Natura 2000
European protected areas - navigating the legal landscape

2. The test of 'likely significant effect' and appropriate assessments (Article 6(3))
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2. Test of likely significant effect and appropriate assessments

November 2015

About the briefings series

1. This is the second briefing in ClientEarth’s series ‘European protected areas - navigating the legal landscape.’ In this briefing, we provide a short and simple overview of when a plan or project will be considered ‘likely to have a significant effect’ on a Natura 2000 site, and will, therefore, be subject to an appropriate assessment under Article 6(3) of the Habitats Directive.¹ We will also examine the legal meaning of ‘appropriate assessment’, which is also called the test of ‘likely significant effect’.

2. This briefing series provides a broad overview of the legal landscape surrounding Article 6 of the Habitats Directive. It is designed to provide the key legal information needed to engage in discussions relating to developments, or plans for developments, in or around Natura 2000 sites. The Natura 2000 network is made up of Special Protection Areas (SPAs) classified under the Birds Directive², and Special Areas of Conservation (SACs) designated under the Habitats Directive.³ The reader will become familiar with the legal framework of Article 6 of the Habitats Directive, which applies across the Natura 2000 network⁴, and how it has been applied by the courts in practice. There are 8 briefings in the series:

1. An overview of Natura 2000
2. The test of ‘likely significant effect’ and appropriate assessments (Article 6(3))
3. The importance and meaning of ‘site integrity’ (Article 6(3))
4. Article 6(3): the precautionary principle and proportionality
5. Article 6(3): the precautionary, proportionality and subsidiarity principles
6. Article 6(3): What constitutes a ‘plan or project’?
7. Article 6: compensation v. mitigation measures
8. Article 6(4): Absence of alternative solutions and imperative reasons of overriding public interest

3. Please check ClientEarth’s website for the latest briefings on the Habitats Directive, and for other documents that may be helpful to those using arguments relating to Article 6. If you have a suggestion for a briefing that is not currently available on www.clientearth.org, please get in touch through wildlife@clientearth.org.

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³ For more detail on the classification of SPAs and the designation of SACs, please see briefing 1 of this series, ‘An overview of Natura 2000’
⁴ Articles 6(2) to 6(4) of the Habitats Directive are relevant to the conservation of SPAs classified under the Birds Directive, by virtue of Article 7 of the Habitats Directive
The threshold for the test of 'likely significant effect'

4. The test of 'likely significant effect', and the carrying out of appropriate assessments, is an essential process underpinning Natura 2000. The words 'likely' and 'significant' cause confusion for decision-makers, however, and have sometimes led to incorrect decisions being made. Greater public awareness of the correct application of these tests and processes will help to ensure that decision-makers apply these basic legal principles openly and correctly to the governance of Natura 2000.

5. As set out in the first briefing in this series, 'An overview of Natura 2000', Article 6(3) of the Habitats Directive establishes procedural and substantive safeguards that govern the network. The first of those safeguards is, in effect, a screening process, to determine whether plans or projects require an 'appropriate assessment'. Article 6(3) states that:

"[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives."  

6. This briefing will examine when a plan or project will be considered likely to have a 'significant effect' on a site and, as such, must be subject to an 'appropriate assessment'. It will also examine what form an 'appropriate assessment' must take.

7. In the Court of Justice of the European Union (CJEU) case of Waddenzee, the Advocate General considered the meaning of the word 'likely' in the context of Article 6(3). She stated that:

"the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects."  

8. The Advocate General then stated that, in assessing 'doubt', account should be taken of the likelihood of harm, and the extent and nature of the harm. This would include an assessment of whether the harm would be irreversible or temporary, and what habitats or species would be likely to be impacted. She concluded that an appropriate assessment is always necessary "where reasonable doubt exists as to the absence of significant adverse effects."
9. In its judgment in *Waddenzee*, the CJEU took a similar approach to that of the Advocate General. It ruled that, in light of the precautionary principle, an 'appropriate assessment' must be carried out if there is a risk that the plan or project will have significant effects on the site concerned, and that risk cannot be excluded on the basis of objective information. The significant effects of a plan or project include its effects when viewed in combination with other plans or projects.\[11\]

10. *Waddenzee* highlights the level of certainty required as to the absence of significant effects on a site before an 'appropriate assessment' will not be needed. That is, an 'appropriate assessment' must be done unless there is no risk of the project having significant effects on the site concerned.

11. The threshold required at the initial screening stage of Article 6(3) was also referred to by the Advocate General in the *Sweetman* case.\[12\] She stated that the requirement for the effect to be 'significant' represents "a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded."\[13\] She went on to say:

"*The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the [CJEU] has termed 'the best scientific knowledge in the field'.*"\[14\]

12. The reasoning in *Waddenzee* has also been applied in UK cases examining the meaning of 'likely significant effect'.\[15\] Those cases confirmed that the word 'likely' should be interpreted as referring to the *possibility*, rather than the *probability*, of a significant effect. This is the same as saying that there is a risk of a significant effect. Consequently, according to UK and EU case-law, if the possibility of a significant effect, either individually or in combination with other plans or projects, cannot be excluded, on the basis of objective information, an appropriate assessment is required.

