Appeal no: UKSC 2024/0108

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL
CIVIL DIVISION (ENGLAND AND WALES)
[2024] EWCA Civ 730

BETWEEN:

C G FRY & SON LIMITED

Appellant

and

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) SOMERSET COUNCIL

Respondents

and

(1) THE HOME BUILDERS' FEDERATION AND LAND, PLANNING AND DEVELOPER FEDERATION
(2) THE OFFICE FOR ENVIRONMENTAL PROTECTION
(3) WILDLIFE AND COUNTRYSIDE LINK

Interveners

WRITTEN CASE ON BEHALF OF THE OFFICE FOR ENVIRONMENTAL PROTECTION

Stephen Tromans KC **Ruth Keating**

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References to the main Hearing Bundle are in the form: **[HB/section/page]**.

References to the Key Documents Bundle are in the form: **[KB/tab/page]**.

References to the Supplemental Bundle are in the form: **[SB/section/page]**.

Overview of the OEP's submissions

1. The OEP's submissions can be summarised as follows:
    a. The OEP is intervening because the arguments raised by the Appellant have implications going far beyond nutrient neutrality.
    b. These arguments would result in a serious weakening of the environmental protection which the Conservation of Habitats and Species Regulations 2017 ("**the Habitats Regulations**") provide for protected sites.
    c. It is clear the Habitats Regulations transpose the Habitats Directive[1] and should operate within a multi-stage process.
    d. Regulation 63 on assessment is clearly intended as a stand-alone provision which operates in cases where the specific provisions on planning do not. The coverage of the assessment provisions is intended to be comprehensive and should not give rise to gaps.
    e. Therefore, if the First Respondent is incorrect in its submission that the approval in this case is within the ambit of the grant of planning permission, it is still an approval caught by regulation 63.

The OEP and the basis for intervention

2. This application to intervene is made on behalf of the OEP. The OEP is an independent non-departmental public body established under section 22 of the Environment Act 2021 and sponsored by the Department for Environment, Food and Rural Affairs. The OEP's principal objective is to contribute to environmental protection and the improvement of the natural environment.[2]

3. The OEP has functions in England and Northern Ireland to hold government and other public authorities to account against their environmental commitments and compliance with environmental law. The OEP also has the power to apply to intervene in any judicial review relating to an alleged failure to comply with environmental law where it considers that the failure (if it occurred) would be serious.[3] The OEP can make such

[1] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Flora and Fauna ("**the Habitats Directive**").
[2] Section 23 Environment Act 2021.
[3] Section 39 Environment Act 2021.
Seriousness is defined in the OEP's Strategy and Enforcement Policy (28 November 2024) and includes at 4.2(a) that a factor in assessing seriousness is: *"whether the conduct raises any points of law of general public*

an application whether or not it considers that the relevant public authority has failed to comply with the environmental law in question.[4]

4. The OEP applied to intervene in this appeal on 9 December 2024 and was granted permission to intervene on 29 January 2025. The OEP's written submissions are in respect of Ground 1 only – namely, whether the judge was wrong to hold that regulation 63 of the Habitats Regulations applied at the discharge of conditions stage. The OEP does not make submissions in respect of Ground 2 in this appeal.

5. These submissions are structured as follows:
    a. The OEP's essential concerns – paragraphs 6 to 9.
    b. Nutrient neutrality – paragraphs 10 to 12.
    c. Case law on the habitats regime – paragraphs 13 to 21.
    d. Suggested approach to interpretation – paragraphs 22 to 45.
    e. Summary of principles – paragraphs 46 to 47.
    f. Conclusion – paragraph 48.

The OEP's essential concerns

6. The OEP emphasises that it is not taking sides between the parties – it is simply concerned to ensure that the law is clear and effective in protecting the environment.

7. The OEP is mindful of Practice Direction 4 paragraph 4.54 that its submissions: *"should not introduce new legal issues or seek to expand the case"*. The OEP has borne this in mind in drafting its submissions. However, despite the Appellant's extensive reference to, and emphasis on, nutrient neutrality there are plainly wider issues engaged by the issues before the Court. This is why these written submissions refer to these wider issues and implications so that they are in view as the Court reaches its decision.

8. The Court of Appeal summarised at the outset of its judgment, the central question as:[5]

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importance. This may be, for example, by setting a precedent with wider potential implications (beyond those of the case) or addressing an important area of law where clarification would be valuable or important". The OEP's Strategy and Enforcement Policy is available at: https://www.theoep.org.uk/report/our-strategy-and-enforcement-policy-2024.

[4] Sections 39(6) and (7) of the Environment Act 2021.

[5] **[KB/6/144]**. *CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 730, at [1].

