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How the scale of effects on internationally designated nature conservation sites in Britain has been considered in decision making: A review of authoritative decisions

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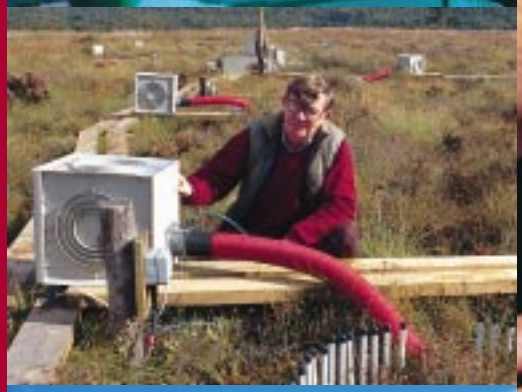

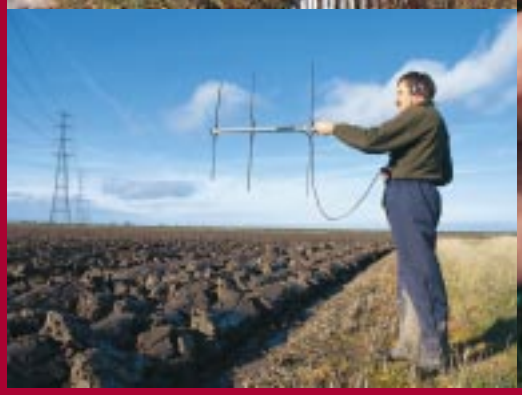

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How the scale of effects on internationally designated nature conservation sites in Britain has been considered in decision making:

A review of authoritative decisions

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Summary

Introduction

The implementation of a wide range of plans or projects can affect the wildlife or habitats for which sites have been designated for their nature conservation importance. This report concentrates on internationally designated sites. Because of the level of protection afforded by law and policy to these sites, especially by the *Conservation (Natural Habitats &c) Regulations* 1994 (here referred to as the Habitats Regulations) it is uncommon for them to be threatened by a project that would have major adverse effects on them. However, small scale effects are more common.

A problem that is frequently encountered is how to judge whether these small scale effects on a site may adversely affect the site's integrity, indeed whether they are even significant in light of the conservation objectives for the site. The issue also arises in the context of the review of outstanding consents, which is required in respect of internationally designated sites under the Habitats Regulations. Decisions need to be made as to the significance of the effects of many ongoing projects and incomplete developments, which alone may have very small effects but which, in combination with other projects could have significant effects.

Whilst there is some guidance available, there has been no definitive explanation as to the scale of effect that should be regarded as significant, or how large scale an effect needs to be before it may be regarded as potentially adversely affecting the integrity of a site. In order to assist in future case work, English Nature commissioned this research report to conduct a review of previous legal judgments and Inspectors' decisions and reports in cases where the spatial scale of impacts was material to the conclusions reached.

Published guidance

The research showed that published guidance explains the general approach to considering whether an effect is likely to be significant, but most does not attempt a quantification of what is a significant effect; none suggest what possible thresholds there might be. Two of the documents make suggestions as to what could be considered to be a significant effect.

The case studies

After a preliminary analysis of many cases, the study looked at thirteen cases in detail, these are summarised in Table 1 at the end of this Summary. There are six examples of small scale effects of approx 1.0% or less of land take or habitat loss:

- London Gateway Port, Essex 0.1%
- Quay 2005 Hull 0.01% (in fact 0.03 when calculated correctly)
- Gilwern to Hafodyrynys Pipeline South Wales 0.15%
- Dibden Bay Terminal Southampton 0.76%
- The Outer Harbour Immingham 0.145%
- Santoña Marshes, Spain 0.5%

All these have the authority of being Secretary of State decisions except Santoña Marshes which is a ECJ judgment. All concluded a likely significant effect and all determined or

implied an adverse effect on integrity. There is a need to take into account a number of other factors in some cases, but there are three cases that appear to be wholly or largely related to landtake effects / habitat loss. They are Quay 2005, Gilwern and Immingham. Two further cases are important because they too are made by Secretaries of State and both involve landtake as the sole or primary issue, they are Barksore Marshes (1.79%) and Bathside Bay (1.87%).

Analysis of consistency of decisions with the guidance

The key decisions were all taken in accordance with the guidance issued by the EC and the UK Government. There is no inconsistency with English Nature guidance. Where necessary, the decision makers correctly applied the precautionary principle embedded in the law and guidance.

Overall conclusions

The overall conclusion is that each case should continue to be determined on its merits, as it is rare for the Secretary of State or an Inspector to have to determine a simple case of a single, permanent land take from a site. However, it is equally clear that Secretaries of State have held that very small scale losses or changes in habitat are likely to be a significant effect. Indeed they have concluded that very small scale losses, substantially less than 1%, would be an adverse effect on integrity; or at least they could not ascertain there would be no adverse effect on integrity.

Whilst it is concluded that very small scale losses can be decisive in important decisions about project proposals, there must be a point at which an effect may be considered *de minimis*. The term *de minimis* is widely used in a legal sense and is defined by the LAW.COM Dictionary as "*Latin for 'of minimum importance' or 'trifling.' Essentially it refers to something or a difference that it so little, small, miniscule or tiny that the law does not refer to it and will not consider it*."

The Gilwern to Hafodyrynys Pipeline is the one case where the longevity of the effect led to the conclusion that a particular small scale effect was *de minimis.* The Secretary of State for Trade and Industry based his conclusions on the small scale of the affected area (0.09%), the short term nature of the effect **and** the degree of certainty that the affected vegetation could be restored to its original quality. Thus, it was concluded that one effect of the pipeline proposal on the Usk Bat Sites cSAC was *de minimis* and the other (long term effect on 0.15% of the site) would be likely to have a significant effect and, indeed, to have an adverse effect on the integrity of the site.

English Nature's European Sites Guidance advises at paragraph 4.3 that "*the duration of any impact(s) and the potential for recovery/reversibility are important factors to consider when determining whether it is possible to demonstrate no adverse effect on integrity… a conclusion of no adverse effect may be able to be reached in the case of a small-scale effect from which the site/feature can quickly recover… the longer the recovery time the more difficult it will be to demonstrate no adverse effect on integrity*."

In considering the relevance of the scale of any habitat loss in determining whether there is an adverse effect on site integrity, it should be noted that of the 13 cases included in this research report, only five cases actually quoted the area of habitat lost as a percentage. The

one case that referred to a percentage of habitat lost and concluded no adverse effect on site integrity was Mostyn Docks, which is a decision that looks increasingly doubtful in its application of the Habitats Regulations. The other four cases where percentages were calculated within the Inspector's report and where adverse effect on the integrity of the site was concluded all cited a percentage loss of less than 1.0%. Of the five cases that did include a percentage calculation, three of them were incorrect.

Recommended guidelines

Unless a particular loss of habitat could be regarded as so trivial as to be *de minimis* (see definitions in section 4 above), it is capable of being a significant effect and may also be an adverse effect on the integrity of the site. Bearing in mind the precautionary principle embedded in the legislation, applied consistently by Secretaries of State and endorsed in court judgments, habitat loss of very small scale, including losses in the order of 0.1% or less of a site, can clearly be regarded as an adverse effect on the integrity of a designated site. By definition, the larger the SPA or SAC or Ramsar site, the larger an area would be that is represented by 0.1%, and thus the more important it may be in supporting individual plants or animals, or ecosystems, for which the site is classified, designated or listed. The value of each and every part of a large site is further emphasized when it is considered that all parts of large areas such as estuaries are potentially important because they are very dynamic and different parts of the system are used at differing times for different reasons, by the birds for which they were classified; for habitats that are rare, such as certain types of heathlands, peatlands or orchid-rich calcareous grasslands, every part of a large site is an important part of a globally scarce resource and part of a functional ecosystem.

Equally, whilst a 0.1% loss from a smaller site may represent a small area in spatial terms, it can be important to the ecological functioning of the site which, being a smaller unit, is likely to depend on much smaller ecosystems or communities, in spatial terms. The argument that a small loss does not matter is one that can be repeated until substantial losses have been incurred. This insidious reduction of habitat is as potentially damaging as a single larger loss. Such arguments are supported by the decisions examined in this research.

The cases identified and examined concentrated on single projects (albeit some had many component parts). Only Mawcarse (3.8) and Tideways (3.12) explicitly referred to combined effects with other projects. However, it is logical to conclude that the decision makers would come to the same conclusion about the significance of an effect irrespective of whether the effect was caused by one, ten or a hundred projects. In other words, where small scale effects are caused by a combination of even smaller-scale effects, the overall effect is still significant and can result in an adverse effect on integrity. Thus, even projects that may appear, *prima facie*, to be *de minimis*, may not be when their effects are combined with other, similarly very small scale effects.

The aim should be to avoid any significant disturbance or deterioration or habitat loss, other than trivial or inconsequential loss, from international sites, if projects are to avoid being subject to 'appropriate assessment' and potentially to the tests of regulation 49 of the Habitats Regulations 1994 (Article 6(4) of the Habitats Directive).

Summary Table of Authoritative Decisions Reviewed

Cases granted after it was concluded that there would not be an adverse effect on site integrity (Paragraphs where the case is referred to in the report are indicated in brackets)			**Cases refused after it was concluded that there would be an adverse effect on site integrity**			**Cases where it was concluded that there would be an adverse effect on integrity but permissions were granted because of imperative reasons of overriding public interest**		
Case	**% site affected**	**Comments**	**Case**	**% site affected**	**Comments**	**Case**	**% site affected**	**Comments**
White Horse Millenium Landmark (3.13)	0.017-0.056 (actually 0.0076 – 0.0255)	Some additional construction disturbance. The Inspector relied on unconfirmed management measures as mitigation. See comments made by the Inspector in the Dibden Bay inquiry report regarding this case.	**Tideways Jetty (3.12)**	0.0000774	Disturbance from boats and jet-skis may have been the main concern.	**London Gateway (3.7)**	0.1	In addition to the direct habitat loss, 1.24% of site would be likely to functionally change as a result of the development. Compensatory measures must be provided because it was concluded that there would be an adverse effect on integrity.
Mostyn Docks (3.9)	0.07 (actually 0.04)	Loss not considered to be significant, but the SPA boundary is now under review as a result of habitat loss. See also comments made by the Inspector in the Dibden Bay inquiry report regarding this case.	**Dibden Bay (3.3)**	0.76	Habitat loss was compounded by the additional loss of 86 ha supporting habitat and other off site effects.	**Bathside Bay Container Terminal (3.2)**	1.87	Compensatory measures must be provided because it was concluded that there would be an adverse effect on integrity.
Mawcarse Loch (3.8)	Not calculated – pollution effect	The pollution effect was so reduced by the mitigation proposed that it could be concluded that there was unlikely to be any significant effect.	**Santoña Marshes, Spain (3.11)**	0.5	A multitude of hydrological changes, disturbance and habitat alteration added to the effects of direct habitat loss.	**Port of Hull Quay 2005 (3.10)**	0.01 (actually 0.03)	Compensatory measures must be provided because it was concluded that there would be an adverse effect on integrity.
			Barksore Marshes (3.1)	1.79	Habitat loss was clearly determined to have an adverse effect on the integrity of the site.	**Immingham Outer Harbour (3.5)**	0.145	Compensatory measures must be provided because it was concluded that there would be an adverse effect on integrity.
			Linshaws Quarry (3.6)	0.0000153 (actually 0.00153)	The Secretary of State declined to call this case in, but the local authority still concluded that the development was likely to have a significant effect on the site.	**Gilwern to Hafodyrynys Pipeline (3.4)**	0.15 AEOI 0.09 mitigated	This case provides an example of what was considered to be *de minimis* (0.09% of the site that could be restored in the short term) and what was not (0.15% of the site that could be restored only in the long term).

Contents

1 Introduction

1.1 Context

The implementation of a wide range of plans or projects can affect the wildlife or habitats for which sites have been designated for their nature conservation importance. They could be sites designated internationally, nationally or more locally. This report concentrates on internationally designated sites. These are Special Protection Areas (SPAs) classified under the EC Birds Directive[1], Special Areas of Conservation (SACs) designated under the EC Habitats Directive[2] and Ramsar Sites listed under the Ramsar Convention[3]. Because of the level of protection afforded by law and policy to these internationally designated sites[4], especially by the *Conservation (Natural Habitats &c) Regulations* 1994 (here referred to as the Habitats Regulations) it is uncommon for them to be threatened by a project that would have major adverse effects on them. Most project proponents will do all that is possible to avoid adversely affecting such sites.

However, small scale effects are more common, either because the project proponents of a plan or project, which in some cases can be a competent authority, considers them to be so small as to be outweighed by the benefits of the development, or because the effects were not forecast, or because individually the effects are considered inconsequential, even if when combined with other, similar, effects, they would be significant.

A problem that is frequently encountered is how to judge whether these small scale effects on a site may adversely affect the site's integrity, indeed whether they are even significant in light of the conservation objectives for the site. These expressions all carry particular consequences in terms of the decision-making procedures prescribed by the Habitats Regulations (see section 1.4 below). Many factors need to be considered and different assessors can reach differing conclusions about the same proposal. This makes the task of decision-makers, who must apply the law and policy when deciding whether to allow a project to be carried out, very difficult.