13. UK case-law has also suggested that, where a detailed investigation or expert opinion is needed to determine whether there is a risk of a likely significant effect, this is, in itself, an indicator that there *is* such a risk. In such a case, the competent authority must conduct an appropriate assessment.\[16\] These cases further confirm the application of the precautionary principle.

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10 The precautionary principle provides that protective action may be taken, in the absence of conclusive scientific evidence as to the existence or extent of risks to the environment, where that risk cannot be excluded. For information on the precautionary principle, please see briefings 4 and 5 of this series.

11 n.6, Judgment of the CJEU, para.44-45


13 Ibid. Opinion of the Advocate General, para.48

14 Ibid, Opinion of the Advocate General, para.49

15 Feeney v Secretary of State for Transport & Ors [2013] EWHC 1238 (Admin), para. 12-13; see also Bagmoor Wind Ltd v The Scottish Ministers [2012] CSIH 93, para.45

16 Ibid, para.45
principle, which states that, in the case of doubt, an appropriate assessment must be undertaken.

**Appropriate assessment**

14. As discussed above, an appropriate assessment is required when a plan or project is likely to have a significant effect on a protected site. The Habitats Directive does not define what an 'appropriate assessment' is, however, nor does it specify the method by which it must be undertaken. While it is clear that an 'appropriate assessment' must allow the Member State authority to establish whether a plan or project will have adverse effects on the integrity of the site, it is left to the discretion of that authority to determine the procedures and methods used to reach its conclusion. Some guidance on the nature of an 'appropriate assessment', however, has been provided by the courts.

15. In *Commission v Italy*, the CJEU acknowledged that the Habitats Directive does not define the method for carrying out an appropriate assessment. It noted that it must be organised in such a manner that "the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation". Therefore, there is no specific format that an appropriate assessment must follow.

16. In addition, a recently decided case in the UK courts found that:

> "'Appropriate' is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned taking account the matters set out in the [Article] ... no special procedure is prescribed and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority.""

17. Flexibility over the format of 'appropriate assessments', however, does not give complete discretion to national authorities as to their content. In *Commission v Spain*, the CJEU stated that an assessment made under Article 6(3) cannot be considered appropriate "if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the [protected site]." Similarly, in *Sweetman*, the CJEU stated that an appropriate assessment "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works".

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17 See n.6, para.52
18 Case C-304/05 Commission v Italy [2007] ECR I-7495
19 Ibid, para.57-58
20 *R (Champion) v North Norfolk District Council* [2015] UKSC 52
21 Ibid, para.41
22 Case C-404/09 Commission v Spain [2011] ECR I-11853, para.100. See also n.12, para.69-73
proposed on the protected site concerned." These cases demonstrate that an assessment will not be 'appropriate' if it lacks rigour, is incomplete, or contains imprecise findings and conclusions.

18. Further guidance as to the format of an appropriate assessment has been provided by the European Commission. While this guidance is not legally binding, it can offer helpful assistance in interpreting requirements under the law. The Commission advises that, where an appropriate assessment takes the form of an assessment under the Environmental Impact Assessment (EIA) Directive, this provides assurances as to records and transparency. Where it does not take that form, similar assurances must still be provided. As such, an appropriate assessment must be recorded, and must be undertaken before any decision on whether a plan or project will proceed is made. It must also disclose a reasoned basis for the subsequent decision. The Commission states that, without those components, an assessment cannot meet the requirements of Article 6(3).

19. With respect to the scope and content of an appropriate assessment, the Commission guidance confirms that it should specifically relate to the site’s conservation objectives. The Commission acknowledges that it is unlikely that the ecological impacts of a plan or project could be properly assessed without considering other environmental factors, such as those set out in Article 3 of the EIA Directive (e.g. soil, water, and landscape). An appropriate assessment may also examine alternative solutions and mitigation measures, which might prevent the plan or project from adversely affecting the integrity of the site. This is not a legal requirement, however.

20. Further guidance on the form and content of an appropriate assessment is provided by the Advocate General in *Waddenzee*. She states that it is clear from the wording of Article 6(3) that an appropriate assessment must "precede agreement to a plan or project and … take account of cumulative effects which arise from combination with other plans or projects". In other words, the assessment must "compare all the adverse effects arising from the plan or project with the site’s conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified."

21. Ultimately, by the end of the appropriate assessment, there should be no reasonable scientific doubt as to the conclusion reached.

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23 n.12, para.44
26 n.24, para.4.5.1
27 n.24, para.4.5.1
28 n.24, para.4.5.2
29 n.24, para.4.5.2
30 n.6, para.96
31 n.6, para.97
Recent UK case-law provides further guidance on the assessment process. Please note that
the following case-law is indicative only of the UK’s interpretation of the Habitats Directive:

(a) R (Devon Wildlife Trust) v. Teignbridge District Council\(^{32}\)

There is no general duty to consult the general public in an appropriate assessment, but the
opinion of the general public must be taken if the authority considers it appropriate.\(^{33}\)

(b) No Adastral New Town Ltd (NANT Ltd) v Suffolk Coastal District Council\(^{34}\)

1. There is no legal obligation to carry out a ‘screening assessment’, \(^{35}\) and no rule about when
one should be carried out.\(^{36}\) However, if it is “not obvious whether a plan or project is likely to
have a significant effect on an SPA, it may be necessary in practice to carry out a screening
assessment in order to ensure that the substantive requirements of the Directive are ultimately
met...There is, however, no obligation to do so.”\(^{37}\) As a result, where the significant effects of
a plan or project are obvious to a decision maker, they may proceed straight to an appropriate
assessment, without a screening decision.