> *"whether the [Habitats Regulations], properly interpreted, required an "appropriate assessment" before a local planning authority decided whether to discharge conditions on the approval of reserved matters, having previously granted outline planning permission, without such an assessment, for a major development of housing on land close to a protected site."*

9. The OEP submits that the answer to this question must be yes, unless the local planning authority can be satisfied, to the high level of certainty required, that the development is not likely to have a significant effect on the protected site. If local planning authorities could not require an *"appropriate assessment"* before discharging conditions on the approval of reserved matters, this would produce a result at odds with ensuring environmental protection and the purpose of the Habitats Regulations. It would mean that competent authorities would be compelled to agree to a project that has not been assessed and might well fail an assessment were one to be undertaken. For the reasons given below, this cannot be the correct interpretation of the Habitats Regulations.

Nutrient neutrality

10. A key consideration in this appeal is that it raises issues of construction and application of the Habitats Regulations which go far beyond the issue of nutrient neutrality. If the decisions of the courts below are – as is submitted by the Appellant – giving rise to detrimental effects in terms of housing delivery,[6] then the answer should lie in reform of the law or in ameliorating those effects following full consideration by government and appropriate public consultation, taking proper account of the implications of any such change for protected sites. The answer cannot be found in an incorrect interpretation of existing law.

11. The OEP has taken an interest in the issue of nutrient neutrality in its role of providing advice to government. Public correspondence between the OEP and the relevant Secretaries of State[7] is included the Supplemental Bundle.[8] The OEP's letter of 30 August 2023 expressed concern that proposed amendments to the Habitats Regulations in the Levelling-up and Regeneration Bill relating to nutrient neutrality would reduce the level of environmental protection provided for in existing environmental law, and

[6] **[KB/2/32]**. See paragraph 8 of the Appellant's written case.
[7] At the time, the Rt Hon Thérèse Coffey MP (Secretary of State Environment, Food & Rural Affairs) and the RT Hon Michael Gove MP (Secretary of State for Levelling Up, Housing and Communities).
[8] **[HB/E 4/200]** to **[HB/E 4/204]**.

as such would represent a regression, in the absence of new measures which would safeguard protected site condition. The letter of 30 August 2023 makes clear that nutrient pollution is a significant issue that requires urgent action: "*Many of England's most important protected wildlife sites are in a parlous state, with their condition well below what it should be. This is often due to nutrient pollution, and development can be a significant contributor to this*." Notwithstanding the then Secretary of State's protestations to the contrary in her letter of 31 August 2023, the OEP maintained its view on this point in its letter of 1 September 2023 that the proposed amendments would have the effect of reducing the level of protection in environmental law.

12. The new government is considering a new approach at a strategic level to overcome the difficulties presented by the requirements of the Habitats Regulations in the context of nutrient neutrality to new development.[9] The OEP will consider these proposals and any draft legislation to implement them in due course. In the context of this appeal, the OEP submits that properly considered and consulted upon reform is the correct way to address conflict between site protection and house building. It is not for the Court to resolve any such conflict: its role is to interpret the existing law. If, properly construed, the law gives rise to problems in housing delivery, then the solution to that problem lies with the government and the legislature.

Case law on the Habitats Regime

13. Broadly stated, the purpose of a Habitats Regulations Assessment ("**HRA**") is to provide strict protection for European sites and European marine sites from the effects of plans and programmes in furtherance of an overarching aim of contributing towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora (see Articles 2(1) and 6 of the Habitats Directive).

14. At paragraph 57 of the Appellant's Written Submissions it is said that none of the authorities relied upon by the courts below, or referred to by the Respondents, directly address the question before – or bind – the Court. The Court will be very familiar with

[9] **[HB/F 5/1129]**. The government launched a policy paper on 15 December 2024, entitled *"Planning Reform Working Paper: Development and Nature Recovery"*. It invites views on *"the government's proposed new approach to development and nature recovery"*. Available at: https://www.gov.uk/government/publications/planning-reform-working-paper-development-and-nature-recovery. Paragraphs 41 to 49 of this policy paper are particularly relevant **[HB/F 5/1139]**.

answering questions such as that in this appeal without case law that directly answers the issue before it – a lack of directly relevant authority does not mean a particular party's interpretation is incorrect. Whilst there may be no case law directly bearing on the interpretation of the provision in question, the OEP submits that the Court of Appeal was correct to find support in interpretation from the cases it referred to.

