations differentiate between the levels of protection afforded to any of the Natura 2000 sites within the UK once duly identified. It is commonly accepted that Regulation 48 and 49 capture the duty set by Article 6(3) and (4), but not the general regime of protection as set by Article 6 (2).
- 3.5. As stated above, the inherent sequential approach advocated by the Directive to CA functions, is comprehensively captured by the Regulations⁵. This approach as exercised by CAs in

² **Managing Natura 2000 Sites** – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC” 2000

³ CA’s are defined within Regulation 6 of the Regulations and include virtually any authority with the power to issue or give consent, permission or other authorisation. CA’s include Local Planning Authorities [LPA’s], Statutory Bodies, such as English Nature, and the Environment Agency, Regional Planning Bodies such as SEERA, the Planning Inspectorate [PINS] and the UK Government and others.

⁴ See reg. 10 of the Habitats Regulations

⁵ Particular reference is made here to Regulation 48 and 49.

consideration of their functions as being relatively straight forward to follow and easy to understand. The Encyclopaedia of Planning Law provides a helpful and concise synopsis on the sequential application of regulation 48 and 49, as they apply to land use planning (*see Appendix 3 – Reg. 48, 49 and 53 General Approach*).

- 3.6. With an increasing number of references is made to what is considered as being one of the more important European Court of Justice (ECJ) ruling; the *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw* (“Waddenzee”) (ECL, judgment7.9.04), for referencing convenience this has been included at *Appendix 4 – Waddenzee Case*.
- 3.7. The requirements of the Habitats Directive apply to Natura 2000 sites only; however the Regulations extend similar application as a matter of policy to potential SPAs, candidate SACs, and Ramsar sites within the UK⁶
- 3.8. It is widely accepted that the Regulations provide for what the Commission refers to as a ‘*step-wise procedure*’⁷ for CA’s to follow when considering plans or projects that if implemented are ‘likely’ to have a significant effect on a Natura 2000.
- 3.9. The duties are triggered following a CA either concluding likely significant effect positively or its inability to conclude ‘no likely significant effect’ on a Natura 2000 site in respect of a plan or project that it is minded to issue consent, permission or other authorisation for during screening.

Article 6 (3) states that:

“Any plan or project not directly connected with or necessary to the management of the site by likely to have a signification effect thereon, either individually or in combination with other plans or projects, shall be subjected to appropriate assessment of its implications for the in view of the site’s conservation objectives. In light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

Waddenzee can be referred to in order to set the limits of discretion of Article 6(3) of the Habitats Directive within which the CA is to operate. The Court held at paragraph 33:

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

Regulation 48(1) provides that:

⁶ (see *Appendix 2 – Habitats Regulations*; and, paragraph Para 6 – 8 of PPS9: Biodiversity and Geological Conservation see *Appendix 5 – PPS9: Biodiversity and Geological Conservation, Main text*.)

⁷ See Appendix 16 – *Managing Natura 2000 Sites*, page 30, paragraph 3.

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 in Great Britain (either alone or in combination with other plans or projects), and,**
- (b) is not directly connected with or necessary for the management of the site,**

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

3.10. Prior to the application of the procedure in Article 6(3) and or Regulation 48, a CA must satisfy itself of the following conditions;

- (i) the proposal being considered is a 'plan or project' within the context and meaning of the Directive and Regulations; and,
- (ii) the plan or project is not directly connected with or necessary for the management of the site before any further application.

Once these conditions are met, further application of the Article 6(3) or Regulation 48 sequence does not require a CA to be '*certain*' of a significant effect. The CA simply needs to be convinced that the plan or project once implemented will have a '*likely*' significant effect on a Natura 2000 site either alone or in combination with other plans or projects. In which case the burden of certainty is on there being 'no significant effect'.