The issue also arises in the context of the review of outstanding consents, which is required in respect of internationally designated sites under the Habitats Regulations. Decisions need to be made as to the significance of effects of ongoing projects and incomplete developments, which could potentially have important implications for the implementation of projects.

Whilst there is some guidance available, as summarised below in section 2, there has been no definitive explanation as to the scale of effect that should be regarded as significant, or how large scale an effect needs to be before it may be regarded as potentially adversely affecting the integrity of a site. The courts have rarely addressed the issue, because they tend to

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[1] Council Directive of 2/4/79 on the conservation of wild birds (79/409/EEC)

[2] Council Directive of 21/5/92 on the conservation of natural habitats and of wild fauna and flora (92/43/EEC)

[3] Convention on wetlands if international importance especially as waterfowl habitat, Ramsar, Iran 2/2/71 as amended by the Paris protocol 3/12/92 and the Regina amendments adopted at the extraordinary conference of contracting parties at Regina, Saskatchewan, Canada, between 28/5 and 3/6/87.

[4] European sites (SPAs and SACs) are protected by the Conservation (Natural Habitats &c) Regulations 1994, as amended, which transpose the requirements of the EC Birds and Habitats Directive into domestic law. As a matter of Government policy, expressed, for example, in *Planning Policy Statement 9 Biodiversity and Geological Conservation*, (Office of the Deputy Prime Minister, 2005), Ramsar sites are to be treated as if they are fully designated European sites for the purposes of considering development proposals that may affect them.

consider the lawfulness of decisions from a procedural point of view. They are generally reluctant to substitute their judgment for that of the decision maker in terms of the science and merits of a decision, unless it is clearly irrational or perverse.

1.2 The brief

In order to assist in future case work, English Nature commissioned this research report with the following objectives. To conduct a review of previous legal judgments and Inspectors' decisions and reports in cases where the spatial scale of impacts was material to the conclusions reached. In undertaking the research we have done so whether or not the issue of scale was determinative in the decision. The cases reviewed have been limited to legal judgments, decisions by Secretaries of State (or the Scottish Ministers or Welsh Assembly Government) and Inspector decisions and reports, because these are considered to be the most authoritative. That is, they tend to be the cases which are cited to other decision-makers as precedents, or authoritative decisions that should be regarded as a guide as to how other decisions should be made. The Brief required a general review of the EU and government guidance to be included. It also requested, as far as reasonably possible, some rules of thumb that could be used by practitioners. The Brief also required an analysis to see whether there is evidence of a difference in the range of areas affected between those cases where the plan or project was permitted, compared to those where it was not.

1.3 Research method

The researchers compiled a list of potentially relevant cases drawn from their own library of decisions, their empirical knowledge of case work and suggestions from officers in the Countryside Council for Wales (CCW), English Nature and Scottish Natural Heritage (SNH).

Each decision was examined and a summary prepared to standardise the information collated about each case. This included a description of the development and its location; the date of decision and decision maker; the area of the designated site, its habitats and sensitivities to the proposed change; the loss of habitat from the site and other relevant effects on the designated interest features; the decision and reasoning for it; whether there was considered to be a likely significant effect on the site, an adverse effect on the integrity of the site and, where relevant, whether there were considered to be alternative solutions or imperative reasons of overriding public interest; and, finally, whether any compensatory measures were proposed. Quotations were drawn from the decision letters and Inspectors' reports and points for discussion noted.

After consideration of each case a working table summarising the findings was generated and discussed before this report was drafted. Table 1 is a modified version of that Table omitting some cases that were researched but not reported, as they did not contribute to the purpose of the study. It should be noted that the report only includes the cases where the loss of small areas of habitat in the designated sites were considered to be relevant to the decision. Cases involving only larger scale losses or indirect effects such as disturbance have not been included.

1.4 Decision-making procedure of the Habitats Regulations

Small scale effects are relevant in the assessment of plans and projects that may have an effect on proposed or designated European sites or Ramsar sites at three main stages: firstly, when considering whether there is likely to be a significant effect on the site; secondly, when undertaking the 'appropriate assessment'; and thirdly, when deciding whether it can be ascertained that there would not be an adverse effect on site integrity. The procedures under Regulation 48 of the Habitats Regulations 1994 are briefly outlined below to provide a context for the analysis of cases that follows. Further guidance on the procedures is found in the Government Circular: *Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System*. ODPM Circular 06/2005.

The approach equally applies to any plan or project for which a competent authority has given any consent, permission or authorisation prior to the classification of a European site (or prior to the commencement of the Habitats Regulations), if such a consent would be subject to Regulation 48 procedures if it was to be considered now. This is often referred to as the 'review of consents' process. Regulation 50 of the Habitats Regulations requires that competent authorities review existing decisions and affirm, modify or revoke any consent to the extent necessary to avoid any adverse effect on the integrity of a European site.

The approach to be taken in considering a development proposal that might affect a proposed or classified European site or a listed Ramsar site is set out below. This process is required by the Habitats Regulations and is summarised in the flow chart in Figure 1 of the Circular.

The decision-taker must first establish whether the proposed development is directly connected with or necessary to site management for nature conservation[5] of a proposed or classified European site or a listed Ramsar site. There will be few cases where a development is directly connected with, or the whole of the development is necessary to, site management and, therefore, not further subject to the requirements of Regulation 48.

1.4.1 Likely significant effect

If it is not directly connected with or necessary to site management the decision-taker must determine whether the proposal is likely to have a significant effect[6] on the site. The decision on whether an appropriate assessment is necessary should be made on a precautionary basis. This is in line with the European Court of Justice in Case C-127/02 (the Waddenzee judgment)[7], which states that "*any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects*." Taking account of advice from the statutory nature conservation body[8], they should consider whether the effect of the proposal on the site, either individually or in combination with other proposals[9], is likely to be significant in terms of the ecological objectives for which the site was designated, classified or listed.

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[5] *The Conservation (Natural Habitats &c) Regulations 1994* Regulation 48(1)(b)
[6] *ibid* Regulation 48(1)(a)
[7] Landelijke Verenigning tot Behoud Van de Waddenzee, Nederlandse v Vereniging tot Bescherming von Vogels v Straatssecretaris Van Landbouw, Natuurbeheer en Visserij (C-127/02: [2005] Env. LR14 [ECJ])
[8] The statutory nature conservation body in England is English Nature (Natural England from October 2006)
[9] *The Conservation (Natural Habitats &c) Regulations 1994* Regulation 48(1)(a)

The decision-taker should require the proposer to provide further information reasonably necessary to assess the likelihood and significance of potential effects, and therefore whether an 'appropriate assessment' is required[10]. It is important that the likelihood of a significant effect is assessed in respect of each interest feature, for which the site is internationally classified, and for each designation where a site is designated, classified or listed under more than one international obligation.

If a plan or project would not be likely to have a significant effect on the site alone, it should nevertheless be considered in combination with other plans and projects to establish whether there would be likely to be a significant effect arising from their combined impacts.

1.4.2 The appropriate assessment

If the decision-taker concludes that a proposed development not directly connected with site management is likely to significantly affect a proposed or classified European site or a listed Ramsar site, they must make an appropriate assessment of the implications of the proposal for the site in view of the site's conservation objectives[11]. These relate to each of the interest features for which the site was designated, classified or listed and will be provided in more detail by the statutory nature conservation body. The scope and content of an appropriate assessment will depend on the nature, location, duration and scale of the proposed project and the interest features of the relevant site. It is important that an appropriate assessment is made in respect of each interest feature and for each designation where a site is designated, classified or listed under more than one international obligation. The decision-taker can require the applicant to provide such information as may reasonably be required to undertake the assessment[12].

In the Waddenzee judgement, the European Court of Justice ruled that an appropriate assessment implies that **all** the aspects of a plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field.

As part of the assessment process, the decision-taker must consult the statutory nature conservation body[13]. The decision-taker must have regard to any representations made by it. They may also consult the general public[14].

1.4.3 Ascertaining the effect on site integrity

In the light of the conclusions of the assessment about the project's effects in view of the site's conservation objectives, the decision-taker must determine whether it can ascertain that the proposal will not adversely affect the integrity of the site(s)[15]. This test incorporates the precautionary principle. It is not for the decision-taker to show that the proposal would harm the site, in order to refuse the proposal. It is for the decision-taker to consider the likely and reasonably foreseeable effects and to ascertain that the proposal will not have an adverse

[10] *ibid* Regulation 48(2)
[11] *The Conservation (Natural Habitats &c) Regulations 1994* Regulation 48(1)
[12] *ibid.* Regulation 48(2)
[13] *ibid.* Regulation 48(3)
[14] *ibid.* Regulation 48(4)
[15] *ibid* Regulation 48(5)

effect on the integrity of the site before it may grant permission. If the proposal would adversely affect integrity, **or the effects on integrity are uncertain but could be significant**[16], the decision-taker should not grant permission, subject to the provisions of regulations 49 and 53, which relate to alternative solutions, imperative reasons of overriding public interest and compensatory measures. These are not discussed further in this report because they are not relevant to the project.

In the Waddenzee judgement, the European Court of Justice ruled that a plan or project may be authorised only if a competent authority has made **certain** that the plan or project will not adversely affect the integrity of the site. "*That is the case where **no reasonable scientific doubt** remains as to the absence of such effects*." Competent authorities must be "**convinced**" that there will not be an adverse effect and where doubt remains as to the absence of adverse effects, the plan or project must not be authorised, subject to the procedure outlined in Article 6(4) of the EC Habitats Directive regarding imperative reasons of overriding public interest[17].

The integrity of a site is the coherence of its ecological structure and function, across its whole area, which enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified, designated or listed[18].

In determining the effect on site integrity, the advice of the statutory nature conservation body and the citation issued by it saying why the site was designated, classified or listed will need to be carefully considered.

1.4.4 Considering conditions or other restrictions

As part of the judgement on integrity, the decision-taker must consider the way in which it is proposed to carry out the project and whether conditions or other restrictions would enable it to be ascertained that site integrity will not be adversely affected[19]. The decision-taker should consider whether a consent could be issued in accordance with regulation 48 subject to conditions. In practice, this means that it should identify the potential risks so far as they may be reasonably foreseeable in light of such information as can reasonably be obtained, and put in place a legally enforceable framework with a view to preventing the risks from materialising[20]. The principle established by the European Court of Justice 'Waddensee judgment,'[21] that a competent authority must be "convinced" that there will not be adverse effects, applies equally to situations where the conclusion relies on conditions or restrictions identified in accordance with Regulation 48(6) of the Habitats Regulations.

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[16] See **ADT Auctions Ltd v Secretary of State Environment, Transport and the Regions and Hart District Council** (2000) JPL 1155 at p. 1171 where it was held that, it was implicit in the wording of regulation 48(5) that the adverse effect on the integrity of the site had to be a significant adverse effect.

[17] *The Conservation (Natural Habitats &c) Regulations 1994* Regulation 49 and paragraphs 25-28.

[18] Government Circular: *Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System.* ODPM Circular 06/2005

[19] *The Conservation (Natural Habitats &c) Regulations 1994* Regulation 48(6)

[20] See **WWF-UK Ltd and RSPB – v – Secretary of State for Scotland and others** [1999]1 C.M.L.R. 1021 [1999] Env. L.R. 632 opinion of Lord Nimmo-Smith

[21] Landelijke Verenigning tot Behoud Van de Waddenzee, Nederlandse v Vereniging tot Bescherming von Vogels v Straatssecretaris Van Landbouw, Natuurbeheer en Visserij (C-127/02: [2005] Env. LR14 [ECJ])

2 Guidance for decision-makers on small scale effects

2.1 The principal sources of guidance for decision-makers

The main sources of guidance in England and Wales currently available for use by decision makers determining whether consent should be given for plans or projects, with regard to international sites are as follows:

1. European Community, 2000, *Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC* (abbreviated here to MN2000), section 4
2. European Community, 2001, *Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: methodological guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive 92/43/EEC* (abbreviated here to EC2001), sections 3.1 and 3.2
3. Office of the Deputy Prime Minister and the Department for Environment and Rural Affairs, 2005, Circular 06/2005 and 02/2005 respectively *Biodiversity and Geological Conservation – Statutory Obligations and Their Impact Within The Planning System* (referred to above and below as 'the Circular'), Part 1 section B
4. Welsh Assembly Government, 2006, *Consultation on Draft Technical Advice Note 5 'Nature Conservation and Planning'* (abbreviated here to Draft TAN5) Annex 3
5. English Nature and others, *Habitats Regulations Guidance Note 1. The Appropriate Assessment (Regulation 48), the Conservation (Natural Habitats &c) Regulations 1994.* Peterborough: English Nature, (abbreviated here to HRGN1)
6. English Nature and others, *Habitats Regulations Guidance Note 3. The Determination of Likely Significant Effect under the Conservation (Natural Habitats &c) Regulations 1994*. Peterborough: English Nature, (abbreviated here to HRGN3)
7. Chapman, C. and Philp, C. 2004. *European Sites Guidance – Internal Guidance to Decisions on 'Site Integrity': a Framework for Provision of Advice to Competent Authorities*.' Peterborough: English Nature.