15. It is similarly said by the Appellant that the cases cited by the courts below, and the Respondents, concerning environmental impact assessment ("**EIA**") are not conclusive because they arise under the differently-worded EIA legislation. The OEP does not repeat the submissions made by the courts below and the Respondents on why these cases are relevant. However, the OEP does add that while the potential scope of the habitats regime is wider – in referring to agreement to any plan or project, as compared with the development consent for defined classes of projects in the case of EIA – both HRA and EIA may need to be applied in the context of multi-stage consents, and it would be surprising if the approach was different between them. The commonalities between the two systems in the context of standard of review were reflected in *Smyth v Secretary of State* [2015] P.T.S.R. 1417, where Sales LJ (as he then was) said at [80]:

> *"Although the requirements of article 6(3) [of the Habitats Directive] are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review …"*

16. It has been clear for many years, since the decisions in *Commission v UK* (C-508/03) [2007] Env LR 1 and *R (Barker) v London Borough of Bromley* (C-290/03) [2006] QB 764 (cited by Court of Appeal at [22]), that the EIA regime applies to *"multi-stage consent"* processes and will bite at later as well as earlier stages. It is therefore not surprising that this should also be a feature of the HRA regime. In the OEP's submission both *R (Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin) ("***Wingfield***") and *R (Swire) v Canterbury CC* [2022] EWHC 390 (Admin) (at [94]-[95]) ("***Swire***") support the view that both Article 6(3) of the Habitats Directive and the Habitats Regulations are broad enough to embrace HRA at all stages of multi-stage decision taking (in appropriate circumstances). The approach of Lang J in *Wingfield* and Holgate J (as he then was) in *Swire* was correct and is apposite to the situation in this case.

17. At paragraph 58 of the Appellant's Written Submissions it is said that *Wingfield "was not a case where the local planning authority took the stance that it could require an appropriate assessment against the developer's will"*.[10] First, whether an appropriate assessment is undertaken with or *"against"* the developer's will is legally irrelevant to whether one is required. Further, the Appellant emphasises that the issues in the present appeal did not arise for determination in *Wingfield*. However, on the reasoning of *Wingfield* there is a clear analogy with the operation of regulation 63 at the discharge of conditions stage. The reasoning in the court's decision in *Wingfield* is applicable, as the Court of Appeal found.

18. There are a variety of reasons why an appropriate assessment may still need to be undertaken after outline planning permission has been granted, for example: a change in the condition of the site; a change in scientific knowledge; a perceived deficiency in earlier assessment; a new legal interpretation on relevant law by the courts such as that following in *People Over Wind*;[11] or because of a change of advice by the statutory nature conservation body. The important question is whether, in light of those changes, the plan or project is likely to have a significant effect on the site's conservation objectives. *Swire* endorses *Wingfield*, in that case it was said that there is no agreement until reserved matters are granted. In particular at [95] it was held: *"there is no legislative objective requiring HRA to be carried out at the earliest possible stage"*.

19. As cited by the Court of Appeal,[12] the expression to *"agree"* was interpreted by the CJEU in *Inter-Environnement Wallonie ASBL v Conseil des Ministres* (Case C-411/17) [2020] Env LR 9 ("***Wallonie***"), by reference to the term *"development consent"* in the EIA Directive, the case law on which is clear both at CJEU and domestic level that assessment may be required at subsequent stages in the development consent process.[13]

20. It is also consistent with the CJEU's observation in *Wallonie* at [143] that: *"if national law provides for a number of steps in the consent procedure, the assessment under*

[10] **[KB/6/165]**. Similar submissions were rejected by the Court of Appeal [2024] EWCA Civ 730, at [78]-[79].
[11] *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668.
[12] **[KB/6/150]**. [2024] EWCA Civ 730, at [20].
[13] See for example *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-508/03)* [2006] QB 764 and *R (Barker) v Bromley London Borough Council (Case C-290/03)* [2006] QB 764.

Article 6(3) of the Habitats Directive, should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable." There is no basis – pursuant to the Directive or the Habitats Regulations – to confine *"the effects"* in the way the Appellant seeks to do. This approach of the assessment being carried out *"as soon as"* the effects which the project in question is likely to have on a protected site are *"sufficiently identifiable"* is consistent with the approach outlined at paragraph 16 above.

21. More recently, the decision of *Friends of the Irish Environment Ltd v An Bord Pleanála* (C-254/19) [2021] Env. L.R. 16[14] reminds authorities that once initial permission for a project has been granted, any subsequent decision to renew, alter or extend it may again trigger the requirement for careful consideration, and possibly a full assessment, of likely impacts under the Habitats Directive. The OEP considers the position is the same under the Habitats Regulations. As said at [55]:

> *"…the taking into account of such previous assessments…cannot rule out the risk that it will have significant effects on the protected site unless those assessments contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account".*[15] (emphasis added).

Suggested approach to interpretation

22. The case law discussed above provides a clear basis for the Court of Appeal's decision, but even approaching the matter by interpreting the relevant legislation on first principles, the OEP would submit that the Court of Appeal's decision was correct. The OEP concurs respectfully with the Court of Appeal that the issue here is one of interpretation, not of the doctrine of direct effect of EU law. There may be cases where direct effect has a role to play but this is not one of them.