3.11. Some would argue that the provisions of Article 6(3) might in some circumstances not be applicable in the case of a strategic level plan such as the DSWP. This is believed to be based on the premise that as some affects are 'known', i.e. are already occurring on a Natura 2000 site, a new similar effect can not be considered as being 'likely' to occur, accordingly the provisions of Article 6(3) are never invoked. This point can be supplemented by the argument that these 'known' affects are more suitably addressed by the avoidance measures which can be made under the principal under Article 6(2). Thus, the provisions of the general rule of protection laid down in Article 6(2) for existing impacts, renders it unnecessary for a CA to invoke the procedures of Article 6(3) which is expressly concerned with ensure that a plan or project likely to result in an significant effect is authorised only to the extent that it will not cause an adverse affect on the integrity of the Natura 2000 site.

3.12. However, CA's should proceed with a suitable degree of caution if they wish to adopt such a reading of use of Article 6(2). In addition, it is advisable that they also fully understand the potential consequences of misunderstanding the relationship between Article 6(2) and Article 6(3). By way of guidance Waddenzee ruled on use of Article 6(2) and its relationship with Article 6(3). On the use of Article 6(2) the Court held at paragraph 37:

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

fauna and flora, as stated in the first recital in the preamble to that directive.”

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

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

- 3.13. Procedurally, it is clear, once a plan is screened as being likely to have significant effects on a Natura 2000 site, prior to adoption the CA will carryout an appropriate assessment in order to ascertain no adverse affect on the integrity of the site. Based on the information contained in the HDA report, it is clear that the authors initially at least consider that there existed the potential for mechanisms for effect (MfE) resulting from the DSWP. The HDA also considered that the plan could on its own and in combination with other plans or projects with similar MfE cumulatively cause a likely significant effect or contribute to the continuation of a known adverse affect on a number of features within a number of Natura 2000 sites. Therefore, it would appear that the resulting MfE originating from the DSWP would logically trigger of the *‘mere probability’* test as referred to in paragraph 41 of Waddenzee and require a appropriate assessment.
- 3.14. However, the HDA also appears to recommend the CA transfer of the requirement to carrying out the required appropriate assessment to the planning application stage of the planning process. Consequently, the CA needs to consider if by accepting this recommendation, he would be acting outside the limitations his discretion set by Article 6(3) of the Habitats Directive.
- 3.15. Whilst it is difficult to see the basis of how procedurally the Article 6(3) duties identified at plan stage could be transferred to project stage, such a consideration needs to be taken by the CA in this case. The possibility that if this Article 6(3) responsibility is transferred to lower tier decision making process, will set up the prospect of a ‘multi stage’ planning consent processes, whereby, the obvious question is, at which level is it appropriate to assess the likely significant effects the plan will have on the Natura 2000 sites.

It could be argued that the EC have provided facility for such a consideration by way of Article 6(2) and its ruling on ECJ Case C-290/03⁸, it is advisable that professional legal advice is sought in advance of a CA choosing to take such an approach to the legislation. It follows that a CA must also be aware of the consequences that if it considers it acceptable not to fully consider identified impacts at the plan adoption stage, given the fact that by accepting the principle of development within certain location, it is possible a decision such as this, will restrict the application of an Article 6(4) or Regulation 49 duty to consider the tests of alternatives and imperative reasons of overriding public interest (IROPI), should they be required.

⁸ (Link to Barker judgment) curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-290/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

4. In Combination Assessment

- 4.1. One of the more difficult concepts to comprehend is the provision of the in combination consideration. Article 6(3) of the Habitats Directive does not define which other plans or projects are within the scope of the in combination provision, nor does Regulation 48 (1), both simply require consideration of such a condition.
- 4.2. However, the European Commission guidance, **Managing Natura 2000** (*see Appendix 7 – Managing Natura 2000*), interpreters the consideration as follows.

Paragraph 4.4.3 states that:

“A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans or projects are within the scope of the combination provision”

going on to state that:

“It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are completed; approved but uncompleted; or not yet proposed.”

Clearly, the Commission see the underlying intention of this provision is to consider the cumulative impact within the provision of the in combination assessment. It is reasonable to consider that a plan such as the DSWP would trigger such a consideration.