2.2 Summary of guidance on determining likely significant effect and adverse impact on site integrity within the available guidance documents

The guidance explains the general approach to considering whether an effect is likely to be significant, but most does not attempt a quantification of what is a significant effect; none suggest what possible thresholds there might be. Two of the documents listed do, however, make suggestions as to what could be considered to be a significant effect. MN2000 considers the different habitat types to which the significant effect test may be applied, suggesting the scale of the interest feature, be it landscape wide or relating to specific botanical rarities, could guide the interpretation of significant effect. English Nature's HRGN3 infers that any direct habitat loss should be considered as a likely significant effect, but that some exceptions may occur. Again the habitat type is suggested to be the governing factor. It should be noted that although HRGN3 is published by English Nature, an endnote indicates that "*this guidance note was developed by the country agencies* [including CCW and SNH] *for the Government's inter-departmental steering group on the Habitats Directive and approved by it*."

The specific guidance offered, and pertinent quotes from each of the documents are summarised below.

2.2.1 European Community, 2000, *Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC*

Section 4 of this document does provide some guidance as to what is a "significant" effect. The Habitats Regulations do not offer any quantification of what is significant, but the MN2000 document suggests that the term needs to be used objectively and consistently, and goes on to clarify that an objective approach must be taken whilst also having regard to the specific features of interest and conservation objectives of the site, which will inevitably lead to conclusions whereby an effect may be significant on one site but may not be in relation to a different site. The key quotation from this text, which suggests what may or may not constitute a significant effect is at paragraph 4.4.1. The inference is that the scale of the habitat may influence whether or not an effect is considered significant.

"*For example, a loss of a hundred square metres of habitat may be significant in relation to a small rare orchid site, while a similar loss in a large steppic site may be insignificant.*"

The guidance goes on to explain that there may be a range of influencing factors in the determination of significant effect, and that these include the extent, magnitude, complexity, probability, duration, frequency and reversibility of the impact, and the impact can be within or outside the European site boundary.

The guidance advises on the scope of an appropriate assessment, and an important point to note is that the guidance states at paragraph 4.5.2 that "*mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities*."

At paragraph 4.6.3 the MN2000 guidance explains that 'integrity of the site' should be focussed on the specific site and the interest feature present, and should not consider any wider context such as the national or European status of the interest feature. It further explains that 'integrity' "*can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation… A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required*."

2.2.2 European Community, 2001, *Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: methodological guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive 92/43/EEC*

Guidance on what could constitute a significant effect is not specifically stated within this document, but advice is given as to what information is necessary in order to make a prediction on the magnitude of any effects. The list within Appendix 1, section 3.2 includes:

- A good understanding of the proposed development
- Detailed predictions of physical and chemical changes as a result of the proposal

- What decision variables are possible
- Knowledge of the site habitats
- Knowledge of outcomes of similar projects
- Knowledge of any potential cumulative effects when other plans or projects are taken into account.

With reference to the assessment of significance, it is stated in Appendix 1, Section 4 that "*In most cases this is essentially a judgement, built up from a number of factors, but it may also be made more objective with the use of criteria and standards*." Factors upon which the assessment of significance should be based are listed, including:

- The character and perceived value of the environment
- Magnitude, duration and extent
- Environmental resilience
- Accuracy of predictions
- Existing policies, programmes and plans
- Current environmental standards that can assess the impacts quantitatively
- The degree of public interest
- The scope for suitable mitigation, sustainability and reversibility.

Little specific reference is made to what constitutes site integrity, but mention is made at section 3.2.6 in Figure. 4, which is an illustration of an example of an appropriate assessment, where it is stated the integrity of the site is "*determined by structure and function and conservation objectives*."

2.2.3 Office of the Deputy Prime Minister and the Department for Environment and Rural Affairs, 2005, Circular 06/2005 and 02/2005 respectively *Biodiversity and Geological Conservation – Statutory Obligations and Their Impact Within The Planning System*

The Circular advises that significant effect should be assessed in terms of the conservation objectives for which the site was classified, and places emphasis on the precautionary principle, stating at Paragraph 13 that "*An appropriate assessment is required where there is a probability or risk that the plan or project will have significant effects*."

The Circular does not provide any further indication of what could be an appropriate assessment, but does explain that the decision maker must decide whether it can be ascertained that the plan or project will not adversely affect site integrity, and a useful description of what constitutes site integrity is provided at Paragraph 20. "*The integrity of a site is 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 the species for which it is classified…Competent national authorities must be 'convinced' that there will not be an adverse effect and where doubt remains as to the absence of adverse effects, the plan or project must not be authorised*."

2.2.4 Welsh Assembly Government, 2006, *Consultation on Draft Technical Advice Note 5 'Nature Conservation and Planning'*

The draft TAN 5 provides wording that is very similar to the Circular, as discussed above, and does not add anything further to the consideration of what constitutes a likely significant effect.

2.2.5 English Nature and others, *Habitats Regulations Guidance Note 1. The Appropriate Assessment (Regulation 48), the Conservation (Natural Habitats &c) Regulations 1994.* Peterborough: English Nature.

This guidance offers English Nature staff more detailed advice as to who undertakes appropriate assessments, when and what should be included. It explains that an appropriate assessment must be undertaken by the competent authority when a plan or project is likely to have a significant effect on a European site, either alone or in combination. The guidance given in terms of likely significant effect is that *"the plan or project does not have to be located within the designated area*" and that "*effects may be direct or indirect, temporary or permanent, beneficial or harmful to the site, or a combination of these*."

With regard to adverse effect on integrity, the guidance explains that "*An adverse effect on integrity is likely to be one which prevents the site from making the same contribution to favourable conservation status for the relevant feature as it did at the time of its designation*."

2.2.6 English Nature and others, *Habitats Regulations Guidance Note 3. The Determination of Likely Significant Effect under the Conservation (Natural Habitats &c) Regulations 1994*

This provides more guidance on the test of significance than the other documents reviewed above. It explains that "*The 'significance' test acts as a course 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*." and that a judgement of likely significant effect "*must be based on sound judgement and bear scientific or expert scrutiny.*"

The guidance clearly states that any effect on the conservation objectives of a site that is not trivial or inconsequential must be considered to be a likely significant effect, which provides a greater certainty to English Nature staff providing advice to competent authorities. "*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*."

Some quantification is suggested by the guidance, and as with the MN2000 document it is the habitat type that is suggested as a determining factor in assessing the likely significant effect of any plan or project. The guidance infers a presumption that all habitat loss is a likely significant effect, but that in some exceptions the loss of a few metres of habitat could be considered to not amount to a likely significant effect. "*Permanent reductions in habitat area or species populations are likely to be significant unless they are very small scale. In the case of certain sites a loss of, say, a few square metres of the site area* ***may*** *not be considered significant (for example, there may be circumstances when this might apply in the*

case of estuarine SPAs which are selected for their bird interest), in others, such as limestone pavement, ***any*** *further loss of the area of qualifying interest may be unacceptable*."

2.2.7 Chapman, C. and Philp, C. 2004. *European Sites Guidance – Internal Guidance to Decisions on 'Site Integrity': a Framework for Provision of Advice to Competent Authorities.'* Peterborough: English Nature.

This internal guidance for English Nature staff gives more detailed guidance as to what constitutes an 'adverse effect on site integrity.' It considers that the definition of integrity should be determined in the context of delivering Favourable Conservation Status, and refers to Article 1 of the Habitats Directive for an explanation of Favourable Conservation Status. The guidance lists extracts that define Favourable Conservation Status from the Directive, and of those extracts, the points most relevant to this study are:

"*For habitats, their range and area must be stable or increasing*"
and
"*For species, the natural range is stable and likely to continue to be, and there is and will probably continue to be a sufficiently large habitat to maintain its population on a long term basis*."

Other examples of relevant guidance within the document includes "*When looking at the 'integrity of the site' it is important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long term*" and also in its explanation of the precautionary approach, the guidance cautions that "*advice provided must be reasonable and based upon information attributing foreseeable risk of a causal effect*." The guidance also provides a checklist of questions to be addressed when considering whether the integrity of a site is likely to be affected.

3 The case studies

3.1 Barksore Marshes

3.1.1 Description of development

The reclamation of land by the deposit of river dredgings on land at Barksore Marshes. The existing planning permission was reviewed under Regulation 55 of the Conservation (Natural Habitats & c.) Regulations 1994 and an order made, partly modifying and partly revoking the permission.

3.1.2 Location

Land at Barksore Marshes, Lower Halstow, Sittingbourne, Kent.

3.1.3 Date of decision

9 November 1998

3.1.4 Decision maker

The Secretary of State following the recommendations of Inspector Michael Hurley after a public inquiry.

3.1.5 Area of designated site

The proposal had the potential to affect the Medway Estuary and Marshes SPA/Ramsar site, which totals 4,684.36 ha (4696.74 ha for the Ramsar site) [22].

3.1.6 Area of habitat affected

The continued deposit of dredgings in accordance with the planning permission would destroy the value of the land as supporting habitat for avocet *Recurvirostra avosetta*. The completion of the planning permission would have directly affected 16.5% of the grazing marsh within the SPA. The development site consisted of 104 ha of land, 20 ha of which was not classified as either SPA/Ramsar. The proposal therefore affected 84ha of SPA/Ramsar. Based on these figures the affected area equates to 1.79% of the SPA/Ramsar. The percentage of affected area has been calculated for the purposes of this research report. Whilst the areas of land affected were stated, the actual percentage of SPA/Ramsar land affected was not quoted within the Inspector's report.

3.1.7 Type of habitat affected – its importance and sensitivity

Barksore Marshes are included within the SPA for their populations of waders and terns, in particular the breeding pairs of avocet, with the Inspector's report indicating that 76% of the SPA population of avocet bred within the Barksore/Funton area (1/IR 6.4[23]). Grazing marsh is one of the diversity of habitat types within the SPA, along with saltmarsh, and esturine mud flats and eelgrass beds.

3.1.8 Decision

The Secretary of State confirmed the Order made by Kent County Council (with a very minor modification), as recommended by the Inspector. The effect of the Order was to revoke the planning permission for all areas within the SPA, and modify the permission for the area outside, but adjacent to the SPA.

The Inspector was in no doubt that the loss of 84ha of the habitat within the SPA holding 76% of the SPA population of an Annex 1 species would be likely to have an adverse effect on the integrity of the site. The area of land equates to 1.76% of the SPA, but is 16.5% of the grazing marsh resource within the SPA, and holds the majority of the breeding pairs of avocets within the SPA.

"I note that the development of the Order land could result in the loss of 16.5% of the grazing marsh in the SPA. That does not seem to me to be an insignificant proportion; I am aware of no policy guidance to suggest that even smaller losses (of, say, 5% or 1%) of a

[22] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.

[23] This format of reference is used throughout the remainder of this report to denote the case number (first number) in the Table of Cases in Appendix A, followed after the oblique by the relevant paragraph numbering either the Inspector's Report (IR) or Secretary of State's Letter (SoSL).

valued habitat type within an SPA should be regarded as being acceptable. Habitats can be as much affected by a number of small losses as by one major reduction" (1/IR 6.7).

"*Further disposal of dredgings at Barksore Marshes would be likely to have an adverse effect on the integrity of the SPA. I am certainly unable to conclude that there would be no such effect*" (1/IR 6.8).

In his letter the Secretary of State agreed with the Inspector's conclusions and concluded that the case did not present any overriding reasons of public interest for which the development should be allowed to continue. The Secretary of State recognised "*the importance of the Port of Medway and that continued dredging is imperative for its continued success. However, he agrees with the Inspector that there are practicable alternative solutions for the disposal of dredgings and that the extra cost involved would be unlikely to jeopardise the commercial success of the port. He therefore concludes that there are no reasons of overriding public interest for the continued deposit of dredgings at Barksore Marshes*." (1/SoSL 7)

3.2 Bathside Bay

3.2.1 Description of development

An application for a Harbour Revision Order and planning permission (together with other associated consents) for the development of an operational container port, including the construction of a quay wall, construction of a container handling and stacking facility, associated infrastructure, reclamation of inter-tidal area, realignment of sea wall and channel dredging.

3.2.2 Location

The main development was located at Bathside Bay, Harwich, with the proposed compensatory habitat works being located at Little Oakley, Hamford Water.

3.2.3 Date of decision

The Secretary of State issued a decision letter on 29 March 2006, authorising the Harbour Revision Order and also granting consent for the construction of the quay wall, breaching of the sea wall and channel dredging. The Secretary of State agreed with the Inspector's conclusions that the project would have an adverse effect on the integrity of the European site, that there were no alternative solutions and that there were imperative reasons of overriding public interest for the authorisation of the Order and other consents.

3.2.4 Decision maker

The Secretary of State, based on Inspector Ken Smith's report following a public inquiry, which recommended that the Order should be made and the planning permission and other consents granted.

3.2.5 Area of designated site

The Stour and Orwell Estuaries SPA/Ramsar is 3,676.92 ha. At the time of the Public Inquiry, part of the site was proposed SPA (pSPA).

3.2.6 Area of habitat affected

As a result of the development, 69 ha of habitat within the Stour and Orwell Estuaries SPA would be lost within the Bathside Bay area of the SPA. This loss would be permanent as a result of the port construction works. The area lost equates to 1.87% of the Stour and Orwell Estuaries SPA and Stour and Orwell Estuaries pSPA. The Inspector does not make reference to any percentage figures in his report. The percentage of affected area has been calculated for the purposes of this research report.