[14] **[HB/D 4.4/2499]**.
[15] **[HB/D 4.4/2525]**.This is also reflected by the other authorities considered by the Court of Appeal, including *Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at [43] **[HB/D 4.5/2542]**, that an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions, in the light of the best scientific knowledge in the field.

23. The Habitats Regulations are domestic legislation which were enacted in order to give effect to the Habitats Directive.[16] They are, as the Court of Appeal summarised, in the terminology of the European Union (Withdrawal) Act 2018 ("**the Withdrawal Act**"), *"EU-derived domestic legislation"*.[17] As the Court of Appeal's analysis shows, sections 2, 4, 5 and 6 of the Withdrawal Act are important to the general question of **t**he distinction between interpretation and the doctrine of direct effect in EU law.[18] The OEP respectfully agrees with the approach of the Court of Appeal that:

> *"it was unnecessary for the judge to refer to the doctrine of direct effect to resolve the issue of interpretation which arises in the present case. Indeed it was unnecessary even to refer to the principles of interpretation in EU law, because, in our view, the Habitats Regulations have the meaning which the judge gave them, simply applying the conventional approach to statutory interpretation in domestic law, which includes the purposive approach"*.[19]

24. In respect of that conventional approach to statutory interpretation in domestic law, the correct starting point is to construe the relevant provisions of the Habitats Regulations, in particular regulations 61 to 63 and 70.

25. The Court of Appeal correctly summarised the approach to statutory interpretation at [67] to [73] of its judgment emphasising – with the benefit of recent Supreme Court authority – the central tenet of the importance of the purpose and scheme of the legislation being construed. The true interpretation of legislation is a unified process and not one to be performed in isolation from context and purpose (at [68]).

26. Leaving aside the statutory provisions on retained, or now assimilated, EU law, the Habitats Regulations were enacted (as were their predecessor regulations of 1994[20] and 2010[21]) to give effect to the Habitats Directive regime.[22] The relevance of these predecessor regulations is returned to at paragraphs 31 to 36 below.

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[16] **[HB/D 2.4/1122]** to **[HB/D 2.6/1127]**. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
[17] **[KB/6/155]**. [2024] EWCA Civ 730 at [37].
[18] **[KB/6/155]** to **[KB/6/156]**. [2024] EWCA Civ 730 at [37] to [45].
[19] **[KB/6/169]**. [2024] EWCA Civ 730 at [97].
[20] **[SB/F 1.10/288]**. Explanatory Note, the Conservation (Natural Habitats, &c.) Regulations 1994.
[21] **[SB/F 1.13/292]**. Explanatory Note, the Conservation of Habitats and Species Regulations 2010.
[22] The OEP therefore does not agree with the characterisation of the Habitats Directive at paragraph 31 of the Appellant's Written Submissions that from 1 January 2021 **[KB/2/38]**, the Habitats Directive has had no direct

Context and purpose of the Habitats Regulations

27. The Explanatory Memorandum to the Habitats Regulations states as follows:[23]

a. At paragraph 2.1, that the purpose is to consolidate and update the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) (the "**Habitats Regulations 2010**").[24]

b. It notes at paragraph 3.3 that there had been two reviews of the implementation of the Habitats Regulations 2010 (including a fitness check of the Nature Directives conducted by the EU) which had concluded that they remain fit for purpose.[25]

c. Paragraph 4.1 states that the Habitats Regulations 2010 were the *"principal means"* by which the Habitats Directive was transposed in England and Wales[26] and the adjacent territorial seas and that they also transpose elements of the EU Wild Birds Directive in England and Wales.[27]

d. At paragraph 4.3 of the Explanatory Memorandum it is expressly said that the Habitats Regulations *"are likely to remain in place for some time after the UK exits the EU."*[28] These references to the Directive in the Habitats Regulations were therefore made with the UK's exit from the EU in contemplation.

e. Under the heading *"Policy Background – What is being done and why"*, under paragraphs 7.1[29] and 7.2 it is expressly said that the Habitats Regulations transpose the Habitats Directive and elements of the Birds Directive in England, Wales and, to a limited extent, Scotland and Northern Ireland.

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status in English law. This characterisation glosses over the continuing role of the Habitats Directive in informing the purpose and context of the Habitats Regulations.

[23] **[HB/D 1.38/884]**. The OEP notes that the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 Explanatory Memorandum is in the main hearing bundle and has provided the Explanatory Memorandum as published in 2017 in the Supplemental Bundle.

[24] **[HB/D 1.38/884]**.

[25] **[HB/D 1.38/885]**.

[26] **[HB/D 1.38/885]**. A similar point is made in respect of Northern Ireland and Scotland at paragraph 4.1.