- 4.3. In the absence of more explicit law or guidance, and bearing in mind the special circumstances of each case, a judgment is required by the CA as to the need for, and extent of, an ‘in combination assessment’. For example, the Inspector will need to consider whether or not by accepting the HDA’s conclusion to effectively exclude any existing background levels of gaseous emissions to the atmosphere constitutes an infringement of Article 6(3) and Regulation 48 (1). In that the CA will have failed to take account of what is irrefutably considered to result in exceedance in both critical level and critical load for designated features within a Natura 2000 site by completed plans.
- 4.4. The simple fact is that these the provisions of Article 6 and Regulation 48 have been designed to protect the most sensitive habitats and species in Europe – a task it is argued that they do incredibly well.

5. Procedure

5.1. In order to facilitate the application of these complicated and sometimes restrictive regulations, it is considered necessary to take account of the following advice and guidance;

- (a) The Assessment of plans and projects significantly affecting Natura 2000 sites (*see Appendix 6*)
- (b) Managing Natura 2000 Sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC (*see Appendix 7*)
- (c) Government Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the planning system (*see Appendix 8*)
- (d) Habitats regulations guidance note 1 – The Appropriate Assessment (Regulation 48) The Conservation (Natural Habitats &c.) Regulations 1994 (*see Appendix 9*)

5.2. Any robust procedure should aim to provide a systematic set of stages for the transparent consideration of the likely effects a plan or project could have on a Natura 2000 site in respect of Article 6(3) and (4) of the Habitats Directive and Regulation 48 and 49 of the Habitats Regulations.

5.3. It is considered that there are four distinct stages to the procedure required to meet the requirements of the legislation, as set out on page 11 of the EC guidance on The Assessment of plans and projects significantly affecting Natura 2000 sites⁹.

- **Stage 1 – Screening**

- Consideration of likely significant effects alone or in combination with other plan or projects. This essentially considers questions relating to the effects the plan may have on a Natura 2000 site in light of the sites conservation objectives and its applicability of the application or the ‘trigger’ for the step-wise procedure and requirements of Stage 2.
- This stage simply requires the CA to objectively demonstrate with supporting evidence that there will be no significant effects on a Natura 2000 site, and if not, make a conclusion of no significant effect. It should be noted that the trigger of likely significant effect is sensitive to the mere probability of a risk, as discussed in para. 3.13. and relies upon the precautionary principle in absence of certainty.

⁹ See Appendix 6

- **Stage 2 – Carrying out an appropriate assessment**

- This stage comprises the assessment of the implications the MfE of the plan or project for the European site having regard inter alia to its conservation objectives for the site, conservation status of the site, existing baseline condition of the site, and what constitutes favourable condition.
- At this stage mitigation measures can be considered by the appropriate assessment. It follows that all mitigation measures must be documented with evidence being provided on their expected success and means of being secured, implemented and monitored.

- **Stage 3 – Assessment of alternative solutions**

- The key consideration for an assessment of alternatives is that no reasonable alternative exists to the plan that is likely to result in an adverse affect on the integrity of a Natura 2000 site. The assessment alternatives should include the consideration of the ‘do nothing’ alternative.

- **Stage 4 – Assessment of compensatory measures**

- Depending on whether or not the site hosts a priority habitat or species will determine whether or not a CA first considers imperative reasons of overriding public interest (IROPI) before considering the assessment of compensatory measures. It follows that in the absence of alternatives to the plan likely to result in an adverse affect on the integrity of a Natura 2000 site, compensatory measures must be identified in advance of the plan being adopted.
- It should be noted that compensatory measures are not the same as mitigation measures.

