

Note on whether it is permissible to conclude that there will be no adverse effects on the integrity of the SAC when it is accepted that the development proposed in the plan will prolong the existing air quality exceedances and delay compliance with Critical Loads

Introduction

1. This note has been prepared on behalf of the Conservators of Epping Forest. It addresses one of the questions raised by the Inspector under atmospheric pollution in her Mater 1, Issue 5 agenda that was published on 8 May 2019 in advance of the week 6 hearings. Specifically, it addresses the following question:
 - Can a conclusion of no adverse effects be reached if reduction in exceedances is delayed by development proposed in the plan?
2. For the reasons set out below, it is considered that *any* delay to compliance with Critical Loads would necessarily give rise to an adverse effect on the integrity of the SAC in the present case, and that it would therefore be unlawful to conclude that the second stage of Article 6(3) is passed in circumstances where the plan would result in a delay in securing the air quality conservation objectives, and therefore restoring favourable conservation status, for the SAC.

Analysis

3. The provisions of Article 6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”) must be construed as a coherent whole in the light of the conservation objectives pursued by the directive (Case C-258/11 *Sweetman v An Board Pleanala* at [32]).
4. Article 2 of the Habitats Directive states that:
 - “1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest...”

5. Article 1 of the Habitats Directive provides the following definitions for the purposes of the directive:

“(a) *conservation* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

[...]

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken to be ‘favourable’ when:

- Its natural range and areas it covers within that range are stable or increasing and
- The specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- The conservation status of its typical species is favourable as defined in (i);

[...]

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;”

6. In *Sweetman* (C-258/11) the court held at [36] that:

“Article 6(2) – 6(4) of the Habitats Directive impose upon Member States a series of specific obligations and procedures designed, as is clear from Article 2(2), to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.”

7. In paragraph 40 of her opinion to the court at, Advocate General Sharpston described this as the “essential objective of the Directive”.

8. The court then went on to consider the scope of the expression “*adversely affect the integrity of the site*”. At [39] it held that:

“...in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.”

9. The Opinion of AG Sharpston, which was endorsed by the court, was as follows:

“AG52 How should the reference in that expression to the “integrity” of the site be construed?

AG53 Here, again, it is worth pausing briefly to note the differing language versions of art.6(3) . The English-language version uses an abstract term (integrity)—an approach followed, for example in the French (*intégrité*) and the Italian (*integrità*). Some other language versions are more concrete. Thus, the German text refers to the site “als solches” (as such). The Dutch version speaks of the “natuurlijke kenmerken” (natural characteristics) of the site.

AG54 Notwithstanding those linguistic differences, it seems to me that the same point is in issue. It is the essential unity of the site that is relevant. To put it another way, the notion of “integrity” must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

AG55 The integrity that is to be preserved must be that “of the site”. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat.

AG56 It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is “why was *this particular site* designated and what are its conservation objectives?”. In the present case, the designation was made, at least in part, because of the presence of limestone pavement on the site—a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which it is therefore essential to conserve.

AG57 Lastly, the effect on the integrity of the site must be “adverse”. In any given case, the second-stage appropriate assessment under art.6(3) may determine that the effect of the plan or project on the site will be neutral, or even beneficial. But if the effect is negative, it cannot proceed—by virtue of that provision, at least.”

10. In order to see whether there will be an adverse effect on the integrity of the SAC it is therefore necessary to consider the constituent characteristics of the Site and what needs to be done to maintain or restore its favourable conservation status (“FCS”) having regard to the conservation objectives of the Site.

11. As Natural England point out, there is a strong argument for concluding that Epping Forest SAC is currently in Unfavourable Conservation Status due to air pollution impacts. Indeed, that is consistent with the fact that there are currently exceedances of the annual mean Critical Levels for ammonia (NH₃) and nitrogen oxide (NO_x) that have been set for all three qualifying habitats. In order to restore the site to FCS, it is necessary to reduce these pollutants so that they are at or below site-relevant Critical Loads that have been identified for each annex 1 habitat.¹ Authorising a plan, which it is recognised will delay these existing exceedances is completely inconsistent with the obligation under the Directive to restore the site to FCS. As Natural England has indicated,² the delay caused by the plan will be contrary to a large number of the Site’s conservation objectives. In light of the above, it is impossible to rationally conclude beyond all reasonable scientific doubt that the delay in air quality improvements caused by the plan will not have an adverse effect on the integrity of the Site. Indeed, the available evidence suggests quite the opposite.