3.2.7 Type of habitat affected – its importance and sensitivity

The Stour and Orwell Estuaries SPA comprises mainly mudflats, low cliffs, grazing marsh and vegetated shingle. It is classified for over-wintering hen harrier *Circus cyaneus* and the following Annex 1 waterfowl species as over-wintering populations: black-tailed godwit *Limosa limosa islandica*, dunlin *Calidris alpina alpina*, grey plover *Pluvialis squatarola*, pintail *Anas acuta*, redshank *Tringa totanus*, ringed plover *Charadrius hiaticula*, shelduck *Tadorna tadorna* and turnstone *Arenaria interpres*[24].

3.2.8 Decision

All relevant parties agreed a significant effect was likely and that there would be an adverse effect on the integrity of the site. "*In this case, there is no dispute that the BBCT proposal would adversely affect the integrity of a European site. Therefore we must move in the decision making process to regulation 49*" (2/IR 18.23).

With no alternative solutions it was recommended by the Inspector that there were imperative reasons of overriding public interest. Compensatory measures that would adequately compensate for the loss of habitat supporting SPA birds were agreed between all parties. The package also included mitigation and compensation measures for wildlife species that are not SPA features. A proposed sediment replacement programme is also a complementary proposal that should result in "*a decrease in the background rate of intertidal erosion in the estuarine system*" (2/IR 18.442).

3.3 Dibden Bay

3.3.1 Description of development

An application for a Harbour Revision Order, an Order under the Transport and Works Act, and a planning permission (together with other associated consents) for the development of an operational container port, with deep water terminal at Dibden Bay, the 'Dibden Terminal,' as an extension to the Port of Southampton. The development included a 1,850m quay and associated infrastructure.

3.3.2 Location

Dibden Bay, Southampton Water, New Forest District, Hampshire.

[24] http://www.jncc.gov.uk/page-4

3.3.3 Date of decision

20 April 2004.

3.3.4 Decision maker

The Secretary of State for Transport and First Secretary of State who declined to make the orders and issued refusals of consent, in accordance with the recommendations of the Inspector, Mr Michael Hurley, following a 54 week long Public Inquiry in 2001.

3.3.5 Area of designated site

The Solent and Southampton Water SPA and Ramsar site is 5,505.86 ha of estuarine and coastal habitats. It should be noted that this case study relates only to the SPA and not to the SACs that would also have been adversely affected by the proposed port development and associated works. The effects on the SACs were more complex and involved either or both indirect effects and large scale habitat change.

3.3.6 Area of habitat affected

The proposal would result in a direct loss of intertidal habitat within the SPA at the quay wall amounting to about 42 ha, together with indirect effects of a loss of a further 3 ha arising from a reduction in tidal range and a further predicted loss of 10ha as a result of increased erosion over a 50 year period, which makes a total of 55ha. However, the SPA is classified only down to Mean Low Water (MLW). An extensive area of habitat below MLW, and therefore not in the SPA but considered by the Inspector to still be important to the species for which the SPA is classified would also be lost. The Inspector explained that "*The Dibden foreshore below MLW provides a habitat that is similar to the foreshore within the international nature conservation sites. Together with the adjacent shallow sub-tidal area, it helps support populations of waterfowl for which the SPA and Ramsar Site have been designated. The destruction of this habitat is unavoidable if the Dibden Terminal project is to proceed. This would have an adverse effect on the integrity of both these international sites, unless the impact could be mitigated by the provision of alternative supporting habitat. The area lost would be 34 ha between MLW and LAT; and a further 52 ha of shallow sub-tidal*" (3/IR 7.149).

The Inspector explained how he considered the mitigation proposals put forward to be compensatory measures rather than mitigation, because the proposed measures could not mitigate the adverse impacts of the development proposal. He states that "*In my view, the creation of new habitat outside a classified site cannot avoid or reduce the damage to the integrity of that site that would result from the destruction of existing protected habitat. The best that habitat creation could do in these circumstances is make restitution for the damage done (and there may well be a degree of uncertainty about its potential effectiveness in doing that). It would not mitigate the adverse impact on the site's integrity, but might redress or compensate for the harm that would be sustained*" (3/IR 36.176).

Thus, with a total area of 5,505.86 ha the loss from the SPA of 55 ha amounts to about 1.0 % of the SPA. This percentage was not included within the Inspector's report but was calculated for the purposes of this research report. The total area of non-SPA habitat supporting Annex 1 species for which the SPA is classified would have been 86 ha but this is not included in the calculated direct loss as it is not in the classified area.

3.3.7 Type of habitat affected – its importance and sensitivity

The SPA contains mudflats and saltmarshes, complimented by coastal habitats including saline lagoons, shingle beach, reedbed and grazing marsh. They are classified for the following Annex 1 breeding birds: common tern *Sterna hirundo*, little tern *Sterna albifrons*, Mediterranean gull *Larus melanocephalus*, roseate tern *Sterna dougallii* and sandwich tern *Sterna sandvicensis*; and for over-wintering populations of black-tailed godwit *Limosa limosa islandica*, teal *Anas crecca*, ringed plover *Charadrius hiaticula* and dark-bellied brent goose *Branta bernicla bernicla*[25].

3.3.8 Decision

The Inspector advised the Secretary of State that there would be an adverse impact on the integrity of the designated site, that the applicant's appropriate assessment was inadequate, and that offsetting measures proposed would not be adequate mitigation to remove the adverse effect on integrity. He also advised that the measures would not be adequate should they be considered as compensatory measures under Regulation 53 of the Habitats Regulations.

In drawing his conclusions the inspector gives weight to the habitat loss outside the designated sites as well as the direct loss from within the SPA boundaries, stating that "*There would also be a direct loss of some 53ha of shallow sub-tidal habitat. No part of this area is within the boundary of any European site. Nevertheless, it provides a feeding resource for various fish eating birds, which are part of the assemblage for which the SPA was classified*" (3/IR 36.208).

3.4 Gilwern to Hafodyrynys Pipeline

3.4.1 Description of development

The installation of a 25 km long and 600mm diameter, gas pipeline from the installation at Gilwern to the installation at Hafodyrynys, in order to improve gas supplies to southern Wales.

3.4.2 Location

Gilwern to Hafordyrynys, Fynwy and Monmouthshire, Wales.

3.4.3 Date of decision

3 July 2002.

3.4.4 Decision maker

The Secretary of State for Trade and Industry granted consent in accordance with Regulation 14(4)(a) of the Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999, after undertaking an appropriate assessment of the pipeline proposal.

[25] http://www.jncc.gov.uk/page-4

3.4.5 Area of designated site

The Usk Bat Sites SAC is 1,686.4 ha[26], it was a candidate SAC at the time when the project was being considered by the Secretary of State.

3.4.6 Area of habitat affected

The Usk Bat Sites SAC is 1,686.4 ha, of which 350 ha is European Dry Heath, a qualifying feature of the cSAC, but the primary reason for site selection was the presence of populations of lesser horseshoe bat *Rhinolophus hipposideros*. Caves not open to the public are also a qualifying Annex 1 feature. The appropriate assessment details impacts on the European Dry Heath in terms of direct removal of 2.5ha of this habitat type, and a potential for disturbance to the caves or their lesser horseshoe bats.

1 ha of the affected area was to be subject to turfing, ie the heathland turfs would be removed, the pipeline laid and the turfs replaced. The Secretary of State for Trade and Industry determined that this would not represent an adverse effect on integrity. The remaining 1.5 ha could not be turfed and the top soil was to be stripped, thus irreparably damaging the existing heathland vegetation and requiring heathland recreation by new planting and seeding.

The affected area of 2.5 ha is 0.15% of the total SAC. It was concluded that the effects on 1 ha of the total 2.5 ha could be mitigated, leaving 1.5 ha of affected habitat that could not be mitigated. There was therefore an unmitigated loss of 1.5ha of heath, equating to 0.09% of the total SAC. 2.5 ha is 0.71% of the area of European Dry Heath within the SAC[27] and the 1.5 ha represents 0.43% of the area of European Dry Heath within the SAC .

No adverse effect on integrity was considered to arise in relation to the lesser horseshoe bat population or cave habitats.

3.4.7 Type of habitat affected – its importance and sensitivity

The UK proportion of the European Dry Heaths is significant, and the UK heaths also exhibit remarkable diversity in comparison with those in other European countries. Within the UK, the climatic and altitude variations provide the rare circumstances in which such a range of heathland variations can be seen, with the range of upland to lowland heaths representative from north to south, and the oceanic to the continental heathland communities are represented from the west coast to the east[28].

With typically nutrient poor, sandy and free draining soils, heathland turfs are easily damaged and broken up by soil movement. Whilst the 1ha of heathland where turfing could take place was not considered to have an adverse impact on the integrity of the site, where soils stripping was proposed it was considered that the soil, vegetation and seed bank would be so disturbed that recovery without intervention would be very slow, and that the habitat may never by fully replicated.

[26] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[27] This is quoted in the appropriate assessment undertaken by the Secretary of State for Trade and Industry. All other percentages above were calculated for the purposes of this research report.
[28] http://www.jncc.gov.uk/page-4

3.4.8 Decision

The Secretary of State for Trade and Industry granted consent and deemed planning permission subject to conditions, after determining that there would be a likely significant effect, and undertaking an appropriate assessment. In light of the appropriate assessment, it was concluded that the proposal would adversely affect the integrity of the cSAC and the Secretary of State therefore considered whether there were any alternative solutions, and concluded that there were none. The appropriate assessment stated that conditions were "very likely" to mitigate for the negative effects, but maintained that there was still a possibility that the pipeline would still have an adverse effect on site integrity. "*The DTI is not of the view that the area involved here should be construed as de minimis*" (4/SoSL page 3).

"*It is reasonable to consider the 1 to 2 years that the 1 ha turfed area is likely to take to restore its full species composition (ie restoration in area and quality), as de minimis. This would not therefore represent an adverse affect on the integrity of the cSAC. In contrast, the DTI is of the view that the 10-12 year-long effect on the 1.5 ha of cSAC habitat which will not be turfed cannot be considered de minimis, and thus should be considered as an adverse effect on the integrity of the site*" (4/SoSL page 3).

The mitigation methods proposed for the 1.5 ha of soil stripped heath included the propagation of dwarf shrubs for transplanting into the affected area. This method was experimental and therefore no reference could be made to previous applications to verify how successful the proposed method might be. Thus it is possible that the lack of certainty of recovery of the stripped 1.5ha was a factor in the Secretary of State's decision, as well as the longevity of the adverse effect. In accordance with Regulation 49 of the Habitats Regulations, the Secretary of State considered whether there were imperative reasons of overriding public interest, and concluded that the need to serve southern Wales with a supply of gas to be such an imperative reason. In accordance with the Regulations, the Secretary of State then imposed a condition that provided compensatory measures in respect of Regulation 53 of the Habitats Regulations for the loss from the cSAC, which was in the form of enhancement and/or expansion of the European Dry Heath habitat.

3.5 Immingham Outer Harbour

3.5.1 Description of development

The expansion of Immingham Harbour to develop a five berth roll-on, roll-off (ro-ro) terminal in a tidal harbour. The new outer harbour will be dredged into the foreshore behind the existing terminal. The development includes the reclamation of SPA foreshore, and the construction of a bund, sea wall, five ramps, walkways and a quay.

3.5.2 Location

Behind the existing terminal of Immingham Harbour, North Lincolnshire.

3.5.3 Date of decision

7 July 2004.

3.5.4 Decision maker

The Secretary of State for Transport authorised the Harbour Revision Order under section 14 of the Harbours Act 1964, without a public inquiry.

3.5.5 Area of designated site

The Humber Flats, Marshes and Coast SPA is 15,202.53 ha and the Humber Estuary pSAC is 39,492.89 ha[29]. The Humber Flats, Marshes and Coast SPA is also a proposed Ramsar site.

3.5.6 Area of habitat affected

22 ha of habitat from within the SPA, which equates to 0.145% of the now classified site. The site was classified a few weeks after the Secretary of State for Transport issued the decision letter. The site is therefore referred to as proposed in that letter. This calculation of the percentage of land affected was not included in the Secretary of State's letter, but was calculated for the purposes of this research report. A further 5 ha of habitat from outside the SPA would also be lost as a result of the development proposal.

3.5.7 Type of habitat affected – its importance and sensitivity

Wetland and coastal habitats including reedbed, grazing marsh, saltmarsh, sand dunes and exposed mud and sand flats at low tide are important for breeding, over-wintering and migratory birds that utilise the site. The site is noted for both its wetland birds and raptor populations.

Breeding populations of little tern *Sterna albifrons* and marsh harrier *Circus aeruginosus* along with over-wintering or passage populations of bar-tailed godwit *Limosa lapponica*, bittern *Botaurus stellaris*, golden plover *Pluvialis apricaria*, hen harrier *Circus cyaneus*, redshank *Tringa totanus*, sanderling *Calidris alba*, dunlin *Calidris alpina alpina*, knot *Calidris canutus* and shelduck *Tadorna tadorna*[30].

3.5.8 The Decision

With a likely significant effect on the European designated sites, Associated British Ports (ABP), as a competent authority (as set out in Regulation 6 of the Habitats Regulations), undertook an appropriate assessment of the proposed development and concluded that it could not be demonstrated that the Immingham Outer Harbour development proposal would not have an adverse effect on the integrity of the SPA/Ramsar/pSAC.