5.4. The vast majority of CA considerations will rarely be required to go beyond Stages 1 and 2. The Stage 1 is captured in Regulation. 48 (1) (a) — the “likely significance test”. Habitats Regulations Guidance Note No. 3 (*see Appendix 10 – Habitats Regulations Guidance Note 3*) provides additional guidance on the determination of likely significant effect in that it states:

“2.1 The ‘significance’ test acts as a coarse filter for all proposed plans and projects which are not directly connected with or necessary to the management of the site (whether or not the effect is likely to be adverse or beneficial) so directing attention to those which require further assessment “

“4.1 Likely significant effect is, in this context, any effect that may reasonably be predicted as a consequence of a plan or project that may affect the conservation objectives of the features for which the site was designated, but excluding trivial or inconsequential effects.”

5.5. The concept of ‘likelihood’ as opposed to ‘certainty’ of the cause-and-effect mechanism at this stage of the procedure is as stated by the EC guidance on *Managing Natura 2000 sites* (*see*

Appendix 7 – Managing Natura 2000 Sites) which [likelihood rather than certainty] are:
“...safeguards set out in Article 6(3) and (4)”

Going on to say that:

“Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain”.

- 5.6. A CA is not required to consult with other bodies at the screening stage, although in practice it is not the case as consultations are generally informal and ongoing. However, statutory consultation is required by Regulation 48(3) states:

The Competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.”

- 5.7. Natural England (NE) is considered to be the appropriate nature conservation body for England. Clearly the *raison d’être* for Regulation.48 (3) consultation with NE is for ‘*the purposes of the assessment*’, and not a determination of whether or not an assessment is required.
- 5.8. Following a conclusion in Stage 1 that the plan alone or in combination with others is likely to result in a significant effect on a Natura 2000 site, either expressly or by implication of the CA not being able to conclude that it won’t, then an appropriate assessment of those effects is required.
- 5.9. An appropriate assessment does not have to be expressed in any particular form. Clearly, the operative word is ‘appropriate’, in that it must be ‘fit-for-purpose’. In the case of a plan being found unsound, it following logically that a conclusion of no adverse affect on integrity can also be reached, as the possibility of an affect occurring to any Natura 2000 site within the UK is zero. It follows that where no adverse affect can occur, it is equally logical that the decision would be unable to act in combination with others, as it patently can have no affect.
- 5.10. Within the UK there is a particular problem relating to the lack of data required to carry out the appropriated assessments. This is compounded by the fact that whilst the UK Nature Conservation Bodies are responsible for the agreement of the conservation objective’s (CO’s) and the production of the favourable condition status (FCS) reports for each of the 1009 Natura 2000 sites, to date this would not appear to have been completed. Thus, it will clearly prove very difficult for any CA to carryout an appropriate assessment of any likely significant effects due to the lack of his information.

6. Precautionary Principle Application

- 6.1. In the absence of data it is not common practice to rely on recourse to the precautionary principle; however such recourse is by no way guaranteed or seen as an automatic response to environmental issues. Hayes A. W. 2004 see it as:

“The precautionary principle in its simplest form is: When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically.”¹⁰

- 6.2. The principle was crystallised as a tool for decision making in the face of risk for current use by the specific reference being made in the Rio Declaration 1992, in principle 15, stating that:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capability, Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

- 6.3. The EU inter alia with other also considers it applicable in managing risks to the environment and humans, in that it states in its communication on the precautionary principle that:

“Applying the precautionary principle is a key tenet of its policy,...to its right to establish the level of protection – particularly of the environment, human, animal and plant health, that it deems appropriate.”(see Appendix 11 – EC Communication on the Precautionary Principle)

- 6.4. The UK Government for its part also accept the applicability of the precautionary principle. It's Interdepartmental Liaison Group on Risk Assessment (ILGRA)¹¹ points out that the precautionary principle should be invoked when:

- *there is good reason to believe that harmful effects may occur to human, animal or plant health or to the environment; and*
- *the level of scientific uncertainty about the consequences or likelihood of the risk is such that the best available scientific advice cannot assess the risk with sufficient confidence to inform decision-making.*

- 6.5. Since the Rio Declaration 1992, a considerable body of literature exists in respect of the pros and cons of the invocation followed by application of the precautionary principle. Arguments appear to be divided between the polarised views of those advocating **strong** compliance verses those advocating **weak** compliance. However, regardless of the position adopted, the fundamental compulsion behind the use of the precautionary principle is to have it applied where there are doubts or uncertainties leading to reasonable grounds to warrant concern that an activity will raise the threat of harm to an environmental feature.