[27] **[SB/F 1.19/327]**. Specifically it is said that: *"The Habitats Regulations 2010 are the principal means by which Council Directive 92/43/EEC on the conservation of natural habitats of wild fauna and flora (the "Habitats Directive") is transposed in England and Wales and the adjacent territorial seas. They also transpose elements of the EU Wild Birds Directive in England and Wales."*

[28] **[SB/F 1.19/327]**.

[29] **[SB/F 1.19/328]**. At paragraph 7.1 it is stated that: *"The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. The Directive lays down rules for the protection, management and exploitation of such habitats and species"*.

28. Further, in regulation 3 'Interpretation' of the Habitats Regulations reference is made to definitions within the Habitats Directive.[30] In addition, regulation 9(3) of the Habitats Regulations provides that: *"a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions"*.[31]

29. The Habitats Directive is therefore plainly relevant to the exercise of understanding the context and purpose of the Habitats Regulations. The Habitats Regulations should therefore be construed according to the purpose of fully and effectively transposing the Habitats Directive.

30. Article 6(3) of the Directive refers to the relevant competent authorities *"agreeing"* to the plan or project. Specifically, Article 6(3) provides: *"in the light of the conclusions of the assessment of the implications for the site…the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public"*. (emphasis added). A national authority 'agreeing' is clearly a term with broad scope. That broad scope also appears from the words *"any plan or project not directly connected with or necessary to the management of the site"* – apart from direct conservation management projects, the protection afforded by Article 6(3) is clearly intended to be fully comprehensive. The word *"agree"* carries a broad meaning in itself, not being confined to any particular type of agreement, or to agreement at any particular stage in the process, or by reference to the precise content of what is being agreed to. This is of course also the thrust of the cases referred to above.

Freestanding nature of regulation 63

31. The context and purpose of the Habitats Regulations, as outlined above, is supported by the legislative history of regulation 63. As referred to at paragraph 26, the predecessor regulations are instructive. The original transposing regulations, the Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716) ("**the 1994**

[30] **[HB/D 1.15/789]**.
[31] **[HB/D 1.17/794]**.

Regulations") provided at regulation 47 *"Application of provisions of this Part"* (as originally made):[32]

> *"47.—(1) The requirements of–*
>
> *(a) regulations 48 and 49 (requirement to consider effect on European sites), and*
>
> *(b) regulations 50 and 51 (requirement to review certain existing decisions and consents, &c.),*
>
> *apply, subject to and in accordance with the provisions of regulations 54 to 85, in relation to the matters specified in those provisions.*
>
> *[…]"* (emphasis added).

32. Regulation 48[33] corresponded to what is now regulation 63. The wording of regulation 47 stated that regulation 48 applied *"in relation to the matters specified"* in regulations 54 to 85. This indicated that the provision had no self- standing effect but applied only to the listed regimes, those being: planning (regulations 54 to 68), highways and roads (regulations 69 and 70), electricity (regulations 71 to 74), pipe-lines (regulations 75 to 78), transport and works (regulations 79 to 82) and environmental controls (regulations 83 to 85).[34]

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[32] **[SB/F 1.8/286]**. The original version has been provided in the Supplemental Bundle.

[33] **[SB/F 1.8/287]**. The original version has been provided in the Supplemental Bundle. Regulation 48: *"48.—Assessment of implications for European site*
(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which–
(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of the site,
shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
(2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.
(3) The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.
(4) They shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate.
(5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.
(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.
(7) This regulation does not apply in relation to a site which is a European site by reason only of regulation 10(1)(c) (site protected in accordance with Article 5(4))."

[34] **[SB/F 1.8/282]**. The arrangement as at 1 November 1994 (the original version) is provided in the Supplemental Bundle.

33. The 1994 Regulations were revoked and replaced by the Habitats Regulations 2010. Regulation 60 dealt with *"Application of provisions of Chapter 1"* and was drafted in similar terms to regulation 47 of the 1994 Regulations:[35]

> *"60.— Application of provisions of Chapter 1*
> *(1) The requirements of—*
> *(a) the assessment provisions, and*
> *(b) the review provisions,*
> *apply, subject to and in accordance with the provisions of Chapters 2 to 7, in relation to the matters specified in those provisions.*
> *(2) Supplementary provision is made by regulations 65 to 67."* (emphasis added)

34. However, a new version of regulation 60 was substituted by regulation 19 of the Conservation of Habitats and Species (Amendment) Regulations 2012 (SI 2012/1927) (from 16 August 2012) ("**the 2012 Regulations**").[36] This read:

> *"60. — Application of provisions of Chapter 1*
> *(1) The requirements of the assessment provisions and the review provisions apply—*
> *(a) subject to and in accordance with the provisions of Chapters 2 to 7, in relation to the matters specified in those provisions; and*
> *(b) subject to regulation 61(7)(c),[37] in relation to all other plans and projects not relating to matters specified in Chapters 2 to 9."* (emphasis added)