The Secretary of State considered the alternative solutions put forward by ABP, and concluded that given the Immingham Outer Harbour proposal would enable the new berths to be accessible at all times irrespective of the tide, this would create significantly more additional capacity than an alternative proposal from Humber Sea Terminal (HST) Ltd, which was tide limited.

The Secretary of State for Transport concluded that the proposal was for imperative reasons of overriding public interest for social and economic reasons, particularly in relation to the

[29] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[30] http://www.jncc.gov.uk/page-4

national and regional economic importance of the port and the need for the port to continue to remain competitive internationally, and also the importance of the port for local employment.

With the conclusion that mitigation measures would not avoid an adverse impact, compensatory measures were proposed for the creation of wetland, coastal and maritime habitats on former agricultural land.

"*The Secretary of State Agrees with the advice of English Nature that the compensation measures set out in the Agreement, which include the managed realignment of agricultural land, of an area significantly greater than the area which would be lost to the works proposed in the Order, and creek habitat enhancement scheme, will enable the coherence of the Natura 2000 network to be protected. He therefore agrees that the requirements of Regulation 53 of the Habitats Regulations have been met*" (5/SoSL 47).

3.6 Linshaws Quarry, Peak District National Park

3.6.1 Description of development

An application to re-open Linshaws Quarry at Dunford for the extraction of sandstone tilestone. This site was previously quarried for sandstone but had been unworked for approximately 50 years. In the interim period the site had naturally regenerated to the extent that it was included within the boundary of the South Pennine Moors SAC.

3.6.2 Location

Linshaws Quarry, Dunford, Peak District National Park.

3.6.3 Date of decision

On the 20 March 2002 the Secretary of State withdrew a direction under Reg 49(6) of Habitats Regulations that had directed the Peak District National Park Authority (PDNPA) not to determine the application. Withdrawal left the decision whether to grant planning permission to the NPA. This case therefore refers to the Secretary of State's view as to the significance of the proposal as well as the PDNPA's view as to its effects.

3.6.4 Decision maker

The Secretary of State withdrew his direction, considering his intervention unjustified. The PDNPA was then free to determine the application, which was refused. The appellant appealed against the refusal but withdrew the appeal after a public inquiry had been called.

3.6.5 Area of designated site

The South Pennine Moors SAC is 64,983.13 ha. The area affected was also part of the Peak District Moors SPA, which now forms part of the South Pennine Moors SPA Phase 1, which has an area of 45,270.52 ha[31].

[31] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.

3.6.6 Area of habitat affected

An area of 0.99 ha of the then candidate SAC was affected by the proposal. According to the Secretary of State's letter, this equates to 0.0000153% of habitat within the South Pennine Moors cSAC. In fact this figure is wrong and the amount of designated site affected equates to 0.00153%, as calculated by the authors of this report.

3.6.7 Type of habitat affected – its importance and sensitivity

The SAC is designated for its Annex 1 habitats, which include blanket bogs, a priority habitat, along with European dry heaths and old sessile oak woods with *Ilex* and *Blechum* in the British Isles.

3.6.8 Decision

The letter dated 20 March 2002 from the Department for Transport, Local Government and the Regions, indicated that the direction from the Secretary of State not to grant planning permission was withdrawn.

"*The Secretary of State has carefully considered all the national planning and other relevant planning issues relevant to this planning application and taken into account the fact that the proposed development will cover a very small part of the Peak District Moors SPA and the South Pennine Moors cSAC. Indeed, he notes that the proposed development will cover just 0.99 ha which is less than 0.0000153% of the total area of the South Pennine Moors cSAC which amounts to 64,983.13 ha. Taking all these factors into account, the Secretary of State has concluded that, on balance, any potential conflict with national planning policy is not sufficient to justify his intervention. He has, therefore, decided that he should leave the decision on whether or not to grant planning permission in this case to the NPA*" (6/SoSL 10).

Thus, whilst the Secretary of State decided that he should not intervene in the decision, he did not indicate whether he considered the habitat loss to be significant in terms of the Habitats Regulations. The PDNPA did consider it would be a significant effect.

3.7 London Gateway

3.7.1 Description of development

An application for a Harbour Revision Order and planning permission (together with other associated consents) for the development of an operational container port, including the construction of a quay wall, construction of a container handling and stacking facility, associated infrastructure, reclamation of inter-tidal area, realignment of sea wall and channel dredging.

3.7.2 Location

London Gateway, on the north bank of the Thames Estuary, Thurrock, Essex.

3.7.3 Date of decision

The Secretary of State for Transport is yet to make a decision, but a letter was issued on 20 July following a public inquiry conducted by Inspector David Ward, which indicated that the Secretary of State for Transport was minded to grant the consents, and make the Order, subject to the resolution of some outstanding issues, which are not related to nature conservation.

3.7.4 Decision maker

Secretary of State for Transport, however no decision has yet been issued.

3.7.5 Area of designated site

The Thames Estuary and Marshes SPA is 4,838.94 ha in size (the Ramsar covers a larger area being 5588.59 ha in size)[32]. The Benfleet and Southend Marshes SPA was also considered regarding any indirect affects, but it was determined that there was no likely significant effect on this site.

3.7.6 Area of habitat affected

5 ha of habitat within the SPA would be lost, along with 9 ha of habitat outside the SPA boundary that is also used by the Annex 1 birds for which the SPA is classified. The development could also potentially cause a functional change in a further 60 ha of the SPA, as a result of changes in coastal and tidal processes as a consequence of the development.

5 ha equates to 0.1% of the SPA and 60 ha of habitat that would be affected and potentially suffer a functional change as a result of the development proposal equates to 1.24% of the total SPA. A total of 1.34% is therefore affected. These percentages have been calculated by the authors for the purposes of this research report and where not quoted within the Inspector's report or the Secretary of State's letter.

3.7.7 Type of habitat affected – its importance and sensitivity

The site is specifically classified for its over-wintering populations of avocet *Recurvirostra avosetta*, hen harrier *Circus cyaneus* and ringed plover *Charadrius hiaticula*, along with being a habitat of international importance for its large assemblage of water birds, with over 30,000 birds over-wintering at the site[33].

3.7.8 Decision

The Secretary of State for Transport notes that all parties are in agreement that the port proposal *"is likely to have a significant effect upon the Thames Estuary and Marshes Special Protection Area (SPA) and Ramsar site and that such an effect is likely to be an adverse one*" (7/SoSL 93).

The Secretary of State concludes that he accepts that there are no alternative sites for the development and that the scheme is of overriding public interest.

[32] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[33] http://www.jncc.gov.uk/page-4

English Nature advised that the compensation scheme put forward by the applicant is acceptable for the fulfillment of Regulation 53, and the Secretary of State agrees with this conclusion.

3.8 Mawcarse, Loch Leven, Kinross

3.8.1 Description of development

The erection of two houses on land between Ashwood and White Rose Cottage, Mawcarse, Kinross, Scotland.

3.8.2 Location

Land between Ashwood and White Rose Cottage, Mawcarse, Kinross, Scotland.

3.8.3 Date of decision

23 December 2005

3.8.4 Decision maker

The Scottish Ministers, following two reports by Mr EDK Thomas.

A refusal of planning permission, by the Perth and Kinross Council, as planning authority, on policy grounds led to an initial appeal that was determined by written representations. The local planning authority challenged the Reporter's decision in the Court of Session, which held that the Reporter had erred in law because Scottish Natural Heritage had not been consulted on the proposal, which had possible implications for a European designated site that was in close proximity to the development site. This was deemed to be the only reason for quashing the previous grant of planning permission given by the Reporter, and other reasons raised by the local planning authority were dismissed. With the original appeal decision quashed the planning appeal then needed to be re-determined, and the Scottish Ministers requested that the same Reporter undertake a hearing in respect of the original appeal, with Scottish Natural Heritage being consulted on the proposal and its implications for Loch Leven SPA. A second report then followed this hearing, recommending that the appeal be upheld subject to conditions, and this was agreed by the Scottish Ministers. The second report included consultation with Scottish Natural Heritage, and appropriate mitigation measures were included at their request.

3.8.5 Area of designated site

Loch Leven SPA/Ramsar site has a designated site area is 1,611.81 ha[34].

3.8.6 Area of habitat affected

Effects were considered in terms of the proposal's contribution to the deterioration of habitats supporting the migratory and Annex 1 species for which the SPA is classified. The proposal does not include any land take from the designated site, but the possible quantity of pollution

[34] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.

in terms of phosphorus discharge arising from the original proposal was given as an estimated 8100mg/day.

3.8.7 Type of habitat affected – its importance and sensitivity

Loch Leven SPA is designated for internationally important over-wintering populations of swans, geese and ducks which are migratory or listed on Annex 1 of the Directive. Whooper swan *Cygnus cygnus*, pink-footed goose *Anser brachyrhynchus* and shoveler *Anas clypeata* all overwinter at the loch[35].

The water quality of the loch had declined considerably in the recent past, with large influxes of phosphorus causing algal blooms. Phosphorus pollution has a detrimental effect on the aquatic plant community within the loch through the growth of algal blooms which block essential light from reaching submerged plants. Efforts to reduce the phosphorus inputs to the loch by way of a catchment management plan and restrictive policies in the local plan, in the few years preceding the planning application, had proved successful and the condition of the loch was improving. The development in its original form proposed to use a septic tank for sewage from the two houses, which was currently the system in place for other dwellings in the area, including the existing large farmhouse, owned by the developer, close to the development site. The septic tank arrangement would have discharged water to the ground or local water courses, which would have contributed to the diffuse pollution entering the loch. The potential phosphorus discharge from two new houses was estimated at 8100mg/day (8/RR 1.11).

3.8.8 Decision

The Scottish Ministers allowed the appeal, following the Reporter's recommendations that included mitigation measures to the satisfaction of Scottish Natural Heritage.

With advice from Scottish Natural Heritage it was considered that the proposal was likely to have a significant effect upon Loch Leven SPA. This then required an Appropriate Assessment, and the appellants submitted a mitigation scheme which was considered at the hearing by the Reporter, in consultation with Scottish Natural Heritage. The appellants proposed to upgrade the septic tank serving the existing large farmhouse, as well as installing new efficient treatment plants for the new dwellings, thus significantly reducing the phosphorus discharge from the existing dwelling. The reduction was such that the new farmhouse discharge rate plus the discharge rate for the two new dwellings was still below the discharge rate for the farmhouse, with the old septic tank system. With the overall reduction in phosphorus discharge rates as a result of the new development and the mitigation proposed, Scottish Natural Heritage confirmed that, the development proposal would not have an adverse effect on the integrity of Loch Leven SPA.

The following information was provided within the Reporter's report:

- Phosphorus discharge from new dwellings with the new treatment plant 8,100 mg/day
- Phosphorus discharge from existing farmhouse with the old septic tank system 21,060 mg/day

[35] http://www.jncc.gov.uk/page-4

- Phosphorus discharge from existing farmhouse with the new treatment plant 8,100 mg/day
- Phosphorus discharge from the existing farmhouse 21,060 mg/day
- Phosphorus discharge from the development plus the existing farmhouse without mitigation 29,160 mg/day
- Phosphorus discharge from the development plus the existing farmhouse with mitigation 16,200 mg/day

The Reporter admitted that it was difficult to conclude that the proposal would have a likely significant effect alone. No analysis took place. However the precedent set by granting planning permission without mitigation was discussed and it is therefore assumed that the likely significant effect is in combination with any future proposals of a similar nature. He commented that "*Although it was difficult to conclude that the proposal alone would be likely to result in an adverse effect on the loch's integrity, if it was approved without mitigation, an important precedent would be set, which would nullify the aims of the catchment and local plans*" (8/RR3.12)

The Reporter also made reference to the Waddenzee judgement to give weight to the conclusions drawn, stating that "*A recent European Court of Justice decision relating to a case in the Netherlands (Landelijke Verenigning tot Behoud Van de Waddenzee, Nederlandse v Vereniging tot Bescherming von Vogels v Straatssecretaris Van Landbouw, Natuurbeheer en Visserij (C-127/02: [2005] Env. LR14 [ECJ]) confirmed that where a proposal not directly connected with or necessary to site management was likely to undermine a site's conservation objectives, it would have a significant effect*" (8/RR 3.9).

3.9 Mostyn Docks

3.9.1 Description of development

The construction of a new quay including mooring dolphins and reclamation of foreshore with dredged material. The proposal included a new quay across the foreshore and estuarine flats of the Dee Estuary, a new berthing facility, and the dredging of the channel to provide access for larger vessels. The dredged material would be spread and compacted within the development site. The majority of the development site is SPA and a Ramsar site.

3.9.2 Location

The Port of Mostyn, south western bank of the Dee Estuary, North Wales.

3.9.3 Date of decision

19 August 1996.

3.9.4 Decision maker

The Secretaries of State for Wales and Transport granted planning permission following an inspectors report by Mr Anthony Vaughan, which only makes a partial recommendation for approval. An Assessor, Mr John Hellawell, also assisted the Inspector.

3.9.5 Area of designated site

The Inspector's report states that the Dee Estuary SPA/Ramsar site is approximately 13,055 ha. However the Ramsar Site Information Service[36] and the Joint Nature Conservation Committee[37] state that the actual boundary is 13,084.85 ha for both the SPA and the Ramsar site.