¹⁰ HAYES, A.W., 2004. *The Precautionary Principle*. Boston, Harvard School of Public Health. Available from: http://www.bournemouth.ac.uk/library/using/guide_to_citing_internet_sourc.html
[Accessed 27 October 2006]

¹¹ ILGRA, 2002. *The Precautionary Principle: Policy and Application*.

- 6.6. It is the potential effects on the Natura 2000 site features for implementation of plans such as the DSWP that will result likely significant effects coupled with the duties required by the Habitats Directive and the Regulations that have required increasing recourse to the use of this principle.
- 6.7. However, as stated above, the issue of reasonable grounds must be satisfied on the bases of an objective scientific evaluation prior to invoking the precautionary principle, including an evaluation clearly indicating that potentially significant effects on the environment may be inconsistent with the chosen level of protection.
- 6.8. It follows that the precautionary principle applies *stricto sensu* where scientific information is **insufficient, inconclusive, or uncertain**, related to an activity and its potential to raise the threat of harm to an environmental feature. Equally, it follows that it will not apply where the impacts of a particular activity are **known**, then actions taken can no longer be considered precautionary; they are either preventive or control actions¹².
- 6.9. There no defined rules for when a CA deciding to adopt a plan or undertake a project should invoke the Precautionary Principle. However, as the majority of literature would suggest, it is considered prudent to consider its invocation within a structured approach to the control and management of risk. Whereby, a scientific risk assessment concluded that there are reasonable grounds for concern that the potential for dangerous effects on EU protected receptors and there remains an inconsistency between the value of the receptor and the level of protection chosen.
- 6.10. EC guidance¹³ sets out five general principles on the application of the precautionary principle. These are:
- a) *Proportionality measures must not be disproportionate to the desired level of protection and must not aim at zero risk;*
 - b) *Non-discrimination comparable situations should not be treated differently and, different situations should not be treated in the same way, unless there are objective grounds for doing so;*
 - c) *Consistency Measures should be consistent with the measures already adopted in similar circumstances or using similar approaches. If the absence of certain scientific data makes it impossible to characterise the risk, the measures should be comparable in nature and scope with measures already taken in equivalent areas;*
 - d) *Examination of the benefits and costs of action or lack of action a comparison must be made between the most likely positive or negative consequences of the envisaged action and those of inaction in terms of the overall cost in the long and short term.*
 - e) *Examination of scientific developments the measures should be maintained for as long as the scientific data are inadequate, imprecise or inconclusive and as long as the risk is considered too high to be imposed on society. Scientific research should be carried out with a view to obtaining a more advanced or more complete scientific assessment.*

Clearly, recourse to the precautionary principle is not as straight forward as it might first appear.

¹² The Precautionary Principle in Action – A Handbook First Edition by Tickner, J. & Raffensperger, C.

¹³ EC, 2000. *Communication on the Precautionary Principle*. Brussels: EC, (COM(2000) 1).