35. This shows a clear intent to make it a free-standing provision, applying to all other plans and projects not within the named regimes. This is further supported by the Explanatory Memorandum to the 2012 Regulations. Section 7 of the Explanatory Memorandum concerns the *"Policy background"* to the amendments. This includes at paragraphs 7.11 and 7.12 specific consideration of *"Amendment of regulations 60 and 61 of the Habitats Regulations"* as follows:[38]

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[35] **[SB/F 1.12/291]**. The original version has been provided in the Supplemental Bundle.
[36] **[SB/F 1.16/297]**. The original version has been provided in the Supplemental Bundle. This was revoked from 30 November 2017 by the Habitat Regulations (Schedule 7, para.1).
[37] Regulation 61(7)(c) specifically excluded certain narrow types of projects, covered by other regimes, providing:
> *"This regulation does not apply in relation to—*
> *(a) a site which is a European site by reason of regulation 8(1)(c);*
> *(b) a site which is a European offshore marine site by reason of regulation 15(c) of the 2007 Regulations; or*
> *(c) a plan or project to which any of the following apply—*
> *(i) the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001(in so far as this regulation is not disapplied by regulation 4 (plans or projects relating to offshore marine area or offshore marine installations) in relation to plans or projects to which those Regulations apply),*
> *(ii) the Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006,*
> *(iii) the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2007, or*
> *(iv) the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2010."*

[38] **[SB/F 1.17/301]**.

> *"7.11 This instrument amends regulation 60 to make it clear that the appropriate assessment provisions apply to any plan or project which a competent authority proposes to undertake or give consent to (unless this requirement is already specifically applied in legislation). At present, the Regulations provide that the appropriate assessment provisions are applied to all those consenting regimes listed in Chapters 2 to 9 of the Regulations. For other plans or projects, at present the need to undertake appropriate assessments is covered by the general duty to comply with or have regard to the Directive, as set out in regulation 9.*
>
> *7.12 The instrument makes a consequential amendment to regulation 61 to disapply regulation 61 where there would otherwise be an overlap with certain other regulations, which are already in place to govern the assessment of plans or projects which may have an effect on European sites and European offshore marine sites."* (emphasis added)

36. Therefore the intention was absolutely clear that amending regulation 60 was intended to ensure that the assessment requirement had a stand-alone effect, not limited to the specified consenting regimes.

The current wording of regulation 63 and regulation 70

37. Regulation 60 of the 2012 Regulations was revoked from 30 November 2017 by the Habitat Regulations (Schedule 7, para.1) – with broadly similar wording at regulation 62 of the Habitats Regulations, also titled, *"Application of provisions of Chapter 1"*.

38. In respect of the wording of regulation 63(1), which is the critical provision, it provides in relevant part that: *"A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which…is likely to have a significant effect on a European site or a European offshore marine site…must make an appropriate assessment of the implications of the plan or project"*. (emphasis added).

39. The OEP observes the following: (i) the appropriate assessment needs to be undertaken *"before"*; (ii) the giving of *"any"* consent, permission or *"other authorisation"*. Whilst putting the language of *"agreeing to"* in the Directive into a more familiar terminology for UK lawyers, the wording is plainly broad – reflecting that a competent authority needs to be satisfied that the assessment is appropriate before consent, permission or other authorisation is given. This broad interpretation is reflected by the language used

including the words *"any"* and *"other authorisation"*. Indeed, it is hard to see how it could be any broader.

40. Pursuant to regulation 63(1), in terms in this case, the authority was giving *"any consent, permission or other authorisation"* for a plan or project. Correctly interpreted, this requirement was engaged. It is clear that the local planning authority's approval of the details submitted under the pre-commencement conditions was necessary before the development could lawfully be commenced. By giving its approval, the authority would have been agreeing to the project commencing.

41. This is supported by regulation 61(2)(a) which states that any reference to the giving or granting of any consent, permission or other authorisation is to be taken, in relation to any consent, permission or authorisation which is capable of being varied or modified, to include a reference to its variation or modification.

42. Against this background the Appellant submits that regulation 70(1) contains a list of planning decisions to which *"the assessment provisions apply"* and states that this does not include the discharge of planning conditions.[39] However, the OEP submits that the coverage of the assessment provisions is intended to be comprehensive – as would be required by a purposive approach and in order to transpose the comprehensive scope of the Directive. Either the assessment provisions apply in their own right to the approval, or they apply through the specific provisions of Chapters 2 to 7. The only gap is those types of approval processes expressly stipulated in regulation 63(7)(c).[40] It is not correct to say that the assessment provisions of regulations 63 and 64 have no free-standing effect outside the provisions of Chapters 2 to 7. The words "*in relation to the matters specified in those provisions*" in regulation 62(1)(a) provide a clear indication that the assessment provisions are of general application and will apply in their general form to any authorisation not covered by Chapters 2 to 7.