3.9.6 Area of habitat affected

The figures quoted within the Inspector's report for the amount of SPA that would be lost as a result of the development proposal do lead to some confusion. The key paragraph relating to the amount of SPA that would be lost is therefore quoted here in full:

"*The immediate 8.71 ha site of the proposed development is located in a bay with an area of upper shore-line and inter-tidal mudflat of approximately 5.67 ha within a total SSSI/SPA/Ramsar site of about 13055 ha. The development site contributes approximately 0.07% of the total Statutory Site and the mudflat which would be lost by the development forms 0.063% of the total area of about 9000 ha of this habitat*" (9/IR 2.1.9).

It appears that the Inspector may have used the total area of the development site, which was 8.71 ha, in calculating the percentage of 0.07%, yet not all of the development site is in the SPA. Furthermore the SPA site area is inaccurate (see 3.9.5 above). However, for the purposes of this report's calculation, the Inspector's own figures are used here because they were the basis of the decision. Assuming that the SPA is 13,055 ha, of which 9000 ha is mudflat, and on the basis of a loss of 5.67 ha of mudflat from the designated site, the loss would be 0.04% of the SPA and 0.063% of the mudflat resource within the SPA.

3.9.7 Type of habitat affected – its importance and sensitivity

The inter-tidal mud and sand flats, along with the salt marshes of the Dee Estuary are rich in invertebrates and therefore attract major populations of waterbirds that are of international importance. The upper shore line grades into brackish and swamp vegetation and maritime heathland and grassland, adding to the range of roosting habitat available for the birds that have come to the Estuary to feed on the rich invertebrate resource within the mudflats. The estuary supports a wader and wildfowl population of between 100,000 and 150,000 birds annually[38].

The SPA supports an extensive area of inter-tidal feeding habitat and roosting habitat for the sandwich tern *Sterna sandvicensis* and bar-tailed godwit *Limosa lapponica*, and is also of European importance for its breeding populations of common tern *Sterna hirundo* and little tern *Sterna albifrons*. In addition to these Annex 1 species, the site supports populations of European importance of the following migratory species for winter feeding and roosting; redshank *Tringa totanus*, black-tailed godwit *Limosa limosa islandica*, curlew *Numenius arquata*, dunlin *Caldris alpina alpina*, grey plover *Pluvialis squatarola*, knot *Caldris canutus*, oystercatcher *Haematopus ostralegus*, pintail *Anas acuta*, shelduck *Tadorna tadorna* and teal *Anas crecca*[39].

[36] http://www.wetlands.org/RSDB/default.htm
[37] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[38] http://www.jncc.gov.uk/page-4
[39] http://www.jncc.gov.uk/page-4

The Dee Estuary SPA includes 9000 ha of inter-tidal mudflat. The loss of 5.67 ha as a result of the planning proposal equates to 0.063% of this resource (9/IR 2.1.9).

The assessor's report is intended to assist the Inspector with the more specialist ecological aspects of the case. The assessor states "*I cannot avoid the conclusion that the site is not a significant feeding ground. Typically less than 100 birds are present. Even species which are considered to be most affected by the proposals, such as redshank and turnstone, did not reach median daily maxima of 25 birds. These figures must be compared with estimated winter counts for the Dee Estuary as a whole of 100,000 to 150,000 birds. As a fraction of the six-yearly mean given by CCW (about 135,000) the Mostyn shore supports about 0.074%*" (9/AR 16.5).

3.9.8 Decision

The Inspector concludes that the project would be unlikely to have a significant effect upon the SSSI, stating that the proposal "*would not be likely to have an adverse effect on the nature conservation interests of the SSSI and its surroundings*" (9/IR 16.12.10). The Inspector makes a decision not to provide a recommendation in terms of likely significant effect on the SPA and does not form any formal conclusions with regard to impacts on the SPA or Ramsar, leaving that decision to the Secretaries of State for Wales and Transport.

Whilst declining to make a substantial recommendation, the Inspector does state that *"as the project would be unlikely to have a significant effect upon the SSSI there would seem to be no impediment to the grant of planning permission. It is therefore reasonable to assume that there would be no apparent breach of either the Ramsar Convention or the requirements of the "Habitats Directive*" (9/IR 16.12.11).

The Secretaries of State therefore determined whether there was likely to be a significant effect and adverse effect on the integrity of the site without any recommendations from the Inspector. However, the letter from the Secretaries of State makes numerous references to the conclusions drawn in the Assessor's report.

Of particular relevance to this research report is the fact that the Secretaries of State disagreed with the assessor's indication that the small scale of the effect on its own rendered it insignificant. "*The Secretaries of State do not accept that the small scale of the proposal is, on its own, sufficient to justify the conclusion that the development is insignificant and therefore acceptable. The significance of effects of a development are not necessarily related to its scale*" (9/SoSL 13). However, after considering all the evidence, the Secretaries of State concludes that there is no likely significant effect on the SPA. "*The Secretaries of State accept that there is no evidence that the bird populations in the Dee Estuary are limited by food resources or roosting sites,*" and that "*The Secretaries of State agree with the Assessor's conclusion that the development proposal is not likely to have a significant effect on the designated sites of the Dee Estuary… as the development is considered to make an insignificant impact on the sites, it cannot destroy their integrity*" (9/SoSL 13). The Secretary of State for Wales and Transport's letter adds that there are "*no significant implications for the European site and they have reached the same conclusion in respect of the Ramsar site*" (9/SoSL 16).

3.9.9 Comments from the Inspector on the Dibden Bay inquiry regarding the Mostyn docks decision

It is not uncommon for an Inspector to make reference to a previous public inquiry when it is of relevance to the case in hand. Inspector Michael Hurley made an important clarifying comment with regard to the Mostyn docks decision when reporting on the Dibden Bay public inquiry.

"*I have had regard to the Ministerial planning decision relating to Mostyn Docks, in which it was found that the destruction of 8ha of protected inter-tidal habitat would be unlikely to have a significant effect on a designated SPA and Ramsar site. It is not for me to comment on that decision. However, it does not seem to me to be necessary to demonstrate that birds would suffer "severe hardship" in order to conclude that a project would have a significant effect on a designated site*" (3/IR 36.162).

Note that Mr. Michael Hurley refers to the destruction of 8 ha of protected inter-tidal habitat, which is factually incorrect, but is probably quoted as a result of the inaccuracies discussed earlier (see 3.9.6), and is also similar to the area that is now thought to have actually been lost from the affected SPA as a result of the Mostyn Docks development.

The reference to "severe hardship" originates in the assessor's report where he states "*Claims that loss of inter-tidal habitat at Mostyn Docks would impose severe hardships on feeding and roosting birds were not substantiated. It was conceded that the estuary provides a rich invertebrate food supply and that there is not evidence that the present bird populations are limited by food resources or roosting sites. The physiological stress of additional energy expenditure by a few birds having to fly slightly greater distances to roost was not quantified and is, in any case, likely to be insignificant*" (9/AR 16.6). The assessor is referring to comments made by CCW on the expenditure of extra energy by the SPA birds and the assertion by CCW that "*The potential loss of upper shore would be seriously harmful*" (9/IR 11.9.4).

3.10 Port Of Hull - Quay 2005

3.10.1 Description of development

The construction of a 'lo-lo' (lift on, lift off) handling facility accommodating vessels with a draft of up to 10.4 metres, reclamation of the river bed and the deepening, dredging and altering of the bed and shores.

3.10.2 Location

The Humber Estuary, Hull, Yorkshire.

3.10.3 Date of decision

21 December 2005.

3.10.4 Decision maker

The Secretary of State made the order, against the recommendation by the Inspector, Mr Peter Beasley, after a public inquiry.

3.10.5 Area of designated site

The Humber Flats, Marshes and Coast SPA/Ramsar is15,202.53 ha, and is also a Ramsar site. The Humber Estuary pSAC is 39,492.89 ha[40].

3.10.6 Area of habitat affected

An area comprising 4 ha of the Humber Flats, Marshes and Coast SPA would be lost as a result of the development. Whilst the Secretary of State's letter refers to there being impacts on all of the Humber Estuary sites, ie the SPA/Ramsar and the pSAC, it is in fact only the adverse effects on the SPA features of interest that form the main part of English Nature's concerns and the discussion on the case.

When the public inquiry took place, the 4 ha of designated site only held a SSSI designation and was included in the boundaries of the international sites in the interim period between the public inquiry and the Secretary of State for Transport's final decision letter. Whilst this change is of importance to the Secretary of State in his decisions, a value of 0.01% of the SSSI, which is 37,000 ha, is nevertheless quoted by the Secretary of State from the Inspector's report

The pSAC site is of a roughly equivalent size to the SSSI originally discussed at the inquiry, being approximately 40,000ha and 37,000 ha respectively, therefore both losing approximately 0.01% of the designated area when 4 ha is calculated as a percentage. However, the SPA is only 15,202.53 ha, and the loss of 4 ha from this designated site equates to 0.03%, which is not referred to at all.

3.10.7 Type of habitat affected – its importance and sensitivity

The Humber Flats, Marshes and Coast SPA contains wetland and coastal habitats including reedbed, grazing marsh, saltmarsh, sand dunes and exposed mud and sand flats at low tide are important for the breeding, over-wintering and migratory birds that utilise the site. The site is noted for both its wetland birds and raptor populations. Breeding populations of little tern *Sterna albifrons* and marsh harrier *Circus aeruginosus* along with over-wintering or on passage populations of bar-tailed godwit *Limosa lapponica*, bittern *Botaurus stellaris*, golden plover *Pluvialis apricaria*, hen harrier *Circus cyaneus*, redshank *Tringa totanus*, sanderling *Calidris alba*, dunlin *Calidris alpina alpina*, knot *Calidris canutus* and shelduck *Tadorna tadorna*[41].

3.10.8 Decision

The Secretary of State for Transport confirmed the Harbour Revision Order, subject to obligations to provide compensatory habitat.

3.10.9 Discussion on decision – how it was made

At the time of the public inquiry the proposed development site lay outside, but within 100m of the SPA. The inter-tidal mud flats that were to be directly affected by the development

[40] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[41] http://www.jncc.gov.uk/page-4

were used by water birds for which the SPA is classified, thus having a likely significant effect on the SPA interest features. Mitigation proposed by the applicant was considered by English Nature to be such that it could remove the likelihood of an adverse effect on integrity.

In the time period between the public inquiry and consideration of the Inspector's report by the Secretary of State, proposed changes to the boundary of the Humber Flats, Marshes and Coast SPA had subsequently incorporated the land that would be directly affected by the Quay 2005 proposal.

It was then necessary for English Nature to provide further advice to the Secretary of State. English Nature advised that it could not now be ascertained that Quay 2005 would not have an adverse effect on site integrity.

The Secretary of State concluded that there are no alternatives to the proposed development at its proposed location, and therefore went on to consider if there were any imperative reasons of overriding public interest, given English Nature's advice that the provision of alternative land does not serve as adequate mitigation. Concluding that there were imperative reasons of overriding public interest, of an economic and social nature in terms of regional employment and economy, the Secretary of State accepted the advice of English Nature that the provision of 6 ha of land for habitat creation, although not accepted as mitigation, is acceptable compensation to ensure the requirements of Regulation 53 have been met and that the overall coherence of Natura 2000 is protected. The 6 ha of compensatory habitat was in fact part of a much larger habitat creation and enhancement scheme. A legal agreement[42] between Associated British Ports and English Nature, the Environment Agency, the Royal Society for the Protection of Birds, Lincolnshire Wildlife Trust and Yorkshire Wildlife Trust was made to provide the necessary mitigation and compensatory measures for a number of schemes being undertaken by Associated British Ports.

3.11 Santoña Marshes, Spain

3.11.1 Description of development

The Spanish government was challenged in the European Court of Justice to answer allegations that there had been a failure to fulfil obligations under Directive 79/409/EEC of April 1979 on the Conservation of Wild Birds. The Spanish government had failed to classify the Santoña Marshes as an SPA and had failed to take steps to avoid pollution or deterioration of habitat or any disturbances affecting the birds. Specific development, including the construction of a road, the discharge of untreated waste water and the granting of permits for clam farming within the marshes were noted within the judgment as being damaging in that the extent of marshland available to the birds had been reduced as a result of such development or activities.

3.11.2 Location

Marismas de Santoña, within the Autonomous Community of Cantabria, on the north coast of Spain.

[42] Compensation Agreement for Immingham Outer Harbour and Hull Quay 2005

3.11.3 Date of decision

2 August 1993.

3.11.4 Decision maker

The Court of Justice of the European Communities. The Court declared that the Kingdom of Spain had failed to fulfil its obligations under the EEC Treaty.

3.11.5 Area of designated site

Approximately 35,000 ha of wetland[43].

3.11.6 Area of habitat affected

Of the many impacts listed, only the road construction is quantified in terms of the amount of wetland that has been lost. The road had removed 185 ha of the wetland, and that this equated to approximately 0.5% of the total area[44].

3.11.7 Type of habitat affected – its importance and sensitivity

Located at the confluence of several rivers, the Santoña marshes are an expanse of wetland that provides feeding and roosting habitat for 19 annex 1 species, along with 14 listed migratory species.

3.11.8 Decision

In its infringement of the birds directive, the Court declared that the Kingdom of Spain had failed to fulfil its obligations under the EEC Treaty. Throughout the judgment there is a clear message that disturbance is effectively habitat loss, because it results in the habitat being less effective in maintaining the bird populations. The following quotations are from the European Communities English Translation of the Judgement of the Court.