12. This analysis is further supported by CJEU’s decision in the ‘Dutch Nitrogen Cases’ (C-293/17 and C-294/17). In that case, the court observed at [103] that:

“In circumstances...where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.”

13. This issue was considered in further detail in AG Kokott’s Opinion to the Court at [57] – [66]. The following passages are particularly relevant:

“57. Where a plan or project is likely to undermine a protected site’s conservation objectives, it must be considered likely to have a significant effect on that site. In order for the integrity of a site as a natural habitat not to

¹ As is set out in Natural England’s European Site Conservation Objectives: Supplementary advice on conserving and restoring site features.

² See Annex 1 to Natural England’s hearing statement

be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to remain at a favourable conservation status. This entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive. The same must apply correspondingly to the protected species.

58. Where Article 6(2) and (3) of the Habitats Directive is applied to nitrogen deposition, it cannot therefore be the aim to maintain or fall below the present load level. Rather, regard must be had to the conservation objectives of the protected site, that is, at least to the conservation of the habitat types and species protected in the site in their status at the time when Article 6(2) and (3) became applicable.

59. If those protected assets are not in a favourable conservation status, the conservation obligation applies at least to the available potential for establishing such conservation status in future as, according to the definition of 'favourable conservation status' in Article 1(e) and (i) of the Habitats Directive, only such conservation status can ensure the long-term maintenance of the habitat types and species in question. A load level which prevents a favourable conservation status from being achieved in the long term creates the risk that that presence will be lost. It would therefore be likely adversely to affect the integrity of the site.

60. The fact presented by the Raad van State (Council of State) that nitrogen deposition is declining overall is thus to be welcomed but is inevitably insufficient in itself. Rather, Article 6(2) and (3) of the Habitats Directive requires that the load level be reduced such that a favourable conservation status can be achieved in the long term.

61. For that purpose, it is necessary, at least for each habitat type and possibly also for specific habitats that are subject to particular conditions, to determine a limit value for the permitted total load.

62. In this regard, it seems difficult, if not impossible, to accept values that are higher than the critical loads. These are intended to define scientifically-based load limits for vegetation types or other protected assets, compliance with which means that pollutant deposition is not expected to have significant harmful effects even in the long term. Scientists have identified such critical loads for nitrogen for the protected habitat types under the Habitats Directive in the Netherlands.

63. Furthermore, it would also appear to be necessary to consider to what extent the individual protected habitats have been exposed to an overload of nitrogen deposition for a considerable time. On the one hand, it would have to be presumed that the status of the habitats has already changed adversely as a result of such deposition, in particular as regards the plant species present. On the other hand, there is probably an initial overload of nitrogen which must be removed or otherwise eliminated before the habitats can be developed in the

light of the conservation objectives for the site. It might therefore be necessary, until the removal of existing nitrogen reserves, to permit even less additional nitrogen deposition than envisaged in the critical loads.”

14. Finally, it should be noted that the need for additional development or the feasibility of complying with the identified Critical Loads / absence of alternative solutions is not relevant to considering whether or not the plan would give rise to an adverse effect on the integrity of the Site under Article 6(3). Instead, these matters must be considered under the specific, identified derogation in Article 6(4). In other words, the fact that it may be difficult to plan for additional development without causing a delay in compliance with Critical Loads is not relevant to the question of whether that delay would have an adverse effect on the integrity of the Site.

Conclusion

15. Having regard to Epping Forest SAC’s unfavourable conservation status and its conservation objectives, which require restoration of atmospheric pollutant levels below Critical Loads, it is not possible to be certain beyond on all reasonable scientific doubt that adopting a plan, which proposes further development that will delay compliance with those Critical Loads, will not have an adverse effect on the integrity of the SAC.

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20 May 2019