[39] **[KB/2/37]**. Appellant's Written Submissions at paragraph 24.
[40] This expressly provides that regulation 63 does not apply in relation to:
"(c) a plan or project to which any of the following apply—
(i) the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (in so far as this regulation is not disapplied by regulation 4 (plans or projects relating to offshore marine area or offshore marine installations) in relation to plans or projects to which those Regulations apply);
(ii) the Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006;
(iii) the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017; or
(iv) the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020."

43. The first question therefore is whether Chapter 2 of Part 6 of the Habitats Regulations which deals with granting planning permission applies to approval given pursuant to a planning condition as in this case. Regulation 70(1) states that the assessment provisions apply in relation to: "… (a) *granting planning permission on an application under Part 3 of the TCPA 1990 (control over development)".* It may well be the case that, as contended by the Respondents, the term *"planning permission"* is wide enough, when properly construed, to include the grant of approval under a condition attached to a planning permission, if that is what is required to authorise the project. Space precludes detailed consideration of that issue, which it is anticipated the Respondents will address, but the important point is that even if the approval in this case is not within the scope of regulation 70(1)(a), it will certainly be within regulation 63(1).

44. The provisions of regulation 70(3) on outline planning permission do have relevance in that they clearly indicate that the requirement for appropriate assessment at reserved matters stage does not depend upon the scope or content of the matters reserved, or their relationship if any to their possible effects on integrity. The fact that any further approval is required triggers the assessment in question in relation to the effects of the plan or project (as opposed to those aspects which are the subject of the further approval).

45. Finally, the OEP observes that at paragraph 39 of the Appellant's Written Submissions, the Appellant submits its interpretation is supported by section 169 and Schedule 15 of the Levelling-up and Regeneration Act 2023 ("**the 2023 Act**") – in particular that Parliament chose only to amend regulations 70, 79, 80, 81, 82 and 83 of the Habitats Regulations, but not regulation 63. In respect of this submission it is noted that:

    a. The Explanatory Notes to the 2023 Act – in particular at paragraph 1352 as to *"Effect"* and paragraph 2474 in respect of Schedule 15 – do not provide any detailed reasoning into the amendments behind those specific regulations.
    b. Further, in respect of the background to those amendments, a consultation ran from December 2022 to March 2023 titled *'Levelling-up and Regeneration Bill:*

reforms to national planning policy consultation'.[41] Neither the consultation nor the consultation response makes specific reference to why regulations 70, 79, 80, 81, 82 and 83 of the Habitats Regulations were amended but not regulation 63.

c. In the OEP's submission, the Appellant's argument goes too far in seeking to infer the intention of Parliament as to the Habitats Regulations (themselves consolidating legislation) from omission, indeed by the omission of a later, different, government and legislature.[42] Indeed it is only where earlier legislation is *"ambiguous"* that subsequent legislation may *"fix the proper interpretation"*.[43] The Appellant has not demonstrated such an ambiguity and indeed the 2023 Act was not specifically or solely focused on the Habitats Regulations.[44]

d. The position could more properly be characterised as Parliament *choosing* to amend certain regulations rather than drawing the conclusion that it therefore *chose* not to amend every other regulation it also could have amended.

e. Therefore the focus should properly be on the true interpretation of regulations 63 and 70 as they stand.

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[41] Available at: https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy#scope-of-consultation. The Consultation Response (updated 19 December 2023) is available at: https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy/outcome/government-response-to-the-levelling-up-and-regeneration-bill-reforms-to-national-planning-policy-consultation

[42] **[SB/F 4.1/1120]**. Professor David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis Butterworths 2020), section 24.19: *"Later legislation will not lightly be taken to override the clear legislative intention expressed in the words of an earlier Act. Here it is necessary to remember that, except when legislating, the legislature generally has no power authoritatively to interpret the law. That function belongs to the judiciary alone.*
[…]
While a proposition in a later Act may indicate an intention to reverse or change the previous law, it may equally be explained by other reasons." (emphasis added)

[43] **[SB/F 4.1/1120]**. The following cases are also referred to *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis Butterworths 2020), section 24.19. As per Lord Sterndale MR in *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403, at 414. (As cited by the Court of Appeal in *SG Retail Ltd v Dixons Retail Group Ltd* [2020] EWCA Civ 671 at [57].) Similarly, as per Lewis LJ in *Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs* [2021] EWCA Civ 241 at [38]: *"I do not consider that it is necessary or legitimate to use the later enactment … The meaning of that section is clear, unambiguous and free from all reasonable doubt. In truth, the reference to later enactments seeks to introduce ambiguity where there is none, rather than resolving a genuine ambiguity."*

[44] Indeed it is a lengthy statute comprising 13 parts, with 256 sections and 24 Schedules spanning several distinct areas of law – by way of example combined county authorities (Part 2), infrastructure levies (Part 4) and compulsory purchase (Part 9). It therefore is not a statute updating an earlier statute solely focused on the same area of law.