"*The commission claims that the new route followed by the C-629 road between Argoños and Santoña results not only in a considerable reduction in the surface area of the Santoña marshes but also in disturbances affecting the peaceful nature of the area and consequently the wild birds protected by the provisions of the directive*" (11/ECJ trans 33).

"*Although Member States do have certain discretion with regard to the choice of territories which are most suitable for classification as special protection areas, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of those areas*" (11/ECJ trans 35).

"*The installation of aquaculture facilities, which not only reduce the surface are of the marshland and cause variations in the natural sedimentation processes there, but also modify*

[43] Institute for European Environmental Policy, 1993, *Preliminary non-technical summary of the Judgment of the European Court of Justice: The Santoña Wetlands and the implementation of the Birds Directive (Case C-355/90)*).
[44] *ibid*

the structure of the existing marsh bed, has the effect of destroying the particular vegetation of those areas, which is an important source of food for the birds" (11/ECJ trans 44).

"*the activity in question has caused a significant deterioration in the habitat and the quality of the living conditions of the birds in the middle of the Santoňa marshes*" (11/ECJ trans 46).

The wording of the judgment with regard to the damaging construction work and permission of damaging activities suggests the equivalent of adverse effect on integrity, and the judgment includes a failure to take appropriate steps to avoid pollution or deterioration of habitats. The European Communities English Translation of the Judgement of the Court gives the following:

"*Reduction in surface area of the marshland…aggravated by the erection of a number of new buildings near this new section of road…have resulted in the loss of refuge, rest and nesting areas for birds. In addition… the action in question has modified the ebb and flow of the tide, causing this part of the marshland to silt up*" (11/ECJ trans 36).

"*harmful impact on the aquatic environment" with regard to the filling in of land adjoining the marshes*" (11/ECJ trans 41).

"*significant deterioration*" (11/ECJ trans 46) as a result of the clam farming.

"*detrimental effects*" (11/ECJ trans 50)of the discharge of untreated water.

3.12 Tideways Jetty

3.12.1 Description of development

The installation of a reinforced concrete slipway over the inter-tidal area from the curtilage of a private house "Tideways."

3.12.2 Location

Land at 46 Sinah Lane, Hayling Island, Havant, Hampshire.

3.12.3 Date of decision

23 May 1997.

3.12.4 Decision maker

Planning Inspector Colin Grimsey, on appeal following written representations.

3.12.5 Area of designated site

Chichester and Langstone Harbours SPA/Ramsar and the development site is also within the Solent Maritime SAC. Although the Maritime SAC designation was not proposed at the time of the inspector's report, English Nature reported the likely inclusion of Langstone Harbour

SSSI within the new designation. Chichester and Langstone Harbours SPA/Ramsar is 5,810.03 ha[45].

3.12.6 Area of habitat affected

A total of 45 square metres of foreshore, most of it below high water mark, crossing inter-tidal habitat that is important for foraging waders.

In addition to habitat loss, the Inspector notes that there will be additional disturbance impacts from the use of the jetty for launching boats and jet-skis.

45 square metres equates to 0.0000774% of the total SPA (45 sq m = 0.0045 ha) but this figure was not quoted in the Inspector's report. The calculation has been made for the purposes of this research report.

3.12.7 Type of habitat affected – its importance and sensitivity

The Chichester and Langstone Harbours SPA supports breeding populations of little tern *Serna albifrons* and sandwich tern *Sterna sandvicensis*, along with the following Annex 1 species over winter or on migratory passage; little egret *Egretta garzetta*, bar-tailed godwit *Limosa lapponica*, ringed plover *Charadrius hiaticula*, black-tailed godwit *Limosa limosa islandica*, dark-bellied brent goose *Branta bernicla bernicla*, dunlin *Calidris alpina alpina*, grey plover *Pluvialis squatarola* and redshank *Tringa totanus*[46].

The harbours are of European importance for water birds, with mud and sand flats and algal beds that offer extensive feeding grounds for the range of Annex 1 species feeding and breeding at the site.

The development proposal would have resulted in the loss of a small proportion of the important feeding grounds below high tide.

3.12.8 Decision

The appeal was dismissed by the Inspector. After determining likely significant effect the Inspector summarised the implications of the proposal as direct loss of feeding habitat and disturbance as a result of the jetty use. He further commented on how the damage may be compounded by the precedent set by granting permission for development that may then result in similar planning applications within the SPA.

"*The proposed slipway would lead to increased disturbance both during construction and thereafter, and reduce the inter-tidal area available to waders… I consider that the proposed slipway would adversely affect the integrity of the site. This damage would be compounded as the precedent set by the granting of planning permission for your proposal would make it more difficult for the planning authority to resist pressure for similar developments elsewhere in Langstone Harbour*" (12/IR 9).

[45] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm.
[46] http://www.jncc.gov.uk/page-4

3.13 White Horse Millennium Landmark

3.13.1 Description of development

The creation of a white outline depicting a horse across the hillside of Cheriton Hill, to be viewed form a distance, by the removal of turfs of calcareous grassland to create a line within which chalk slabs could be laid.

3.13.2 Location

Cheriton Hill, Crete Road West, Folkstone, within the Kent Downs.

3.13.3 Date of decision

27 March 2002.

3.13.4 Decision maker

The Secretary of State for Transport Local Government and the Regions granted following Inspector Chris Frost's report as a result of a public inquiry.

3.13.5 Area of designated site

The Inspector refers to a site area of 120 ha for the Folkstone to Etchinghill Escarpment cSAC. However the site area, as confirmed by the Joint Nature Conservation Committee is 260.75 ha (an amendment in 2001 increased the site boundary by approximately 80ha, but this change is prior to the decision in 2002)[47].

3.13.6 Area of habitat affected

The area of excavation was 0.02 ha according to the applicant, and potentially as much as 0.0665 ha according to English Nature. The inspector acknowledges that "*the precise area remains uncertain*" (13/IR 79).

Taking the inspector's reference to 120ha and the potential land take of between 0.02 ha and 0.0665 ha, the percentage lost is between 0.017% and 0.056%.

Taking the actual site area of 260.75 ha and the potential land take of between 0.02 ha and 0.0665 ha, the percentage lost is between 0.0076% and 0.0255%.

3.13.7 Type of habitat affected – its importance and sensitivity

The site has the following Annex 1 habitat: semi-natural dry grasslands and scrub facies on calcareous substrate (*Festuco-Broetalia*) (important orchid sites). The calcareous grassland has a number of rare and scarce plants, with particular importance placed on the rare orchid species present, including early spider orchid *Ophrys sphegodes*, late spider orchid *Ophrys fuciflora* and burnt orchid *Orchis ustulata*.

[47] http://www.jncc.gov.uk/page-4 and Colin McLeod, JNCC, pers comm

3.13.8 Decision

Planning permission granted by Secretary of State for Transport Local Government and the Regions in accordance with Inspector's recommendations, which concluded there would be no adverse effect on the integrity of the site.

"*In absolute terms the cSAC would be better able to retain its integrity without the hill-figure and it must be acknowledged that the proposals would have an immediate adverse effect on the site in terms of habitat loss. However, this does not equate to an adverse effect on its integrity if that integrity can be preserved, in the longer term, by reason of the effective management of the considerable habitat resource that the cSAC holds. Accordingly I do not regard the changes proposed as so significant that they amount to what could, overall, be regarded as an 'adverse effect on the integrity of the cSAC' (taking account of the definition of integrity given in PPG9)*" (13/IR 81).

After agreement on the fact that the development proposal was likely to have a significant effect, the Inspector held the view that the removal of the turfs from the hillside would have a short term adverse effect on the SAC, but that with appropriate management there would not be a long term adverse effect on site integrity. However, the Inspector did not ensure that the mitigation relied upon to avoid the adverse effect on integrity (improvements to the effective management of the site) was in place. The Secretary of State agreed with the Inspector's conclusions. The management of the site has not significantly changed, and is cattle grazed in the same way that it has been since before the planning application was made[48].

The Inspector does take note of the fact that the site contains a priority habitat, and as such is subject to Reg 49 (2) if it is determined that there is an adverse effect on the integrity of the site. The Inspector makes reference to this in case the Secretary of State decided that there is an adverse effect on integrity, concluding that "*I find that the integrity of the European site would not be adversely affected. If however, this view is not accepted, there are reasons based on the contribution of the scheme to strategic economic development and regeneration to justify considering seeking the opinion of the European Commission*" (13/IR 96).

Owing to a priority habitat being affected, Regulation 49(2) of the Habitats Regulations requires that where there are adverse effects on integrity, and no alternative solutions, the imperative reasons of overriding public interest need to be reasons relating to human health or public safety, or reasons relating to beneficial consequences of primary importance to the environment. Without such reasons the case would need to be referred to the European Commission, as recommended by the Inspector if the Secretary of State had considered there to be an adverse effect on site integrity.

"*The Secretary of State agrees that although the proposal will have an immediate adverse effect on the site in terms of habitat loss, it will not have an adverse effect on its integrity (IR81). Having taken this view, the provisions of section 49 do not apply*" (13/SoSL 9).

This case was raised in evidence and submissions at the Dibden Terminal public inquiry and the Inspector Michael Hurley noted in his report that "*The conclusion in the White horse Millennium Landmark case is striking, since the Secretary of State agreed with the Inspector's opinion that "the cSAC would be better able to retain its integrity" without the*

[48] Phil Williams, Conservation Officer, English Nature (Kent Area Team) pers. comm.

proposed development. The decision does not establish a binding precedent" (3/IR 7.30) and further "*I note that the inspector (with whom the Secretary of State agreed) considered that "the cSAC would be better able to retain its integrity without the hill-figure." Taken alone, that would necessarily imply that the hill-figure could adversely affect the integrity of the European site*" (3/IR 36.173).

"*However, the Inspector continued by arguing that the habitat loss would not equate to an adverse effect on the site's integrity "if that integrity can be preserved in the longer term, by reason of the effective management of the considerable habitat resource that the cSAC holds." It was on that basis that he concluded that there would be no adverse effect on the integrity of the cSAC*" (3/IR 36.174).

4 Conclusions

4.1 Analysis of the decisions

4.1.1 Tideways

We are excluding Tideways from further analysis because disturbance may have been the prevailing consideration in the Inspector's mind and he was also considering the in combination effects through the precedence it could set. These were legitimate factors to take into account but they obscure the judgement as to the significance of the very small scale of direct landtake (0.0000774%).

4.1.2 The eight key decisions

There are six examples of small scale effects of approx 1.0% or less of land take or habitat loss:

- London Gateway Essex 0.1%
- Quay 2005 Hull 0.01% (in fact 0.03 when calculated correctly)
- Gilwern to Hafodyrynys Pipeline South Wales 0.15%
- Dibden Bay Terminal Southampton 0.76%
- Outer Harbour Immingham 0.145%
- Santoña Marshes Spain 0.5%

All these have the authority of being Secretary of State decisions except Santoña Marshes which is a ECJ judgment. All concluded a likely significant effect and all determined or implied an adverse effect on integrity. However, there is a need to take into account a number of other factors:

- The London Gateway percentage habitat loss included an area that would suffer a change in function of habitat.
- Dibden Bay would cause a loss of supporting habitat in addition to the percentage of habitat loss within the SPA.
- Santoña Marshes was complicated by a number of other factors including impacts on hydrology and several causes of disturbance.

Nevertheless, there are three cases that all appear to be wholly or largely related to landtake effects / habitat loss: Quay 2005, Gilwern and Immingham.

Two further cases are important because they too are made by Secretaries of State and both involve landtake as the sole or primary issue, they are Barksore Marshes (1.79%) and Bathside Bay (1.87%).

4.1.3 The other cases

The other cases included in this report are important for various reasons and provide useful contributions to the wider picture of the scale of effects. However, the White Horse case is difficult to draw firm conclusions from. On the face of it, as the Inspector at the Dibden Inquiry concluded, it can only be read as a decision that there would be an adverse effect on integrity if the effects were not offset by the anticipated management measures. These measures were assumed by the Inspector but not secured by him. The loss of 0.17% is therefore a further example of a Secretary of State decision on likely significant effect and potential adverse effect on integrity.

Linshaws Quarry is also a difficult case to draw firm conclusions from. Whilst the Secretary of State decided that it did not justify his intervention, he was aware that the PDNPA considered the effects to be significant and that they might refuse the application. By not intervening he was allowing the Authority to take whatever decision they wanted to make. They did refuse the application and the subsequent appeal was withdrawn.

The Mawcarse case at Loch Leven is included for its comparative value and as a measurable, small-scale, indirect effect that would be significant when combined with other projects and in absence of the mitigation. It is different in the type of effect, being indirect pollution, but illustrates how a very small scale effect can be deemed to be a likely significant effect and without the offsetting measures an adverse effect on integrity. It was accepted on the basis of a net improvement in the discharges that would guarantee no adverse effect on the water quality of the Loch. The original proposal without mitigation made a negative contribution towards the improvement of the condition of the designated site. The mitigation measures proposed made a positive contribution towards the achievement of favourable conservation status for the designated site.

Mostyn Docks is a decision that we regard as questionable. Indeed, it is understood that CCW is recommending to the Welsh Assembly Government that the reclaimed area should be removed from the SPA[49], a point that we consider further demonstrates an adverse effect on integrity if the boundary of the site has to be re-drawn.