7. Other legal duties relevant to consideration of planning applications

- 7.1. The attention of the Inspector is drawn to the duty arising in respect of the SSSIs under section 28G of the Wildlife and Countryside Act 1981, as amended by Countryside and Rights of Way Act 2000 (*see Appendix 12 – Schedule 9 of CRow 2000*), for public bodies to: *“...to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest”*.
- 7.2. Attention is also drawn to the same statutory instrument and the requirements of section 28I. The grant of permission in this case would be against the advice of Natural England. Relevant extracts from the Act as amended are provided as *Appendix 12 – Schedule 9 CRow 2000*.
- 7.3. Section 74 of the CRow 2000 is also relevant; *see Appendix 13 – s.74 CRow 2000*. This provides a statutory framework for implementation of the Biodiversity Convention, and imposes legal duties on Government in this respect (in England and Wales, but not Scotland or Northern Ireland).
- 7.4. The list required by section 74(2) has been published by Defra, and it includes “lowland heathland” (*see Appendix 14 – S74 List*). The List refers to the Biodiversity Strategy for England (“**Working with the grain of nature — A biodiversity strategy for England, Defra October 2002**”) as setting out “the means by which the Government will comply with its duty under Section 74 to take or promote the taking by others of steps to further the conservation of the listed habitats and species, including though the continued implementation of the Action Plans”.
- 7.5. The obligation, under English domestic law, to comply with the section 74(3) duty in respect of the listed habitats, became complete on publication of the List, irrespective of the content of any documents describing how the obligation is intended to be fulfilled. Such documents, and especially the Biodiversity Action Plans for relevant types of habitat, are, however, highly relevant in seeking guidance in particular cases. The relevant Biodiversity Action Plan is *Appendix 15 – HAP Lowland Heathland*.

8. Conclusion

- 8.1. Runnymede Borough Council was requested by Inspector acting in the capacity of CA to be provided with an informative on the application of an applicability of the Article 6 (3) and (4) of the Habitats Directive to the DSWP. Therefore the main focus of this informative relates in essence to the application of the provisions set out in Article 6(2), Article 6(3) and Article 6(4) of the Habitats Directive to the protection of Natura 2000 sites in consideration of the soundness of the DSWP.
- 8.2. The importance the EU places on the protection regime laid down in the Habitats Directive and should be treated with due regard. Its weight is encompassed in the fact that prior to authorising any project that is considered likely to have a significant effect on a Natura 2000 site, a CA may only do so following consideration of an appropriated assessment.
- 8.3. Article 6(3) of the Habitats Directive captures this duty and provides inter alia that a plan or project likely to have a significant effect on any Natura 2000 site cannot be authorised without a prior assessment of its effects (See para 22 Waddenzee).
- 8.4. The HDR having first considered that the DSWP would result in a likely significant effect on the a number of Natura 2000 sites, a CA would be at risk of acting outside the limits of its discretion if it recommended for adoption the DSWP without first carrying out an appropriate assessment in order to ascertain no adverse affect on the integrity of for example the TBHSPA.
- 8.5. The data requirement is high, but assuming that a CA decided to carry out an appropriate assessment of the likely significant effects arising from the adoption of the DSWP by using the analysis, information and data contained within the HDR, a CA might wish to query the data supplied on account of the known lack of information on conservation objectives, baseline condition assessments and what constitutes favourable condition status.
- 8.6. Given this lack of available data, it is possible that a CA could invoke the precautionary principle. If this were to be the case, one would expect the CA to refer to the scientific environmental risk assessment that concluded that the threat level to the Natura 2000 site feature(s) was not sufficiently high to warrant a disproportionate response of subjecting the project to the rigor of a stage two appropriate assessment.
- 8.7. However, if the CA is minded to approve this plan, and assuming that it cannot be ascertained that the plan will not adversely affect the integrity of a Natura 2000 site, then the CA must consider the Article 6(4) requirement of whether there are any alternative solutions to that being proposed. It is difficult to see on what basis this plan could pass the test of 'no alternative'.
- 8.8. Nevertheless, if the CA is minded to approve this proposal and believes there are no alternative solutions for the policies contained within the DSWP other than at the locations as planned this time, not withstanding a negative assessment of the implications for a Natura 2000 site, then the CA may authorise adoption "*for imperative reasons of overriding public interest*"(IROPI). It is

difficult to see on what basis the test of ‘no alternative’, the test of ‘IROPI’ will be passed for this or any plan.

Assuming that the CA is satisfied that there are IROPI, notwithstanding a negative assessment of the implications for a Natura 2000 site, the Secretary of State herself is under a duty to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected as required by Article 6(4) of the Habitats Directive and Regulation 53 of the Habitats Regulations.