Summary of principles

46. The OEP's position can be summarised as follows:

a. If, at the stage when *"any consent, permission or other authorisation"* is to be given for a plan or project (regulation 63), the circumstances are such that an appropriate assessment is needed – because there is likely to be a significant effect on a site for which the Habitats Regulations apply – then it should be carried out. In the light of the precautionary principle, a project is *"likely to have a significant effect"* so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information.

b. This may arise where there had been no appropriate assessment at an earlier stage, or where there had been an assessment but circumstances had since changed. The earlier assessment (or indeed an earlier conclusion of no likely significant effect) does not obviate the need for reconsideration because the circumstances could have changed since earlier stages of the process for a variety of reasons – including because of a change in the condition of the site, a change in scientific knowledge or because of a change in the advice of the statutory nature conservation body (as was the case here),[45] or the manner in which the project is proposed to be carried out (see regulation 63(6)), or there may now be other relevant projects so that the in combination effects are different, so that a significant effect is likely.

c. In such cases an appropriate assessment of the effects of the project, in combination with other plans or projects and in the light of the site's conservation objectives, must be carried out before the development can lawfully be commenced.

d. If an HRA had already been carried out at an earlier stage, a change in circumstances would not necessarily have the effect of requiring a completely new assessment. It may be that the previous assessment remains adequate for

[45] In this case of course the Advice Note from Natural England applied the principles of the *Dutch Nitrogen* case and advised that projects which may give rise to additional phosphate contributions within the catchment for the Somerset Moors and Levels Ramsar Site should be the subject of assessment. This was published on 17 August 2020, only shortly after reserved matters approval was given for the relevant Phase of the development, in June 2020 (see [2024] EWCA Civ 730, at [12]).

the authority to arrive at a conclusion of no adverse effect on integrity, or it may be that only assessment of some new issue or changed effect is necessary. In cases where this happens, it may be inconvenient to the developer: however, this is the correct interpretation of regulation 63(1) as the scheme is intended to be effective in protecting the important designated sites to which it applies.

e. Regulation 67 (headed "*Co-ordination where more than one competent authority involved*") applies to the situation where a plan or project *"requires the consent, permission or other authorisation of one or more other competent authorities"*. This indicates that there may be more than one relevant regime in relation to a single plan or project to which the assessment provisions of regulation 63 apply. Regulation 67(2) provides that *"Nothing in regulation 63(1) or 65(2) requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority."* Therefore, the assessment should be carried out by the competent authority but it may be that circumstances are such that – depending on the specific facts or issue – that competent authority may be another competent authority. In this way duplication of assessment can be avoided by only the most appropriate competent authority carrying it out.

f. The OEP does not consider that the nature and content of the *"consent, permission or other authorisation"* is relevant. Therefore, there is not a 'de minimis' type of consent, permission or authorisation that would, in principle, not require an HRA, if the relevant circumstances demonstrated a likely significant effect from the project, either alone or in combination with other projects.

g. At any stage, the Habitats Regulations can operate to prevent the plan or project if necessary to protect the integrity of the site.

47. As the Court of Appeal stated there is no dichotomy between the *"natural and ordinary meaning"* of legislation and a *"purposive approach"*.[46] The purpose of the Habitats

[46] As the Court of Appeal observed: [2024] EWCA Civ 730 at [68].

Regulations is to prevent adverse effects on the integrity of certain protected sites as a result of plans or projects, on a precautionary basis. That purpose would be severely undermined if competent authorities would be compelled to agree to a project that has not been assessed and would fail an assessment were one to be undertaken now after changed circumstances. For the reasons given above, this cannot be the correct interpretation of the Habitats Regulations.

Conclusion

48. The Supreme Court's judgment will have wider implications, beyond the specific facts of this case, for the protection afforded by the Habitats Regulations. Nutrient neutrality is not the only issue which might mean an HRA is required to be carried out – plainly those other circumstances given by way of example, at paragraph 46(b) above, could mean a project is likely to have a significant effect on the site's conservation objectives. As submitted above, if the nutrient neutrality issue is presenting problems in housing provision – as submitted by the Appellant – the answer does not lie in the underlying general law on habitat protection, but rather in specific legislative or policy intervention. For the reasons above the OEP submits that the appeal against Ground 1 should be dismissed.

5 February 2025[47]

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[47] References to Supplementary Bundle added on 12 February 2025.