4.1.4 Analysis of consistency of decisions with the guidance

The eight key decisions referred to above were all taken in accordance with the guidance issued by the EC, and the UK Government; there is no inconsistency with the English Nature guidance in HRGN1 or HRGN3. In particular the decision makers were meticulous in their application of the precautionary principle embedded in the law and guidance.

[49] Adam Cole-King, pers.comm.

4.1.5 Overall conclusions

The overall conclusion is that each case should continue to be determined on its merits, as it is rare for the Secretary of State or an Inspector to have to determine a simple case of a single, permanent land take from a site. However, it is equally clear that Secretaries of State have held that very small scale losses or changes in habitat are likely to be a significant effect. Indeed they have concluded that very small scale losses, substantially less than 1%, would be an adverse effect on integrity; or at least they could not ascertain there would be no adverse effect on integrity.

Whilst it is concluded that very small scale losses cannot ascertain no adverse effect on integrity purely because of the small scale of the effect, there must be a point at which the effect is considered *de minimis*. The term *de minimis* is widely used in a legal sense and is defined by the LAW.COM Dictionary as "*Latin for 'of minimum importance' or 'trifling.' Essentially it refers to something or a difference that it so little, small, miniscule or tiny that the law does not refer to it and will not consider it*."[50]

The Gilwern to Hafodyrynys Pipeline is the one case where the longevity of the effect led to the conclusion that a particular small scale effect was *de minimis.* The Secretary of State for Trade and Industry based his conclusions on the small scale of the affected area (0.09%), the short term nature of the effect **and** the degree of certainty that the affected vegetation could be restored to its original quality. Thus, it was concluded that one effect of the pipeline proposal on the Usk Bat Sites cSAC was *de minimis* and the other (long-term effect on 0.15% of the site) would be likely to have a significant effect and, indeed, to have an adverse effect on the integrity of the site.

"*It is reasonable to consider the 1 to 2 years that the 1 ha turfed is likely to take to restore its full species composition (ie restoration in area and quality), as de minimis. This would not therefore represent an adverse affect on the integrity of the cSAC. In contrast, the DTI is of the view that the 10-12 year-long effect on the 1.5 ha of cSAC habitat which will not be turfed cannot be considered de minimis, and thus should be considered as an adverse effect on the integrity of the site*" (4/SoSL page 3).

English Nature's European Sites Guidance[51] advises at paragraph 4.3 that "*the duration of any impact(s) and the potential for recovery/reversibility are important factors to consider when determining whether it is possible to demonstrate no adverse effect on integrity… a conclusion of no adverse effect may be able to be reached in the case of a small-scale effect from which the site/feature can quickly recover… the longer the recovery time the more difficult it will be to demonstrate no adverse effect on integrity*." The Managing Natura 2000 guidance[52] explains at paragraph 4.6.3 that "*when looking at the 'integrity of the site' it is important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term*."

In the Dibden Bay inquiry, the Inspector was not convinced by the argument put forward by ABP regarding the short term nature of potential adverse effects.

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[50] http://dictionary.law.com

[51] Chapman, C. and Philp, C. 2004. *European Sites Guidance – Internal Guidance to Decisions on 'Site Integrity': a Framework for Provision of Advice to Competent Authorities*.' Peterborough: English Nature.

[52] European Community, 2000. *Managing Natura 2000 Sites The provisions of Article 6 of the Habitats Directive 92/43/EEC*

"*I have some difficulty with this approach. A short-term effect may have longer-term consequences. For instance, dredging and recharge operations may result in there being a reduced concentration of dissolved oxygen in Southampton Water for just a few weeks. But if that period coincides with the migration of salmon through the affected area, the consequences could be far reaching…similarly the smothering of benthic invertebrates on a foreshore could be regarded as a short term effect, since it might reasonably be expected that the area would be re-colonised within 3 years or so. However, during that period the condition of wading birds on the foreshore could deteriorate*" (3/IR 36.186-187).

In considering the relevance of the scale of any habitat loss in determining whether there is an adverse effect on site integrity, it should be noted that of the 13 cases included in this research report, only five cases actually quoted the area of habitat lost as a percentage. The only case that referred to a percentage of habitat lost and concluded no adverse effect on site integrity was Mostyn Docks. The other four cases where percentages were calculated within the Inspector's report and where adverse effect on the integrity of the site was concluded all cited a percentage loss of less than 1.0%. Of the five cases that did include a percentage calculation, three of them were incorrect.

The conclusions of the Inspector in the Dibden Terminal Inquiry report are worth considering here. In determining that there would be an adverse effect on the integrity of the SPA and Ramsar Site he stated that "*the destruction of protected habitat on a significant scale necessarily implies that the site's ecological structure will be damaged and rendered less coherent. Manifestly, it will no longer sustain, across the whole of its area, the habitat for which it was classified*" (3/IR 36.172). In light of the definition of the integrity of a site then given in Annex C of PPG9 this would lead to an adverse effect on the integrity of the site. ABP argued that the concept of "sufficiency" enabled a decision maker to exercise judgement in considering whether the loss of habitat from a SPA would be permissible (3/IR 36.176). The Inspector did not accept this. "*One of the purposes of classifying SPAs is to protect a sufficient diversity and area of habitat for the conservation of particular bird species. This implies that a Member State may exercise discretion in deciding whether a sufficient area has been classified. But once a SPA has been classified, it is not open to a competent authority to permit the destruction of protected habitat on the grounds that a sufficiency of habitat would remain. Such an approach would negate the Member State's original decision to classify the site, and undermine the protective regime"* (3/IR 36.189).

5 Guidelines

We have been asked to recommend guidelines for the future based on the research. In light of our conclusions, we offer the following advice.

Unless a particular loss of habitat could be regarded as so trivial as to be *de minimis* (see definitions in section 4 above), it is capable of being a significant effect and may also be an adverse effect on the integrity of the site. Bearing in mind the precautionary principle embedded in the legislation, applied consistently by Secretaries of State and endorsed in court judgments, habitat loss of very small scale, including losses in the order of 0.1% or less of a site, can clearly be regarded as an adverse effect on the integrity of a designated site. By definition, the larger the SPA or SAC or Ramsar site, the larger an area would be that is represented by 0.1%, and thus the more important it may be in supporting individual plants or animals, or ecosystems, for which the site is classified, designated or listed. The value of

each and every part of a large site is further emphasized when it is considered that all parts of large areas such as estuaries are potentially important because they are very dynamic and different parts of the system are used at differing times for different reasons, by the birds for which they were classified; for habitats that are rare, such as certain types of heathlands, peatlands or orchid-rich calcareous grasslands, every part of a large site is an important part of a globally scarce resource and part of a functional ecosystem.

Equally, whilst a 0.1% loss from a smaller site may represent a small area in spatial terms, it can be important to the ecological functioning of the site which, being a smaller unit, is likely to depend on much smaller ecosystems or communities, in spatial terms. The argument that a small loss does not matter is one that can be repeated until substantial losses have been incurred. This insidious reduction of habitat is as potentially damaging as a single larger loss. Such arguments are supported by the decisions examined in this research.

The cases identified and examined concentrated on single projects (albeit some had many component parts). Only Mawcarse (3.8) and Tideways (3.12) explicitly referred to combined effects with other projects. However, it is logical to conclude that the decision makers would come to the same conclusion about the significance of an effect irrespective of whether the effect was caused by one, ten or a hundred projects. In other words, where small scale effects are caused by a combination of even smaller-scale effects, the overall effect is still significant and can result in an adverse effect on integrity. Thus, even projects that may appear, *prima facie*, to be *de minimis*, may not be when their effects are combined with other, similarly very small scale effects.

The aim should be to avoid any significant disturbance or deterioration or habitat loss, other than trivial or inconsequential loss, from international sites, if projects are to avoid being subject to 'appropriate assessment' and potentially to the tests of regulation 49 of the Habitats Regulations 1994 (Article 6(4) of the Habitats Directive).

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Appendix A Table of cases

Number in text	Date	Case name	Reference
1	9 November 1998	Barksore Marshes	GOSE/104/4/KENT/1
2	29 March 2006	Bathside Bay Container Terminal	APP/P1560/A03/1129387
3	20 April 2004	Dibden Bay	P89/24/59
4	3 July 2002	Gilwern to Hafodyrynys Pipeline	RFBZ/C/001/00019
5	7 July 2004	Immingham Outer Harbour	P89/3/397
6		Linshaws Quarry	NP/B/0300/001
7	20 July 2005	London Gateway	
8	23 December 2005	Mawcarse, Loch Leven, Kinross	P/PPA/340/275/1
9	19 August 1996	Mostyn Docks	PP013/98/005 (formerly APPX6015/X/95/508310)
10	21 December 2005	Port Of Hull - Quay 2005	P89/3/381/PCP/2/4/1
11	2 August 1993	Santoña Marshes, Spain	Case C-355/90: Commission .v. Kingdom of Spain Translation reference: STS 891/93
12	23 May 1997	Tideways Jetty	T/APP/X1735/A/96/274856/P9
13	27 March 2002	White Horse Millenium Landmark	GOSE 108/001/SHEP/004

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Research Information Note

English Nature Research Reports, No. 704

How the scale of effects on internationally designated nature conservation sites in Britain has been considered in decision making: A review of authoritative decisions

Report Authors: Rachel Hoskin and David Tyldesley Date: 1 September 2006
Keywords: Habitats Regulations; site integrity; spatial scale; *de minimis*

Introduction

The implementation of a wide range of plans or projects can affect the wildlife or habitats for which sites have been designated for their nature conservation importance. This report concentrates on internationally designated sites. Because of the level of protection afforded by law and policy to these sites, especially by the *Conservation (Natural Habitats &c) Regulations* 1994 (here referred to as the Habitats Regulations) it is uncommon for them to be threatened by a project that would have major adverse effects on them. However, small scale effects are more common.

A problem that is frequently encountered is how to judge whether these small scale effects on a site may adversely affect the site's integrity, indeed whether they are even significant in light of the conservation objectives for the site. The issue also arises in the context of the review of outstanding consents, which is required in respect of internationally designated sites under the Habitats Regulations. Decisions need to be made as to the significance of the effects of many ongoing projects and incomplete developments, which alone may have very small effects but which, in combination with other projects could have significant effects.

Whilst there is some guidance available, there has been no definitive explanation as to the scale of effect that should be regarded as significant, or how large scale an effect needs to be before it may be regarded as potentially adversely affecting the integrity of a site. In order to assist in future case work, English Nature commissioned this research report to conduct a review of previous legal judgments and Inspectors' decisions and reports in cases where the spatial scale of impacts was material to the conclusions reached.

What was done

The researchers compiled a list of potentially relevant cases drawn from their own library of decisions, their empirical knowledge of case work and suggestions from officers in the Countryside Council for Wales (CCW), English Nature and Scottish Natural Heritage (SNH).

Each decision was examined and a summary prepared to standardise the information collated about each case. This included a description of the development and its location; the date of decision and decision maker; the area of the designated site, its habitats and sensitivities to the proposed change; the loss of habitat from the site and other relevant effects on the designated interest features; the decision and reasoning for it; whether there was considered to be a likely significant effect on the site,

Continued……

an adverse effect on the integrity of the site and, where relevant, whether there were considered to be alternative solutions or imperative reasons of overriding public interest; and, finally, whether any compensatory measures were proposed. Quotations were drawn from the decision letters and Inspectors' reports and points for discussion noted.

After consideration of each case a working table summarising the findings was generated and discussed before this report was drafted. Table 1 in the report is a modified version of that Table omitting some cases that were researched but not reported, as they did not contribute to the purpose of the study. It should be noted that the report only includes the cases where the loss of small areas of habitat in the designated sites were considered to be relevant to the decision. Cases involving only larger scale losses or indirect effects such as disturbance have not been included.

Results and conclusions

After a preliminary analysis of many cases, the study looked at thirteen cases in detail. These are summarised in Table 1 in the Summary of the report and assessed in more detail on an individual basis in Section 3.

The overall conclusion is that each case should continue to be determined on its merits, as it is rare for the Secretary of State or an Inspector to have to determine a simple case of a single, permanent land take from a site. However, it is equally clear that Secretaries of State have held that very small scale losses or changes in habitat are likely to be a significant effect. Indeed they have concluded that very small scale losses, substantially less than 1%, would be an adverse effect on integrity; or at least they could not ascertain there would be no adverse effect on integrity.

Guidelines to help decision-making in future casework are presented.

English Nature's viewpoint

So far as English Nature is concerned this report appears to have been based on relevant examples and reaches conclusions that are in line with English Nature's current thinking.

Further information

English Nature Research Reports and their *Research Information Notes* are available to download from our website: www.english-nature.org.uk

For a printed copy of the full report, or for information on other publications on this subject, please contact the Enquiry Service on 01733 455100/101/102 or e-mail enquiries@english-nature.org.uk

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Top left: Using a home-made moth trap.
Peter Wakely/English Nature 17,396
Middle left: Co_2 experiment at Roudsea Wood and Mosses NNR, Lancashire.
Peter Wakely/English Nature 21,792
Bottom left: Radio tracking a hare on Pawlett Hams, Somerset.
Paul Glendell/English Nature 23,020
Main: Identifying moths caught in a moth trap at Ham Wall NNR, Somerset.
Paul Glendell/English Nature 24,888