2. An appropriate assessment of the Council’s Core Strategy (i.e. a housing project) could
leave the specifics of the mitigation measures to be decided at a later planning stage: “the
important question in a case such as this is not whether mitigation measures were considered
at the stage of [Core Strategy] in as much detail as the available information permitted, but
whether there was sufficient information at that stage to enable the Council to be duly satisfied
that the proposed mitigation could be achieved in practice.”\(^{38}\)

(c) Cairngorms Campaign v Cairngorms National Park Authority\(^{39}\)

It is not necessary for the assessment to provide a conclusive answer to all questions raised
about the potential for significant adverse effects on the integrity of the site at the local plan
stage. It is sufficient that the appropriate assessment satisfied the authority that
implementation of the plan would not adversely affect the integrity of the site. By setting out
policies in the local plan (e.g. environmental protection policies) which governed the treatment
of future planning decisions, the judgment indicated that the authority had adopted an
effective procedure by which it could be sure that the development would not adversely affect
the integrity of the site, as per Article 6(3).

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\(^{32}\) R (Devon Wildlife Trust) v Teignbridge District Council [2015] EWHC 2159
\(^{33}\) Ibid, para.105
\(^{34}\) No Adastral New Town Ltd (NANT Ltd) v Suffolk Coastal District Council [2015] EWCA Civ 88
\(^{35}\) The purpose of the screening assessment is to ascertain whether the plan is ‘likely to have a significant effect’ on the conservation objectives of the site
\(^{36}\) n.34, para.68
\(^{37}\) Ibid
\(^{38}\) n.34, para.72. Followed in n.32 and DLA Delivery Ltd v Lewes DC and Newick Parish Council (Interested Party) (2015) EWHC 2311
\(^{39}\) Cairngorms Campaign v Cairngorms National Park Authority [2013] CSIH 65
'In combination' effects

22. Article 6(3) requires an 'in combination' assessment of each plan or project. That is, an assessment of the combined impacts of multiple plans or projects on the protected site must be performed. In Waddenzee, the CJEU commented that:

"according to the wording of [Article 6(3)], an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives."

23. In its guidance, the Commission provides the example of a road development passing some distance from a protected site. The disturbance caused by traffic noise may not, on its own, significantly affect the bird species that are important to the integrity of the site. This may change, however, if there are existing or proposed projects or plans that would also affect the site, such as another road to be developed on the other side of the site. In that case, the combined noise levels generated by the projects, taken together, may cause a significant disturbance to the bird species.

24. As concerns UK case law, the recent case of Smyth v Secretary of State for Communities and Local Government held that, where a development has potential 'in combination' effects arising from its interaction with a future plan or project, mitigation measures must address those potential future cumulative effects. In Smyth, the initial housing development was not denied planning permission, even though future planned housing developments meant that there were potential 'in-combination' effects, and the mitigation measures needed to address them were not yet clear.

25. A similar finding was made in R (on the application of Forest of Dean (Friends of the Earth)) v Forest of Dean DC. In that case, it was held that, even where a series of developments is envisaged, the strict precautionary approach of Article 6(3) would be complied with in relation to the first development if that first project would not, of itself, have a detrimental impact on the protected site. In such cases, there would need to be an appropriate opportunity in the future to consider measures relating to the later projects, to allow any potential 'in-combination' effects of the projects to be identified and addressed.

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A hypothetical example where 'in combination' effects may typically arise is where an initial housing development built near a SAC is to be followed at a later date by further development projects, such as access roads or additional housing, as part of a wider development plan. In such situations, the initial housing development can be considered on its own, and will only require an appropriate assessment if it, by itself, is likely to have a significant effect on the...
Conclusion

26. There is a common misconception that the test of 'likely significant effect' under Article 6(3) of the Habitats Directive sets a high burden of proving that a protected site will be damaged for plans or projects to be rejected. Legally, this is incorrect. The test must be interpreted in the context of the whole of Article 6(3), which applies the precautionary principle, and in accordance with judicial rulings on its interpretation. Those rulings confirm that the threshold for finding a 'likely significant effect' is a low one.

27. Many plans or projects must, therefore, undergo appropriate assessments before they can be authorised. Improved public awareness about what is meant by an 'appropriate assessment' will help ensure greater understanding, both for users of Natura 2000 sites and government authorities, of the processes required to authorise human activities in and around Natura 2000 sites.

28. For more details about appropriate assessments, please refer to our third briefing in this series, 'Article 6(3): The importance and meaning of 'site integrity'', which considers the next stage of procedural safeguards under Article 6(3).
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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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